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# **THE ENGLISH REPORTS**

**HOUSE OF LORDS**

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ATTORNEY-GENERAL**

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THE  
ENGLISH REPORTS

VOLUME IX

HOUSE OF LORDS

CONTAINING

MACLEAN & ROBINSON; WEST; and HOUSE OF  
LORDS CASES (CLARK'S), VOLUMES 1 and 2.

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## PREFATORY NOTE

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WEST was the first reporter "by appointment of the House of Lords."

The first and second volumes of the House of Lords Cases were reported by Clark and Finnely (who were also reporters "by appointment of the House of Lords"); the remaining volumes by Clark alone.

In the original paging of Volume I. of the House of Lords Cases, the numbers 175 and 176 were omitted. The mistake has not been rectified in the present Volume of the English Reports.

*Wilbraham v. Scarisbrick* (1 H.L.C. 167) was discussed and followed in *Shuttleworth v. Murray*, 1901, 70 L.J. Ch. 459.



## LORD CHANCELLORS

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1839 to 1850.

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1836 (Jan. 16)–1841	.	.	Sir CHARLES CHRISTOPHER PEPYS, LORD COTTENHAM (Jan. 20, 1836).	
1841 (Sept. 3)–1846	.	.	JOHN LORD LYNDHURST.	
1846 (July 4)–1850	.	.	CHARLES LORD COTTENHAM.	
1850 (June 19)–1850 (July 15)	.	.	HENRY LORD LANGDALE Sir LANCELOT SHADWELL. Sir ROBERT MONSEY ROLFE.	} Commissioners.
1850 (July 15)–1852	.	.	THOMAS LORD TRURO.	

CHIEF JUDGES OF THE SUPERIOR COURTS, AND LAW OFFICERS,  
OF ENGLAND, SCOTLAND, AND IRELAND DURING THE  
PERIOD COVERED BY MACLEAN & ROBINSON; WEST; AND  
HOUSE OF LORDS CASES 1 AND 2.

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1839 to 1850.

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ENGLAND.

LORD CHANCELLORS.—See preceding page.

MASTER OF THE ROLLS.

1836 (Jan. 19)–1851 . . . HENRY BICKERSTETH (LORD LANGDALE, Jan. 23,  
1836).

VICE-CHANCELLOR OF ENGLAND.

1827 (Nov. 1)–1850 . . . Sir LANCELOT SHADWELL.

VICE-CHANCELLORS.

1841 (Oct. 8)–1851 . . . JAMES LEWIS KNIGHT BRUCE (Knt., Jan. 15,  
1842).

1841 (Oct. 8)–1851 . . . JAMES WIGRAM (Knt., Jan. 15, 1842).

LORD CHIEF JUSTICES OF THE COURT OF QUEEN'S BENCH.

1832 (Nov. 4)–1850 . . . Sir THOMAS DENMAN (LORD DENMAN, March 22,  
1834).

1850 (March 5)–1859 . . . JOHN LORD CAMPBELL.

LORD CHIEF JUSTICES OF THE COURT OF COMMON PLEAS.

1829 (June 9)–1846 (July) . . . Sir NICOLAS CONYNTHAM TINDAL.

1846 (July 7)–1850 . . . Sir THOMAS WILDE, afterwards LORD TRURO.

1850 (July 15)–1856 . . . Sir JOHN JERVIS.

LORD CHIEF BARONS OF THE COURT OF EXCHEQUER.

1834 (Dec. 24)–1844 (April) . . . Sir JAMES SCARLETT (LORD ABINGER, Jan. 12,  
1835).

1844 (April 15)–1866 . . . Sir FREDERICK POLLOCK.

LAW OFFICERS.

ATTORNEYS GENERAL.

1835 (April 30)–1841 . . . Sir JOHN CAMPBELL.

1841 (July 3)–1841 (Sept.) . . . Sir THOMAS WILDE.

1841 (Sept. 6)–1844	. . .	Sir FREDERICK POLLOCK.
1844 (April 15)–1845 (June 28)	. . .	Sir WILLIAM WEBB FOLLETT.
1845 (June 29)–1846	. . .	Sir FREDERICK THESIGER, afterwards LORD CHELMSFORD.
1846 (July 4)–1846	. . .	Sir THOMAS WILDE.
1846 (July 7)–1850	. . .	JOHN JERVIS (Knt., Aug. 1).
1850 (July 11)–1851	. . .	Sir JOHN ROMILLY, afterwards LORD ROMILLY.

## SOLICITORS GENERAL.

1835 (May 4)–1839	. . .	ROBERT MONSEY ROLFE (Knt., May 6, 1835).
1839 (Dec. 2)–1841	. . .	THOMAS WILDE (Knt., Feb. 19, 1840).
1841 (Sept. 6)–1844	. . .	Sir WILLIAM WEBB FOLLETT.
1844 (April 15)–1845	. . .	FREDERICK THESIGER (Knt., May 23, 1844).
1845 (June 29)–1846	. . .	FITZROY KELLY (Knt., Aug. 8, 1845).
1846 (July 4)–1846	. . .	JOHN JERVIS.
1846 (July 10)–1848	. . .	DAVID DUNDAS (Knt., Feb. 24, 1847).
1848 (March)–1850	. . .	JOHN ROMILLY (Knt., May 17, 1848).
1850 (July 11)–1851	. . .	ALEXANDER JAMES EDMUND COCKBURN (Knt., July 12, 1850).

## SCOTLAND.

## LORD PRESIDENTS OF THE COURT OF SESSION.

1811–1841	. . .	Rt. Hon. CHARLES HOPE (LORD GRANTON).
1841–1852	. . .	Rt. Hon. DAVID BOYLE (LORD BOYLE).

## LORD JUSTICE CLERKS.

1811–1841	. . .	Rt. Hon. DAVID BOYLE.
1841–1858	. . .	Rt. Hon. JOHN HOPE.

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## LORD ADVOCATES.

1835–1839	. . .	JOHN ARCHIBALD MURRAY.
1839–1841	. . .	ANDREW RUTHERFURD, afterwards LORD RUTHERFURD.
1841 (Sept. 6)–1842	. . .	Sir WILLIAM RAE, Bart.
1842–1846	. . .	DUNCAN M'NEILL, afterwards BARON COLONSAY AND ORONSAY.
1846–1851	. . .	ANDREW RUTHERFURD.

## SOLICITORS GENERAL OF SCOTLAND.

1837–1839	. . .	ANDREW RUTHERFURD.
1839–1840	. . .	JAMES IVORY, afterwards LORD IVORY.
1840–1841	. . .	THOMAS MAITLAND, LORD DUNDRENNAN.
1841–1842	. . .	DUNCAN M'NEILL.
1842–1846	. . .	ADAM ANDERSON.
1846–1850	. . .	THOMAS MAITLAND, LORD DUNDRENNAN.
1850 (Feb. 7)–1851	. . .	JAMES MONCREIFF.

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1835 (April 30)–1841 . . .	WILLIAM CONYNTHAM, LORD PLUNKET.
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1841 (Oct. 8)–1846 . . .	Sir EDWARD BURTENSHAW SUGDEN, afterwards LORD ST. LEONARDS.
1846 (July 16)–1852 . . .	MAZIERE BRADY (Bart., Mar. 1, 1869).

## MASTERS OF THE ROLLS.

1837–1842 . . . . .	Sir MICHAEL O'LOGHLEN (Bart., Jan. 28, 1837).
1842 (Nov. 1)–1846 . . .	FRANCIS BLACKBURNE.
1846 (Jan.)–1866 . . . .	THOMAS BERRY CUSACK SMITH.

## LORD CHIEF JUSTICES OF THE COURT OF QUEEN'S BENCH.

1822–1841 . . . . .	CHARLES KENDAL BUSHE.
1841–1846 . . . . .	EDWARD PENNEFATHER.
1846 (Jan.)–1852 . . . .	FRANCIS BLACKBURNE.

## LORD CHIEF JUSTICE OF THE COURT OF COMMON PLEAS.

1830–1850 . . . . .	JOHN DOHERTY.
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## LORD CHIEF BARONS OF THE COURT OF EXCHEQUER.

1838 (July)–1840 . . . .	STEPHEN WOULFE.
1840 (Feb.)–1846 . . . .	MAZIERE BRADY.
1846–1873 . . . . .	DAVID RICHARD PIGOT.

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## ATTORNEYS GENERAL.

1839 (Feb. 3)–1840 . . .	MAZIERE BRADY.
1840 (Aug. 14)–1841 . . .	DAVID RICHARD PIGOT.
1841 (Sept. 23)–1842 . . .	FRANCIS BLACKBURNE.
1842 (Nov. 1)–1846 . . .	THOMAS BERRY CUSACK SMITH.
1846 (Feb. 2)–1846 (July)	RICHARD WILSON GREENE.
1846 (July 16)–1847 . . .	RICHARD MOORE.
1847 (Dec. 24)–1850 . . .	JAMES HENRY MONAHAN.

## SOLICITORS GENERAL.

1839 (Feb. 11)–1840 . . .	DAVID RICHARD PIGOT.
1840 (Aug. 14)–1841 . . .	RICHARD MOORE.
1841 (Sept. 23)–1841 (Nov.)	EDWARD PENNEFATHER.
1841 (Nov. 10)–1842 . . .	JOSEPH DEVONSHIRE JACKSON.
1842 (Sept. 21)–1842 (Nov.)	THOMAS BERRY CUSACK SMITH.
1842 (Nov. 1)–1846 . . .	RICHARD WILSON GREENE.
1846 (Feb. 2)–1846 (July)	ABRAHAM BREWSTER.
1846 (July 16)–1847 . . .	JAMES HENRY MONAHAN.
1847 (Dec. 24)–1850 . . .	JOHN HATCHELL.



# REPORTS OF CASES upon Appeals and Writs of Error, and Questions of Peerage, decided by the House of Lords, during the Session 1839. By C. H. MACLEAN and G. ROBINSON, Barristers-at-Law.

## ERROR FROM THE EXCHEQUER CHAMBER, ENGLAND.

THE KING, *Plaintiff in Error*.—Erle—Hurlstone; THOMAS JOHNSON, *Defendant in Error*.—Attorney General (Sir John Campbell)—Recorder of London (Law)—Bullock [19th February 1839].

[Mews' Dig. i. 350; v. 257; vi. 173; xi. 481; S.C. 6 Cl. and F. 41, affirming 5 A. and E. 488; 6 Nev. and M. 870; 5 L.J. Ex. 282. On point as to discharging jury from giving verdict (6 C. and F. 60), cited with approval in *Yeo v. Tatem—The Orient*, 1871, L.R. 3, P.C. 702, 703. On point as to existence of custom followed in *Scales v. Key*, 1840, 11 A. and E. 819.]

*Custom—City of London—Stat. 11 Geo. 1, c. 18, sec. 7.—Jury.*—On *quo warranto* for exercising the office of alderman of London the defendant pleaded two customs of the city of London; viz. a custom for the court of mayor and aldermen to examine and determine whether a person elected alderman of a ward, and returned to the said court as such alderman, be, according to their sound discretion and consciences, a fit and proper person and duly qualified; and also a custom that where the [2] same person shall be three times elected to be alderman by a ward, and three times rejected by the court of mayor and aldermen as not a fit and proper person, and not duly qualified to support the dignity and discharge the duties of the office, the mayor and aldermen may for remedy thereof nominate, elect, and appoint a fit person, being a freeman, out of the whole body of citizens to be alderman of such ward; and further pleaded that a party who was three times returned by a ward had been adjudged unfit by the mayor and aldermen who elected the defendant; the relator took issue upon the existence of the customs, and replied that the party rejected was fit and qualified, upon which issue was joined. The Lord Chief Justice at the trial directed the jury, that if they were of opinion that the customs aforesaid had existed from time immemorial down to 1689, of which there was evidence, they should find for the customs, notwithstanding a city bye-law of the 13 Anne, and the statute 11 Geo. 1, c. 18, which, as alleged by defendant, had put an end to the customs. The jury then found the customs, and the Lord Chief Justice, without consent of parties, discharged the jury from returning a verdict on the issues as to fitness, etc. as being immaterial. Upon verdict for the defendant, and bill of exceptions by relator, Held (affirming the judgment in error from the Exchequer Chamber, which affirmed the direction of the Lord Chief Justice,) 1. That the stat. 11 Geo. 1, c. 18, and the city bye-law of the 13th of Queen Anne, relating to the mode of election, stood well with the customs as proved, and did not touch the power of rejection and selection in the mayor and aldermen.

2. That where the jury have found their verdict on all the material issues joined, the judge who tries the cause may, without the consent of the parties, discharge

the jury from returning any verdict on issues that in his opinion are immaterial.

*Practice.* Per Lord Wynford.—In deciding on bills of exceptions, it is the practice of the Court not to go into the whole record, but to decide upon the points raised by the bill of exceptions.

[3] In February 1831 a vacancy having occurred in the office of alderman of the ward of Portsoken, Michael Scales and Daniel Whittle Harvey were respectively candidates for that office, on which occasion Scales was chosen by a majority of the inhabitants of the ward. A petition was then presented to the court of mayor and aldermen against the admission of Scales to the office of alderman, and that court having taken the petition into consideration, adjudged that he was not a fit and proper person to be alderman, and refused to swear him in. Two other elections subsequently took place, on each of which occasions Scales was chosen by a majority of the inhabitants, but the court of mayor and aldermen refused, as before, to swear him in, and after the last election appointed the defendant, Johnson, to the vacant office of alderman, alleging a custom that when the same person has been three times elected as alderman by the inhabitants of any ward, and three times rejected by the court of mayor and aldermen as unfit, that then the court of mayor and aldermen may elect as alderman any freeman out of the whole body of the citizens.

On *quo warranto* at the relation of Samuel Dalton against Thomas Johnson, for unlawfully exercising the office of alderman of the ward of Portsoken in the city of London,—

Plea 1.—That the city of London now is, and from time whereof the memory of man is not to the contrary hath been, an ancient city, and the citizens thereof a body corporate and politic: that there are divers wards, and amongst others the ward of Portsoken, and divers citizens and freemen have been called aldermen, one to each ward, which office of alderman is one of [4] great trust and pre-eminence: that the court of mayor and aldermen is held within the said city for the purpose (amongst others) of admitting and swearing into the office of alderman persons duly elected thereto and qualified to fill the office; that wardmote courts are held within the city for the election by the inhabitants of the ward of persons into the office of alderman, by virtue of precepts issued by the mayor, to which precept returns are made into the court of mayor and aldermen: that there is an assembly called the court of common council, holden before the mayor and aldermen and the commons of the city, which has power to make bye-laws: that from time immemorial until the passing of a bye-law on the 1st August in the 21st of King Richard the Second, whereby it was ordained, that for the future in the elections of aldermen two honest and discreet men should be presented to the mayor and aldermen, so that either of them whom they should choose might be admitted and sworn; and also after the passing of a bye-law made on the 15th of April in the 13th year of the reign of Queen Anne, intituled “An act for reviving the ancient manner of electing aldermen,” whereby, after reciting amongst other things, that by the ancient usage and custom of the city of London, when any ward of the said city became vacant and destitute of an alderman, the inhabitants of that ward having a right to vote in such elections were wont to choose one person only, being a citizen and freeman of the same city, to be alderman of the same ward, for reviving the said ancient custom, and restoring to the said inhabitants their ancient rights and privileges of choosing one person only to be their alderman, it was enacted from thenceforth in all elec-[5]-tions of aldermen of the said city, at a wardmote to be holden for that purpose, there should be elected, according to the said ancient custom, only one able and sufficient citizen and freeman of the said city, not being an alderman, to be returned to the court of mayor and aldermen, which person so elected should be by them admitted and sworn well and truly to execute the office of alderman, and from thence thitherto the aldermen had been elected at the wardmote courts, one for each ward.

The first plea then stated, that the court of mayor and aldermen have the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging concerning the election and return of every person elected into any place or office at a wardmote court, (whenever the merits of such election or return had been brought into question by the petition of any person interested therein,) and also of

examining and determining whether or not any person so returned to the court of mayor and aldermen as an alderman of any ward, was according to the discretion and sound consciences of the mayor and aldermen a fit and proper person, and duly qualified, (whosoever the fitness and qualification of the person so returned has been brought into question by the petition of any person interested therein to the court of mayor and aldermen,) and that it was a necessary qualification of the person to be elected, admitted, and sworn alderman of any ward that such person should be a fit and proper person to support the dignity and discharge the duties of the office of alderman, and the honour and charge of the city, according to the discretion and sound consciences of the mayor and aldermen.

[6] The first plea further stated, that within the city of London there now is, and from time immemorial there hath been and still is, a certain ancient and laudable custom there used and approved, viz., that whosoever the inhabitants of any ward should three times return to the court of mayor and aldermen the same person to be alderman of any such ward, who should be by the said court, according to the custom aforesaid, adjudged and determined, according to the discretion and sound consciences of the mayor and aldermen, not a person fit and proper to support the dignity and discharge the duties of the place and office of an alderman upon such three several returns, that then the court of mayor and aldermen lawfully might for remedy in that behalf nominate, elect, and admit a fit and proper person, being a freeman of the city, out of the whole body of the citizens, to be alderman of any such ward being so made destitute of an alderman.

The plea then stated the three successive elections and rejections of Scales, and the election of the defendant by the court of mayor and aldermen, in pursuance of the said ancient custom last above mentioned.

Plea 2.—The second plea was the same as the first, except that in the custom first set out it alleged the right of the court of mayor and aldermen to adjudicate generally on the fitness of the person elected, without the allegation of a petition to raise the question.

The third plea stated that in the election at which Scales and the defendant were candidates the latter was duly elected.

The replication denied the jurisdiction of the court of mayor and aldermen, traversed the custom to elect after three rejections as set forth in the first and second pleas [7] respectively, and, denying the allegation in the third plea, averred, in reference to the first and second pleas, that Scales at the times of the first, second, and third elections was an able and sufficient citizen, etc. and a fit and proper person to support the dignity, etc., to which there was a rejoinder, and issues thereon.

At the trial before Lord Denman, C.J., at the sittings in London after Michaelmas term 1834, the counsel for the King tendered evidence in support of the issues as to the fitness of Scales, at the several times when he was so rejected by the mayor and aldermen, to support the dignity and discharge the duties, etc., which being objected to, the Chief Justice refused the evidence offered, and wholly discharged the jury from giving any verdict upon the issues as to fitness, etc.; and the attention of the Chief Justice being directed to a certain act of parliament made and passed in the eleventh year of the reign of King George the First, intituled "An act for regulating elections within the city of London, and for preserving the peace, good order, and government of the said city,"\* the Chief Justice directed [8] the jury, that if they were of opinion that the customs set forth in the two first-mentioned pleas had existed from time immemorial down to the year 1689, then, [9] in his opinion, that act of parliament

\* The act founded on is entitled "An Act for regulating elections within the city of London, and for preserving the peace, good order, and government of the said city." There is a general recital in the preamble: "Whereas of late years great controversies and dissensions have arisen in the city of London at the elections of citizens to serve in Parliament, and of mayors, aldermen, sheriffs, and other officers of the said city; and many evil-minded persons, having no right of voting, have unlawfully intruded themselves into the assemblies of the citizens, and presumed to give their votes at such elections, in manifest violation of the rights and privileges of the citizens, and of the freedom of their elections, and to the disturbance of the public peace: And whereas great numbers of wealthy persons, not free of the said city, do

did not put an end to such customs, or prevent them from finding, and that they should find for the customs.

The *postea*, as drawn up, contained a finding for the defendant upon the four issues as to the customs stated in the first two pleas, but against him upon the issue on the third plea; and as to the remaining issues the *postea* stated that the jurors were discharged from giving any verdict. The judgment was that the office claimed by the defendant be allowed and adjudged to him, with costs.

A writ of error was thereupon brought, which was argued in the Exchequer Chamber on 2d June 1836 (5 Ad. and E. 488), before Tindal, C. J.; Park, Gaselee, Bosanquet, and Vaughan, Justices; Parke, Bolland, Gurney, and Alderson, Barons.

Tindal, C. J., on 8th June 1836, delivered the judgment of the Court.

"This case comes before us on a bill of exceptions tendered to Lord Denman on the trial of this cause by the counsel of the party on whose relation the information proceeded. The exceptions taken to the direction of the Lord Chief Justice to the Jury were two; first, that he refused to allow witnesses to be examined in support of the issues raised upon the pleadings, with respect to Michael Scales being an able and sufficient citizen and freeman of the city of London, and a fit and proper person to support the dignity and discharge the duties of an alderman of that city, and that he wholly discharged the jurors from giving any verdict upon those issues; and, [10] secondly, that the Chief Justice directed the jury, that if they thought the customs set forth in the two first-mentioned pleas had existed from time immemorial down to the

inhabit and carry on the trade of merchandize and other employments within the said city, and refuse or decline to become freemen of the same, by reason of an ancient custom within the said city restraining the freemen of the same from disposing of their personal estates by their last wills and testaments: And whereas great dissensions have arisen between the aldermen and commons of the common council of London in or concerning the making or passing of acts, orders, or ordinances in common council;" it then goes on to make various provisions, and recites the general evils which the act was intended to remedy; and the seventh section is in these words: "And whereas divers controversies and disputes have arisen in the said city of London touching the right of election of aldermen and common councilmen for the respective wards of the said city; for quieting all such disputes and controversies for the future, it is hereby further enacted by the authority aforesaid, that from and after the said first day of June in the year of our Lord 1725, the right of election of aldermen and common councilmen for the several and respective wards of the said city shall belong and appertain to freemen of the said city of London, being householders, paying scot as herein-after is mentioned and provided, and bearing lot when required in their several and respective wards, and to none other whatsoever." The 15th section is in these words: "And to the intent that a final end may be put to all disputes between the mayor and aldermen and the commons of the common council of the said city, touching the making or passing of acts, orders, or ordinances in common council; and that no act, order, or ordinance may for the future be made or passed in common council without the full consent of the representative body of the said city, according to the ancient constitution of the same; be it enacted by the authority aforesaid, that no act, order, or ordinance whatsoever, at any time from and after the said first day of June 1725, shall be made or passed in the common council of the said city, without the assent of the mayor and aldermen present at such common council or the major part of them, nor without the assent of the commons present at such common council or the major part of them. In the 16th section the right of election of the lord mayor and aldermen to various offices is preserved to them, and taken out of the operation of the general words in the prior part of the act: "Provided always, that nothing in this act contained shall extend or be construed to extend to any election, nomination, or appointment in common council of any common serjeant, town clerk, judges of the sheriff court, coroner, common crier, commissioners of sewers, garbeller, and the governor and assistants of London of the new plantation of Ulster in Ireland; but that the election, nomination, or appointment of all or any of the said officers shall or may, from and after the said first day of June 1725, be made by the mayor, aldermen, and commons in common council assembled, or the major part of them; any thing in this act contained to the contrary thereof notwithstanding."

year 1689, the act of 11 Geo. 1, c. 18, did not put an end to such customs; and in that case he directed them to find a verdict for the defendant on the four issues first in order on the record.

"It will be more desirable, in the first place, to state our opinion as to the second exception, as the judgment formed by us on that will form the groundwork of the opinion at which we have arrived upon the subject of the first.

"The custom which forms the subject of the first and third issues is a custom that the court of mayor and aldermen, from time immemorial, have had the cognizance and determination of the election and return of every person into any place or office at any wardmote court, whenever the merits of such election were brought into question, and of examining and determining whether any person returned to them as an alderman of any ward of the city is, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person, and duly qualified in that behalf. The custom which forms the subject of the second and fourth issues, is a custom that whenever it should happen that the inhabitants of any ward should three times return to the court of mayor and aldermen the same person to be an alderman of any such ward, who should, upon such three several returns, according to the former custom, be adjudged and determined, according to the discretion and sound consciences of the mayor and aldermen, not a person [11] fit and proper to support the dignity and discharge the duties of the place and office of an alderman of the said city, that the court may for remedy in that behalf, nominate, elect, and admit a fit and proper person, being a freeman of the said city, out of the body of the whole citizens, to be an alderman of such ward so made destitute of an alderman. The first custom set up is, therefore, a custom to approve or reject; the second is a custom to nominate and elect, in case the same person is three times returned by the wardmote, and three times rejected as unfit by the court of mayor and aldermen. Now the only exception taken to the direction of the Lord Chief Justice, which goes to the validity of the customs above set forth, is, that the jury should have been directed by him that the statute 11 Geo. 1, c. 18. is in direct contravention of those customs, and, in effect, has abrogated them altogether. To the validity of the first custom but little objection was made in the course of the argument; indeed, after the determination of the case of *The King v. The Mayor and Aldermen of London* (3 Barne and Adolph. 255), where the legality of the custom of approval or rejection was brought distinctly before the Court of King's Bench, it is impossible to contend that it was not a legal custom still existing in full force, notwithstanding the statute of George the First.

"The question, therefore, principally turns upon the effect of the statute, as to the custom secondly set forth. Now we think that custom, considered in itself, a legal and reasonable custom, supplying a [12] remedy where an evil is likely to occur from the exercise of the custom to approve or reject, and without which remedy the first would become neither useful nor reasonable, from the consequences that might frequently follow from its exercise. The question therefore becomes this, whether this custom in the second plea is repealed by the statute 11 Geo. 1. and we are all of opinion that it is not in any way affected thereby. That statute was passed principally for the purpose of regulating the course of elections which take place at the wardmotes of the city, both of citizens to serve in parliament, of mayors and other officers, and, as the first section expresses, 'of aldermen and common councilmen, chosen at the respective wardmotes of the said city,' and the first six sections of the statute are exclusively occupied with regulations as to the mode of taking the poll. The seventh section, after reciting that divers controversies and disputes had arisen in the city of London touching the right of election of aldermen and common councilmen for the respective wards of the city, enacts that, after the day therein specified, the right of election of aldermen and common councilmen for the several and respective wards of the city shall belong and appertain to freemen of the said city being householders, and paying scot and bearing lot when required, and to none other whatsoever. The seven following sections contain provisions as to particular cases of qualifications for voting at such elections, and the sections which follow are foreign altogether to the subject matter of the present inquiry; so that the statute [13] taken altogether is no more than an enactment that the right of electing aldermen, amongst other officers, shall be by the freemen of the city, being householders, at the wardmotes of the respective wards, the poll to be

taken, and the right of voting to be determined, in the manner and under the regulations described in the act.

"Now the ancient customs, which are the subject of the present discussion, have themselves been confirmed amongst the other ancient bye laws and customs of the city by parliament; and the first observation that arises thereupon is, that as these customs were in full operation at the time of the statute, and as the statute is altogether silent about the powers of the court of lord mayor and aldermen, there is nothing that can be construed into a repeal of either of the customs. Again, it is to be observed that the exercise of this custom is in no way inconsistent with the statute, for the custom does not begin to operate until after the statute and all the provisions contained in it have had their full operation and effect. The alderman must be first elected at the wardmote by the electors qualified according to the provisions of the statute, at a poll taken in the manner therein prescribed, before he can be returned to the court of lord mayor and aldermen for approval or rejection. Then it is for the first time that the two ancient customs begin to have their force. They contain a mode of trial of the fitness of the return, made under the statute, after the election has taken place, and apply to a point of time which is altogether out of the provisions of the statute. In fact, the effect of the two customs, which are in effect acts of parlia-[14]-ment, is this, that by the first the election at the wardmote is annulled, and by the second, after three rejections no further election at a wardmote is to take place. Now this is not at all inconsistent with a statute regulating elections only, in the case of their taking place at a wardmote. The statute, therefore, and the two ancient customs may both stand well together, and we see no reason whatever for holding that the customs are not in full force, notwithstanding the provisions of the Act.

"It was further insisted in the course of the argument on the part of the relator that the bye law of the 13th of Anne had the same effect as to the annulling the customs set forth as the statute. It appears to us, however, to be unnecessary to give any other answer to this objection than that which has already been given as to the statute of George the First. Both stand precisely upon the same ground, the only difference between the two objections being this—that whilst the statute is by necessary implication only to be construed as speaking of the election at wardmotes of the city, the bye law is confined in express terms to that mode of election.

"The other exception, tendered to the Lord Chief Justice at the trial, related to his refusal to receive evidence tendered to him upon the several issues before referred to, and discharging the jury from giving any verdict on the same. It appears to us that the four issues which are first in order upon the record having been found in favour of the defendant, and the defendant being entitled, in our opinion, notwithstanding the objections which have [15] been taken, to judgment in his favour on those issues, it has become perfectly immaterial in favour of which of the two parties the jury might have found their verdict on the issues in question; for the fitness or unfitness of the party to fill the office of alderman having been determined by a court not only of competent but exclusive jurisdiction, any finding of a jury on that point is altogether inoperative and useless. If this record had contained a verdict in favour of the relator upon these issues, we should have allowed the defendant, notwithstanding such verdict, to enter up judgment for himself; and it is, therefore, unnecessary to say that we cannot agree to send those issues to be tried at a very useless expense before a second jury. Indeed the case of *Powell v. Sonnett* and others in error, in the House of Lords (Bligh's Reports, 1827, p. 552), furnishes a decisive authority that where the jury have found their verdict on all the material issues joined, the others being perfectly immaterial as between the parties, they may be discharged by the judge who tries the cause from returning any verdict on issues that are immaterial, without the consent of the parties.

"We therefore think the judgment of the Court of King's Bench must be affirmed.

"My brother Bosanquet, who also heard this argument, requests me to say that he concurs in the judgment we have given."

The Exchequer Chamber having affirmed the judgment of the Court of King's Bench, a writ of error was brought in parliament, which came on for hearing on [16] the 19th of February 1839 before the House of Lords, assisted by Chief Justice

Tindal, Justices Littledale, Vaughan, Patteson, Williams, and Coleridge, and Barons Park, and Gurney.

Plaintiff in Error.—The principal points to be argued were:—1st. That the alleged custom for the court of mayor and aldermen to elect any person from the body of the citizens to be alderman in the event of their having three times rejected the person elected by the inhabitants of any ward in unreasonable, contrary to public policy, and void in law. The alleged custom of election is bad in law, for if such a custom prevailed, the court of mayor and aldermen might totally deprive the citizens of their right to elect their aldermen, and render their privileges in that respect subject to the arbitrary will and discretion of the court of mayor and aldermen, who would have only to reject as unfit the person three times elected by the citizens without giving any reason, and the election of every alderman would be in their hands. It is obvious how this alleged custom might be perverted to party and political purposes. It is not a reasonable custom that an irresponsible body should put aside the choice of the wardmote. Besides, if this custom existed of electing any person after the candidate chosen by the citizens has been thrice returned and rejected, there is no reason why the same custom should not exist when an individual has been twice or even once refused, and the consequence would be, as observed by Lord Tenterden in *Re v. The Lord Mayor of London* (9 B. and C. 1), "That the court of mayor and aldermen would have in their hands the absolute [17] control over all the elections to city offices by the wardmote courts." A custom so liable to abuse is inconsistent with public policy.

2dly. That the said custom of election is in direct contravention of the 11 Geo. 1. c. 18., and of the bye law passed in the 13th year of the reign of Queen Anne set out in the pleadings. The question in controversy is, whether the defendant can maintain that he has a right to the office of alderman in respect of a twofold custom, by which the court of mayor and aldermen have not only a right thrice to reject the same person chosen by the wardmote, but that if they shall so reject on three several occasions the person thus often presented to them, this court of mayor and aldermen lawfully may elect a fit and proper person, being a freeman, out of the whole body of citizens, to be alderman of any such ward so made destitute. The alleged custom is inconsistent with the 11 Geo. 1. c. 18., which defines the electoral body who shall have the exclusive right, and consequently the act of parliament must prevail. The seventh section of that statute declares that the right of election shall appertain to freemen of the city being householders paying scot and bearing lot, and to none other whatsoever. The 14th section enacts, that no person shall vote at any election of aldermen who shall have been discharged from paying to the rates and taxes to which citizens of London inhabiting therein are liable. Altogether the persons composing the court of aldermen must of necessity be freemen, yet they need not, and in fact some of them are not, householders paying scot and bearing lot. [Lord Brougham.—Do not these words apply to the franchise in the wardmote?] The 16th [18] section provides that the act shall not extend to certain officers, but that the election of those officers shall be made by the mayor, aldermen, and common council, thereby showing that the legislature made an express enactment where any right of election was intended to be continued to the mayor, aldermen, and common council, and excepted out of that act. The distinction betwixt electing and the right of setting aside the election is illustrated by the cases of *Regina v. Mayor of Norwich* (2 Lord Ray. 1244), and *Wright v. Fawcett* (4 Burr. 2041).

The alleged custom is also inconsistent with the bye law passed in the 13th year of the reign of Queen Anne, and if so, the bye law must prevail over the custom. The bye law shows upon the face of it the usurpation of the court of aldermen; it is entitled "An act for reviving the ancient manner of electing aldermen," and the recital declares it to be made for the purpose of restoring the inhabitants their ancient rights and privileges of choosing one person only to be their alderman; and it enacts, that the person elected by the citizens should be by the court of mayor and aldermen admitted and sworn. The bye law and the act of parliament are uniform in their object, and the same right is established by both. Thus the bye-law was material in deciding as to the custom, of which last there was no evidence after 1689. Bye laws of the city of London not contravening any statute are of authority.

*Re v. Mayor and Aldermen of London* (9 B. and C. 1), *Hutchins v. Player* (Sir O. Bridgman's Judgments, p. 272), and in the case of *Wagoner* (8 Co. Rep. 121 b.), therein referred to.

[19] 3dly. That the Lord Chief Justice ought at the trial of this information to have allowed witnesses to be examined in support of the issues joined as to the fitness of Scales. The evidence rejected at the trial being in support of material issues should have been allowed to be adduced. If the replication upon which those issues are raised were bad in law, the defendant should have demurred. The power of judgment of the fitness or not did not arise till after the election by the ward-mote.

[Lord Brougham.—If the issue be clearly immaterial the case of *Powell v. Sonnett* and others (1 Bligh's Rep. N. S. p. 552, and 3 Bing. 381) settled the point, that a judge is perfectly right in discharging the jury from finding a verdict upon such immaterial issue.]

The counsel for the defendant in error were not called on.

Lord Brougham.—My Lords, I wish to ask your Lordships whether it is necessary that the counsel for the defendant in error should be heard. The learned judges have come to assist your Lordships in the two cases appointed for hearing to-day; but that does not, I apprehend, imply that it is necessary they should be heard throughout, and it will involve a waste of time if there is no reasonable doubt, and if the opinion of all the learned judges, as well as of your Lordships, is against the plaintiff in error, and in support of the judgment of the Lord Chief Justice, against whose decision the bill of exceptions was tendered, but which decision was affirmed in the court of error, the Court [20] of Exchequer Chamber. I have reason to believe the learned judges still retain their opinion; if I am wrong they will interfere; but I believe it is the fact, that they have heard nothing to shake their opinion; if so, I think it will be an unwarrantable waste of time to prolong the argument. My noble and learned friend (Lord Wynford), formerly Chief Justice of the Court of Common Pleas, entirely assents to the view I have taken, that this judgment is perfectly right. I have attended most carefully to the argument of the learned counsel. I have never heard one syllable of the opposite side. I have not looked into the judgment of the court below. I have looked into the act of parliament, on which the main reliance is placed by the learned counsel, and I have not any doubt whatever in my mind; at the same time, if the learned judges were unanimously to tell me they have changed their opinion, I should have a doubt, and should desire to hear the other side. At present I humbly submit to your Lordships that the judgment of the court below be affirmed; and I do it in consequence of the view I take of this act of parliament, upon which the main reliance is placed. I am informed that the judges of the Queen's Bench have given no judgment. The Exchequer Chamber consisted of the judges of the two courts of Common Pleas and Exchequer. The learned judges of the Court of Queen's Bench are now, therefore, exercising their judgment; and if they have any doubt I will withdraw my motion, and consent to the argument proceeding.

(The learned Judges consulted together.)

[21] My Lords, I find there is no doubt whatever existing among the learned judges of the Queen's Bench, so that it is so much fairer towards the party who is the plaintiff in error, for it is on his own showing that he has not been able even to raise a doubt. This entirely concurs with the view I have taken upon the subject. I have heard with the greatest attention every argument which has been brought forward by the learned counsel, not only whatever suggested itself to his own acute and experienced mind, but whatever the eagerness and the anxiety of the client, outstripping the professional zeal of the advocate, could suggest: we have heard him present his argument with all those additional reinforcements which a person so materially interested in the result might be reasonably expected to present; but the whole has left my mind entirely free from doubt.

My Lords, I consider that this act of parliament was intended to prevent the mischief which is stated in the preamble as the governing motive of the legislature. No doubt that mischief applied very much to persons unqualified intruding themselves in the choice of mayor, and in the choice of aldermen; for it says "that the right of election in the respective wards shall belong and appertain to freemen of



the said city of London, being householders paying scot and bearing lot in the several and respective wards, and to none other whatsoever." That is a clear and distinct enactment, relating entirely to who shall and who shall not exercise that franchise at the wardmote; it has no reference to what ought to be done in respect of admission in case of rejection. There is no reference to any custom, there is no reference even to any bye law; but in my [22] opinion the act of parliament and the custom may very well stand together, because it is quite consistent with the custom that the wardmote shall be constituted in a particular way. The election is by the wardmote, but the approval may be in the mayor and aldermen; and really on that point I entertain no doubt. I need not enquire into the effect of the bye law which appears upon the record, but not on the bill of exceptions. But giving the party the benefit of it, it appears to me that the argument raised upon it comes to nothing, and that it is subject to the same observation as the other.

With respect to the point as to discharging the jury, I think it is quite clear that a judge has authority, even without the consent of the parties, to discharge the jury from giving a verdict where the finding cannot be material. In this case it is clear it could not be material. It might be material in the case put of a libel, to which the defendant pleaded the general issue and a plea of justification. It is said, when the jury have found not guilty, what signifies it whether it is true or false? It does not signify as to the question in this case, but it may signify as to the costs of that issue; because the plea of not guilty being affirmed by the finding of the jury, would discharge the defendant, and saddle the plaintiff with the general costs; but then there would remain the other question, who shall pay the costs of the special plea of justification? If that special plea were found one way one party would pay those costs, and if it were found the other way the other party would pay the costs. How then can it be said to be quite immaterial whether the publication is true or not? It is clear, therefore, that case does not apply to this, [23] because whichever way this was found there would be no costs.

Upon these short grounds which I have run over, (and I am not aware that it is necessary I should detain your Lordships upon any other,) I have no hesitation whatever in asking your Lordships to determine this case without further discussion; it would be throwing away more of the valuable time of the learned judges, and of your Lordship's time, in this case, and I think it would be setting a wrong precedent, for the consequence would be, that if the learned judges had been summoned, even if the case turned out to be a clear one, which I think this is, you would be obliged to waste your time and theirs in going through the case: I will not be a party to laying down any such precedent. On these grounds I humbly move your Lordships that the judgment be affirmed.

Lord Wynford.—My Lords, a decision of mine having been referred to by the learned counsel at the bar, I beg to say that it appears to me I gave a right judgment, though perhaps with a wrong reason, as I find it reported. My Lords, I am happy to be informed that it is not my judgment, but the judgment of a learned judge much more likely to give a right reason than I am. I think a better reason might have been given for it.

With respect to the motion made by my noble and learned friend, I entirely concur in it. The case is so extremely plain that it appears to me impossible that any two lawyers can doubt about it. With respect to the point of the consent of parties being required where a judge feels it to be his duty to disenumber the cause [24] of a parcel of lumber perfectly immaterial to the real issue, it would be absurd if he was not at liberty to do that without the consent of the parties; and in this case I conceive if the issues in question were immaterial he was perfectly justified in discharging the jury from finding a verdict upon those issues, though the parties might refuse to consent. At the same time I agree with my noble and learned friend that if the finding upon those issues made any difference either in the costs or in any other respect, he must have the consent of the parties. The issues in question became immaterial when the existence of the custom was established, and as their being found one way or the other could make no difference to the parties, it appears to me the learned judge did perfectly right in getting rid of them.

It seems impossible to doubt that the act of parliament applies to the first election, and may very well stand with this bye law. As my noble and learned friend very

properly observed, we cannot take any notice of the record, for there is no exception to it. It is the practice of the Court not to go into the whole record, but to decide upon the points raised by the bill of exceptions; but that is not very material, because the statute clearly applies only to the first election, and not to what might be done after the first election is over. The legislature saw that it was likely that great mischief might arise if some mode was not found to prevent any improper persons from interfering at the wardmote. The words of the statute applied distinctly to the wardmote, and the statute being intended to regulate the first election, it said that none shall interfere but persons duly [25] qualified, according to the terms of that act; and the wardmote having elected a person whom the court of lord mayor and aldermen did not think a proper person to be elected, the lord mayor and aldermen interfere upon that. Under this bye law the matter is entirely in the hands of the lord mayor and aldermen.

It appears to me that that point is perfectly clear, and that what they have done with respect to the rejection of one candidate, and the election of another candidate,—these elections having taken place of a person whom the lord mayor and aldermen did not consider a proper person to fill the office,—is perfectly justified in law. For these reasons I entirely concur in the motion made by my noble and learned friend.

Lord Chancellor.—My Lords, I entirely concur in the course proposed to your Lordships. It can never be said that because your Lordships have thought fit to call in the assistance of the learned judges the course of proceeding should be different if your Lordships on hearing one side feel no doubt, and there is no question to be referred to the learned judges. It does so happen that we have the opportunity of ascertaining on the present occasion, that all the learned judges, and all your Lordships here present, are of one opinion upon the subject of the present case, and therefore it would be extremely imprudent to occupy further time upon the consideration of the subject, when the statement of the plaintiff in error has not created any doubt in the minds of any of your Lordships.

[26] My Lords, with reference to the construction of the act, it appears to me abundantly clear, that the seventh section was not addressed to any thing like the present case; it was to regulate the right of original election, leaving to be decided by the existing custom what was to be done with the party so elected. The question is, what power there is in the court of aldermen to deal with an election by the wardmote; and the seventh section, being confined as it is to the original election, does not touch any right which may exist elsewhere of controlling the admission of the person to be invested with the office of alderman.

With regard to the rejection of the evidence of fitness, in the present stage of the case, in the view that your Lordships take of it at all events,—that is utterly immaterial, this custom being found to exist, and your Lordships being of opinion that it is a legal custom, and that the court of aldermen have the power contended for, the eligibility of the party being a matter entirely in their discretion, and subject to their judgment; the opinion of the jury with respect to his fitness could never be material; for these reasons I entirely concur in the opinions expressed by my noble and learned friends, that the judgment of your Lordships should be for the defendant in error.

Mr. Attorney General.—My Lords, I move for costs.

The House of Lords ordered and adjudged, That the judgment given in the said Court of Exchequer Chamber for the said defendant, affirming a judgment of the said Court of King's Bench, be, and the same is hereby affirmed; [27] and that the record be remitted, to the end execution may be had thereupon as if no such writ of error had been brought into this House: And it is further ordered, That the said plaintiff in error do pay or cause to be paid to the said defendant the costs incurred in respect of the said writ of error, the amount thereof to be certified by the clerk assistant.

OWEN and DIXON.—R. F. NEWMAN, Solicitors.

[28] APPEAL FROM COURT OF SESSION, SCOTLAND.

JAMES FARQUHAR GORDON and Others, the Trustees and Executors of DAVID CLYNE,\* *Appellants*.—Tinney—James Russell; GEORGE DUNNET, JAMES TRAILL, and DAVID HENDERSON, *Respondents*.—Burge—John Stuart [25th February 1839].

[*Mews'* Dig. iv. 859; S.C. 11 Shaw 791. See *National Bank of Scotland v. Forbes*, 1858, 21 Dunlop 83; *Fleming v. North of Scotland Banking Co.*, 1881, 9 Rettie 13, 14.]

*Arrestment—Assignment—Right in Security—Proof*.—A party held an intimated assignation, as a security for certain specified debts and relief of specific obligations; another party, creditor of the granter of the assignation, used arrestments in the hands of the assignee, and of the debtor in the assigned debt. Held (affirming the judgment of the Court of Session) that the assignee, in accounting with the arrester, was entitled to take credit, in the first place, for the amount of the debts and obligations specified in the assignation, and all expenses relating thereto; secondly, for all sums paid to or for behoof of and for all furnishings made by him to the common debtor prior to the arrestment; and, thirdly, for all sums which, though paid for behoof of the common debtor after the date of the arrestment, were paid in virtue of obligations contracted prior thereto: Held further (affirming as aforesaid) that it was competent for the assignee to prove by the oath of the common debtor that his claims fell under one or other of the above descriptions.

*Costs*.—Per L. C. Incompetent to appeal for costs, and it is indispensably necessary to maintain the rule, that parties appealing should not be permitted to mix up their appeal with matter of merits in order to cover an appeal for costs.

[29] *Practice*.—Question, whether when appealing against a judgment of the Court, it is competent to include in the appeal interlocutors of the Lord Ordinary in the cause, not previously made the subject of a reclaiming note.

The late Mr. David Clyne raised an action against a person named Fraser for payment of money alleged to be due, and on the dependence thereof he used arrestments in the hands of the respondent Dunnet, and of the respondents Traill and Henderson respectively. The respondent Traill was trustee of a Colonel Williamson, from whose estate Fraser was entitled to receive dividends; the respondent Henderson was factor for the trust. Prior to the arrestment Fraser had assigned his claims upon Colonel Williamson's estate to the house of M'Beath and Dunnet, of whom the other respondent was the surviving partner, in security of certain advances and furnishings made to him. The assignation was granted 23d April 1823; a dividend of 10s. in the pound was paid 22d July 1824. Clyne's arrestments were in May 1825, and he obtained decree in his action against Fraser in June thereafter. A further dividend of 5s. in the pound was paid in January 1830. In April 1830 Clyne brought an action of furthcoming against the respondents, in which he claimed the balance due to Fraser by Williamson's trustees, after paying the advances and furnishings specified in the assignation. The respondent Dunnet contended that he was not bound to make forthcoming funds not in his hands at the date of the arrestment; and further, that he was entitled to apply funds received by him under the assignation to advances made on the faith thereof, though these advances were not referred to in the assignation. The other respondents contended, [30] that as Fraser was entirely dived by the assignation the action was improperly directed against them.

On the 1st December 1832 the Lord Ordinary pronounced the following interlocutor:—"Appoints the defender Dunnet to put in a statement of the account between him and Fraser, showing the balance that was due, first, at the period of the first dividend; secondly, at the date of the arrestment; and, thirdly, at the date of the second dividend, etc." That dividend was received at a period subsequent to the arrestment.

A state was accordingly lodged by Dunnet, and after objections and answers

\* Reported in 11 S., D., and B., 791.

with which avizandum was made, the Lord Ordinary pronounced an interlocutor on the 9th March 1833, in the following terms:—"Finds, that in the accounting between George Dunnet as arrestee, and David Clyne, the former is entitled to take credit, in the first place, for the amount of the debts and obligations in security and relief of which the assignation to him by Fraser the common debtor was granted, and all the expenses relating to these debts and obligations; secondly, for all sums paid to or for behoof of, and for all furnishings made, to the common debtor, prior to Mr. Clyne's arrestment in 1825; and, thirdly, for all sums which, though paid for behoof of Fraser the common debtor, after the date of the said arrestment, were paid in virtue of obligations contracted prior to said date; but finds that Mr. Dunnet the arrestee is not entitled to credit for any advances or furnishings made to the common debtor subsequent to the date of the said arrestment, and not falling within the preceding finding: Finds, that Mr. Clyne is, in virtue of his arrestment in the [31] hands of Mr. Dunnet, entitled to any balance which, on the application of the principles above laid down, may be found to remain in the hands of the said arrestee, but only on the condition of relieving Mr. Dunnet of the bond of caution granted by him in the loosing of arrestment on the dependence of the action of William Sutherland against Fraser, the common debtor, being one of the obligations still outstanding in relief of which the assignation was granted: Finds farther, that Mr. Clyne is, on the performance of the above-mentioned condition to Mr. Dunnet, entitled, in virtue of his arrestment in the hands of the other defenders, Colonel Williamson's trustees, entitled to draw any balance which may remain due by the said trustees to Fraser the common debtor, in so far as necessary for payment of the debt due by the common debtor to the arrestor: Lastly, in respect that Messrs. Clyne and Dunnet differ in regard to the amount of the advances or furnishings actually made to or for behoof of the common debtor, remits the case to Mr. Donald Lindsay, accountant, to examine the accounts, and to report upon the balance which may be due by Mr. Dunnet agreeably to the preceding findings."

Two of the parties, viz. the pursuer Mr. Clyne, and the respondents, Colonel Williamson's trustees, presented reclaiming notes against this judgment to the First Division of the Court; Mr. Clyne praying for certain alterations on the judgment, which would increase the balance subject to his arrestment, and Colonel Williamson's trustees praying to be assoilzied from the action, and to be found entitled to expenses.

These reclaiming notes were advised on the 27th of [32] June 1833, when the following interlocutor was pronounced:—"The Lords having advised this cause with the mutual reclaiming notes, and heard counsel, adhere to the interlocutor of the Lord Ordinary reclaimed against, refuse the desire of both the reclaiming notes, and reserve all questions of expenses till the final issue of the cause."

In November 1833 Mr. Clyne died, and the appellants, as trustees under his settlements, sisted themselves as parties in the action, and got the remit to the accountant renewed, who thereupon made a report, showing a balance due by Mr. Dunnet after applying the dividends received on the principles of the preceding interlocutor. There being a defect of proof of some of the items allowed, Dunnet proposed to refer to the oath of Fraser, which having been allowed by the Lord Ordinary, the appellant reclaimed. The Court, after an amendment of the minute of reference, also sustained the reference.

On the 31st of January 1837 the Lord Ordinary pronounced the following interlocutor with reference to the question between the appellants and the respondent Dunnet:—"Finds it proved by the oath of Fraser the common debtor, that the advances of cash and furnishings set forth in the accountant's report do fall under one or other of the descriptions in the interlocutor of the 9th of March 1833, with the exceptions, first, of the sum of 10s., being the additional articles of the account of furnishings ending in 1823; secondly, of the sum of £2 7s., consisting of cash advances, said to have been made by Mr. Dunnet to Mr. Fraser; and, thirdly, the sum of £10 15s. 3d., being the business account [33] alleged to have been paid in August 1824 by Dunnet to Robert M'Kay on account of Fraser the common debtor: Finds, that these three sums are not proved, by the common debtor's oath, to fall under either of the descriptions mentioned in the foresaid interlocutor, and therefore, to the extent of those three sums, sustains the objections to the accountant's report; *quoad ultra*, approves of the report: Finds, accordingly, that the balance now in the

hands of the defender Dunnet amounts to the sum of £40 14s. sterling, with interest from the 1st day of January 1830, and decerns against the said George Dunnet the arrestee for the same, superseding extract of the said decree until the pursuer shall have relieved the said arrestee, in terms of the interlocutor of the 9th of March 1833, of the bond of caution granted by him, in the loosing of arrestment, on the dependence of the action of William Sutherland against Fraser the common debtor: Finds the defender the said George Dunnet entitled to his expenses, and allows an account thereof to be given in, and to be taxed by the auditor.

*Note.*—It is with some hesitation that the Lord Ordinary has ultimately formed the opinion that the articles contained in the exceptions in the above interlocutor are not sufficiently proved. Looking at the whole tenor of the deposition, it appears to him that the failure of the defender, even in those points, is mainly imputable to the very natural uncertainty of the common debtor's recollections as to the precise dates at which the alleged transactions took place. Considering, however, that the defender, the arrestee, has been substantially successful in all the important [34] points of the case, and that a very great, and, as it appears to the Lord Ordinary, unnecessary expense has been created by the very critical mode of accounting, insisted in with so much pertinacity by the pursuer, the Lord Ordinary thinks that in justice to the defender he must be allowed his expenses."

On the 1st February 1837 the Lord Ordinary pronounced the following interlocutor with reference to the question between the appellants and the respondents, Colonel Williamson's trustees:—"Finds the pursuers entitled, under their arrestments, to any future dividend that may be declared and become payable to the common debtor by the said defenders in their character of trustees, with any interest that may become due thereupon, and that to the extent only, and in extinction pro tanto, of the debt due to the said pursuers; they, always before extract, relieving the other arrestee of his cautionary obligation, in terms of the separate interlocutor of yesterday's date: Finds no expenses due to either party, and decerns to the above effect accordingly.

*Note.*—In this case both parties have carried their pleas too far; the pursuer in maintaining that the assignation in favour of Dunnet was of no effect whatever in divesting the defenders, the arrestees; and the defenders in contending that the assignation, though confessedly only an assignation in security, totally and absolutely divested them, without any regard to the question whether the debt secured by it had been paid or not, a point which has already been decided against the arrestees by the interlocutor [35] of 9th March 1833. In these circumstances, the Lord Ordinary thinks that neither party is entitled to expenses."

The appellants reclaimed against these interlocutors, praying the Court to alter the interlocutor of the 31st of January in the question with Mr. Dunnet, in so far as it found Mr. Dunnet entitled to expenses, and to find him liable in the expenses of process; and also to alter the interlocutor of the 1st of February in the question with Colonel Williamson's trustees, in so far as it found no expenses due to either party, and to find Colonel Williamson's trustees liable in expenses.

Colonel Williamson's trustees also reclaimed against the interlocutor of the 1st of February, praying the Court to alter it, in so far as regarded expenses, and to find that they were entitled to their expenses.

On the 30th June 1837 the Court, on advising these reclaiming notes, pronounced the following interlocutor:—"Adhere to the interlocutor reclaimed against, in so far as it finds George Dunnet entitled to his expenses, and refuse the desire of this reclaiming note on that point; of new, find expenses due to the said George Dunnet, and remit the account thereof, when lodged, to the auditor of Court, to tax and report; adhere also to the said interlocutor, in so far as regards the question with Colonel Williamson's trustees, and refuse the desire of both reclaiming notes on that part of the cause."

Against this judgment the appellants brought their appeal, and also against all the interlocutors pronounced in the cause, being eleven in number.

[36] *Appellants.*—An arrester is entitled to have the funds arrested made forthcoming to him by the arrestee, unless the arrestee shall establish a lien over them, or produce evidence that they are attached by diligence preferable to the arrester's diligence.

The oath of Fraser was inadmissible to prove the items of account not otherwise established. In the first place there was evident collusion between Dunnet and Fraser, and in the second place the account was not liquid before the arrestments were used. In the ordinary case the arrestee, in a process of forthcoming, may refer his defence to the oath of the common debtor; but where there is collusion, or when a debt, of which compensation or retention is pleaded, was not liquid before the arrestment was used, the oath of the common debtor cannot affect the claim of the arrester.

The firm of M'Beath and Dunnet, who were the original assignees of the common debtor Fraser, and Mr. Dunnet as the surviving partner of that company, were not entitled to apply or hold the funds assigned in security for any other purposes than the purposes specified in the assignation; neither can it be contended that the respondent Mr. Dunnet, as an individual, had any right to apply or hold the funds assigned to M'Beath and Dunnet in security, nor any title to a preference over these funds, in competition with Mr. Clyne's arrestment.

As the appellants have succeeded, in a process of forthcoming, in proving the existence of a fund which was denied by the arrestees, they ought to have been found entitled to expenses; and they ought not at any rate to have been found liable in expenses to the respondent Mr. Dunnet, who, as an arrestee, maintained, [37] contrary to the fact, that he held no funds which he was bound to make forthcoming. The appellants only asked for that which they could not have obtained without a suit; that part of the interlocutor which gave costs cannot be maintained (*Ersk. b. iii. tit. 6, sec. 2, 11, 15; 2 Bell's Comm. 66; 2 Bell's Comm. 637, 638; Wardrop, Feb. 1744; Dict. 1025; Stair, b. iii. tit. 1, sec. 42, b. iv. tit. 35, sec. 6; Creditors of Menie v. Bloomfield, Dec. 7, 1736, Elch. voce Arrestment*). The recent case of *Smellie v. Miller* before the Appeal Committee is a clear decision in support of this appeal.

*Respondent Dunnet.*—As this respondent could not be bound to make forthcoming any funds of the arrestee which have never come into his possession, and for which he never was liable to the common debtor, he is not chargeable in this accounting with any other sums than the two dividends which he, as assignee of the common debtor, received from Colonel Williamson's trustees, and in accounting for the sums actually received by him on account of the common debtor, he is entitled to credit for the debts and obligations in security and relief of which the assignation by the common debtor was expressly granted, and for all expenses incurred by the respondent in reference to these debts and obligations. Besides this, he is further entitled to credit for all advances and furnishings by him to or for behoof of the common debtor prior to Mr. Clyne's arrestment in 1825, and for all sums which, though paid for behoof of Fraser the common debtor after the date of the said arrestment, were paid in virtue of obligations contracted prior to that date. And the respondent was entitled to prove, as he in fact did, [38] such payments and furnishings by the oath of Fraser the common debtor.

The real question in the cause is as to the costs.

The interlocutor of 1837 adopts the report of the Lord Ordinary, and the principles laid down by him; and it is not competent to reverse that part of the interlocutor of 1837 against which no reclaiming note has been presented without infringing the express provisions of the statute 48 Geo. 3, cap. 151, sect. 15 (*Ersk. b. iii. tit. 6, sec. 16; Forbes, 20 Feb. 1711, Horn, Dict. 12464; Kames, 62; Nairn, 1725, Dict. 12468; Maitland, Gibson, and others v. Wills, 2 Dec. 1826, 5 S. and D. 74; Ersk. b. iv. tit. 2, sec. 8; Blair v. Balfour, 9 July, 1745; Dict. 12473; Hogg v. Low, 13th June, 1826, 4 S. and D. 702*).

*Respondents Traill and Henderson.*—As the appellants did not think proper to take the judgment of the Inner House upon the propriety of paying the second dividend from Colonel Williamson's estate to the other respondent Mr. Dunnet, it is not competent to bring that part of the case under appeal. By the 48th Geo. 3 cap. 151, sect. 15, which is an act concerning the administration of justice in Scotland, and concerning appeals to the House of Lords, it is enacted, "that hereafter no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the judges pronouncing such interlocutory judgments, or except in cases where there is a difference of opinion among the judges of the said Division; nor [39] shall any appeal to the House of Lords be allowed from

interlocutors or decrees of Lords Ordinary which have not been reviewed by the judges sitting in the Division to which such Lords Ordinary belong."

By their reclaiming note the appellants confined their application to the Court to an alteration on the question of costs, and as this House never entertains an appeal in regard to costs alone, the present appeal must be dismissed as incompetent. The case of *Smellie v. Miller* never having been actually before this House, cannot be relied upon or used as an authority (*Jeffrey v. Brown*, 2 Shaw's App. Cases, 356; *Tod v. Tod*, 26th March, 1827, 2 Wilson and Shaw, 549; *Hunter v. Duff*, 11th August, 1832, 1 Wilson and Courtenay, 212; *M'Aulay v. Adam and Brown*, 17th May, 1835, 1 Shaw and Maclean, 665).

Lord Chancellor.—My Lords, there are some points which have been addressed to your Lordships in the course of this discussion which are points of form; and your Lordships have also heard the merits of the case discussed. The first point, namely, of form, is, how far this case falls within the provision which prohibits parties from coming to your Lordships upon interlocutors which have not been the subject of a reclaiming note to either of the Divisions of the Court of Session, namely, appeals from the interlocutor of the Lord Ordinary only.

A case has been referred to as deciding that point, namely, the case of *Smellie v. Miller*. In the view I take of the present case it will be unnecessary for me to come to any conclusion upon that point; the only [40] object of my referring to it at all is, that there may be no misconception as to the case that has been referred to. My Lords, the case of *Smellie v. Miller* was a petition which was disposed of by the Committee of Appeal, not by your Lordships House, and therefore can go no further than the individual opinions of such of your Lordships as happened to be present upon the Committee of Appeal; but what was done upon that petition your Lordships will see in a moment does not proceed upon the ground for which it has been cited at your Lordships' bar. There were two interlocutors appealed from. The objection to the appeal as to one was, that it was an interlocutor of the Lord Ordinary; the objection raised to the other was as to matter which had been gone into by a Division of the Court of Session by a reclaiming note. I have no recollection of the case, or of the grounds on which it was disposed of; but it is clear that as there were two points raised, it could not have been decided in favour of the petitioner, and the appeal dismissed, unless the committee had been in favour of the case stated by the petitioner on both points. This question of form will have to be considered if it should ever be brought before your Lordships in a case in which it is necessary to come to a decision upon it. It does not appear to me to be necessary to enter into the discussion of that question now, being very distinctly of opinion that your Lordships will find quite sufficient upon the merits of the case to dispose of the appeal now before you, which merits may be very shortly stated.

A gentleman of the name of Fraser being entitled to receive certain sums of money from the trustees [41] of Colonel Williamson, and having transactions with the firm of which the respondent Dunnet is now the surviving partner, assigned his interest in those sums of money—his right to receive those sums—to the firm of which Dunnet is now the surviving partner, for the purpose of indemnifying them against certain obligations which they had come under for his, Fraser's, benefit, and which obligations are specified in the deed of assignment. It appears that a dividend of ten shillings in the pound was received by the house of which Dunnet is the surviving partner, and it appears that the house being in possession of this security, and therefore necessarily looking to receive these monies on account of Fraser, made certain advances in money to him, and furnished him with articles which he required, which raised a private debt as between the house and Fraser. After the first dividend of ten shillings in the pound had been paid to Dunnet, there being a further dividend expected to be received from Williamson's estate, the present appellant, that is, the person who is now represented in the present appeal, namely, Mr. Clyne, having also a demand against Fraser, arrests in the hands of Dunnet such monies as he might have belonging to Fraser, that is to say, such money as he otherwise would have to pay to Fraser, subject of course to all such demands as the house now represented by Dunnet would have against Fraser, because it cannot for a moment be contended that the party making the arrestment or arresting the fund could put the arrestee in

a worse situation than he would have been in as against the party to whom he was bound to account. Whatever rights Dunnet had against Fraser he necessarily had [42] against Clyne, who could only claim from Dunnet that which Dunnet would otherwise be bound to pay to Fraser.

This case came before the Lord Ordinary in the first instance, and the first interlocutor was pronounced on the 1st of December 1832; and by that interlocutor the Lord Ordinary appoints the defender Dunnet to put in a statement of the account between him and Fraser, showing, first, the balance that was due at the period of the first dividend; secondly, at the date of the arrestment; and, thirdly, at the period of the second dividend, the second dividend having been received at a period subsequent to the arrestment. The interlocutor of the 9th March 1833, which was made the subject of a reclaiming note by Mr. Clyne, was adhered to by the Court of Session; and this forms the foundation of all that followed; it establishes the right as between the parties; and what has afterwards taken place merely are the means by which that right is worked out. That interlocutor finds, first, "that in the accounting between George Dunnet as arrestee, and David Clyne, the former is entitled to take credit, in the first place, for the amount of the debts and obligations in security and relief of which the assignation to him by Fraser the common debtor was granted, and all the expenses relating to these debts and obligations;" that was secured and conditioned in the deed by which the debt was assigned to them; the second point is now made a subject of contest, being for all sums paid to or for behoof of and for all furnishings made to the common debtor prior to Mr. Clyne's arrestment in 1825; and, thirdly, for all sums which, though paid for behoof of Fraser the [43] common debtor after the date of the said arrestment, were paid in virtue of obligations contracted prior to the said date. The interlocutor further finds that Mr. Dunnet the arrestee is not entitled to credit for any advances or furnishings made to the common debtor subsequent to the date of the said arrestment, and not falling within the preceding finding. The result, therefore, is, that the interlocutor of the year 1833 declared that, as between the party arresting, namely, Mr. Clyne, and the arrestee Dunnet, in taking the account for the purpose of ascertaining upon what sum that arrestment ought to operate, Dunnet was entitled to deduct not only the particular sums specified in the assignation under which he claimed, but that he was also entitled to deduct all sums furnished by him,—sums paid, or furnishings, as they are called, to Fraser at the time when the arrestment was made; and that he was also entitled to set off against what might be found in his hands due to Fraser such sums as were paid subsequently, provided they appeared to have been paid by virtue of obligations entered into prior to the time at which the arrestment took place.

The only question, supposing this to be open now for your Lordships' consideration—and I am anxious to show the parties that the decision of your Lordships' House, if your Lordships agree with me in the opinion which I have formed, does not proceed upon matter of form, but that your Lordships have the facts so far before you, that if there were no objection in point of form, the decision to which your Lordships would come would be precisely the same—the question is, whether Fraser as against Dunnet could either have stopped the [44] second dividend in the hands of the trustees of Williamson, or have compelled Dunnet to pay over to him, Fraser, monies which he had actually received, leaving Dunnet to obtain payment as he could of monies paid or furnishings supplied to Fraser anterior to the period of the arrestment, or subsequently, in consequence of obligations entered into before the arrestment. That no such law can exist in Scotland is manifest, not only from some of the authorities which have been referred to, but from the nature of things, because it is not a matter of set off; but here is a fund put into the hands of a certain party, and the person whose funds are so put into his hands induces him to advance monies, which, whether the subject of any special contract or not, are obviously advanced upon the credit which he is furnished with by means of the assignation, which puts into the hands of the party paying, funds belonging to the party to whom the monies are advanced, and which funds are to be accountable for that advancement of money. It might as well be said that a banker to whom monies or securities are given, nothing special being said upon the subject, can have these securities taken out of his hands without paying him the balance found due upon the money



transactions between the parties. It does not, however, rest upon that, because Fraser himself is examined, (I shall presently consider how far that examination is correct, looking at the state of the pleadings between the parties,) and Fraser says that it was a matter of arrangement between the parties,—that he drew these sums, and was supplied with the furnishings, in consequence of the credit which he was to receive on account of money coming from those trustees. It is said that that statement of Fraser [45] ought not to prejudice the question now between the parties, because it is not made a subject of pleading. It did not arise upon the pleadings. The pleadings were these;—to what extent the plaintiff was entitled to receive the balance of the account pending between Fraser and Dunnet; and accordingly it is referred to an accountant for the purpose of looking into the account, and reporting what, at the various periods stated in the first interlocutor, was the state of the account between the parties. In taking that account Dunnet claims certain sums, to which sums he is to establish his title. It may as well be said, that in proceeding for the purpose of taking the account, every item of account is the subject of a special plea. It arises necessarily in the investigation of the accounts; and in the investigation of the accounts, Dunnet, having claimed a right to retain a certain portion of the monies in his hands for the purpose of paying a certain obligation, proves his right, first by showing that he did advance the money to Fraser; and he establishes his title to it by showing that the money advanced to Fraser was upon the faith and credit of the money, of which he held an assignment. Therefore not only is there no dispute, but there is no contest raised at your Lordships' bar between the account as taken by the accountant and as acted upon; and the last interlocutor appealed from is not the subject of contest as to any item of account which it contained. A very different course of proceeding must have been adopted if it had been the intention of the appellant to appeal against particular items, but it is not attempted on the part of the appellants to bring before your Lordships a question upon the disallowance of any particular [46] item; the appeal is for a different purpose, and not for the purpose of trying the question as to disallowing any particular sum. The interlocutor of 1833 laid down the principle upon which this account was to be taken, giving to Mr. Dunnet the benefit of all sums which he could show to have been advanced to Fraser, before the date of the arrestment, or subsequently, in consequence of obligations contracted before that time.

The cause was proceeded in down to the date of the last interlocutor, which was in the month of February 1837, without any appeal being brought before your Lordships, questioning the propriety of the principle established in the decree of 1833. Interlocutors in sufficient abundance appear to have been pronounced, eleven in number, all of which are made in part or in whole the subject of the present appeal; but against the principle established by the decree in March 1833, up to the time when this petition was presented, which I understand was in July 1837, no question was brought before your Lordships as to the propriety of the principle established in that interlocutor of March 1833. The result of all this investigation has been, that at the time of the arrestment there was nothing due to Fraser; I consider it to be established beyond all controversy that there was nothing that the pursuer could claim against Dunnet, because, whether there was a small balance or not in the hands of Dunnet, whether it was £7 or £30 in the hands of Dunnet actually exceeding the amount which at that time he had advanced and paid, he had at that time come under obligations binding himself to make payments at a future day to Fraser, to an amount exceeding that [47] which he had in his hands, whether it be considered one sum or the other; and it is impossible to say that the present party, who could not stand in a better situation as against Fraser, had any right to come against Dunnet to obtain a sum of money which he had in his hands in that state of circumstances. At the time the arrestment took place there was nothing in his hands. The whole suit proceeds upon the foundation of that arrestment; and the result of that investigation has been that a certain sum amounting to £30 was at that time due from Dunnet, not however payable by him, because there was an obligation existing between himself and Fraser, which entitled him to be secured, and secured upon money in hand against the consequences which might follow upon that obligation.

My Lords, a question might be made, (but it is not necessary to consider that,) whether it was quite right to alter the security which the party had in his hands, and whether it was not giving the pursuer something more than the pursuer ought to have, an indemnity having been given in respect to which there was actual money in hand. The pursuer at least cannot complain of that; he has all that he could reasonably expect, and perhaps it might be thought that he had something more than he was strictly entitled to, but however that may be the money balance is found to be £40.

Now, up to that amount nothing is complained of; no appeal is presented to your Lordships' House. The parties from 1833 up to 1837 are proceeding upon the principle which established the right as between themselves, and now the amount of the account taken is not [48] in dispute. What is it then that has given rise to this appeal, by which in 1837 the parties complained of an interlocutor of the year 1833 in which they had acquiesced from that time until the time when the appeal was presented? They are ordered to pay the costs. Now, I have a very strong opinion, that if these costs had been otherwise disposed of your Lordships would never have heard of the appeal from the interlocutor in 1833. And concurring entirely with these opinions which have been referred to, in which it has been stated that this House will not entertain an appeal for costs, it is indispensably necessary, in order to maintain that principle, that where parties appealing for costs in substance mix up their appeal with some other matter of merits, in order to cover the appeal for costs, they should not be permitted to escape from that rule by attempting to mix the one subject matter with the other. But, my Lords, I do feel some satisfaction in having heard so much of this case as not to be compelled to advise your Lordships to dispose of it upon that technical ground, because if you look at the liabilities of the parties to costs upon the merits, it seems to me that there is no question upon it, and that the Court below have done, with regard to costs, that which the justice of the case required. Mr. Dunnet has no connexion with the present appellant Mr. Clyne; his transactions were entirely with Fraser. It is for the purpose of a benefit to Clyne that he is permitted to come upon the fund in the hands of another person, and he cannot come upon this fund to the prejudice of that other person; he cannot take money which that other person is entitled to retain, or expose him to a liability for costs to which he would [49] not have been exposed but for the intervention of a stranger.

Now, I have already said, that at the time of the arrestment he had nothing. It turns out that by means of a subsequent dividend, not by means of any thing which he had at that time, but subsequently, he had something which, whether Fraser received or Clyne, his (Dunnet's) demand being satisfied, was a matter of indifference to him. But till that moment, till his demands are satisfied, he is not in a situation to be compelled to part with his money to the one party or the other, for he has still in him a right to look to that money, or any other he may receive to secure him from any liability which he may have come under to Fraser; and it is only on the condition of relieving himself from that liability that he is entitled to retain the sum of £40. Then what has the interlocutor done with regard to costs, so far as these parties are concerned. I am looking to Dunnet only. Why, so far as these parties are concerned, it has said that Dunnet was entitled to retain this money, he being the stakeholder as between Fraser and Clyne, who was claiming as against Fraser, and he, Dunnet, being involved in litigation merely because he had in hand a fund which was, so far as regarded the surplus, payable to Fraser's creditors. The only subject of contest is with respect to this balance, which he is compelled to part with upon the performance of a certain condition. That condition never having been performed, he was never in a situation to part with it; and all that the interlocutor provides is, that he shall not be put to expense and to costs by proceedings not arising out of his own act, but arising out of the act of the pursuer, who is seeking [50] a remedy which incidentally involves him, Dunnet, as the stakeholder of the fund in question. My Lords, it appears to be quite a matter of course, and according to the justice of the case, and according to every principle by which courts regulate their proceedings as to costs, that the stakeholder should be indemnified against the expenses which the litigation had occasioned, and with which he had nothing to do

beyond securing himself from the liability arising out of obligations totally independent of the party claiming, namely, Mr. Clyne.

Then, My Lords, there are parties before us here, who have much less to do with it than Dunnet, namely, the parties from whom the monies were to proceed, which Dunnet by his assignation was entitled to. These were monies that Fraser in the first instance was entitled to; Fraser's right to receive those monies had by him been assigned to Dunnet. Why are Williamson's trustees to be involved in that question? the party to whom they were bound to pay had by his assignation directed them to pay to another, and to Dunnet they had a right to pay. I do not, therefore, see why it was necessary to keep those parties before the Court; but having been brought to your Lordships' bar as respondents, it appears that they have done only that which the person to whom they owed a duty, namely, Fraser, ordered them to do; they have paid to Dunnet that which Dunnet was entitled to receive by virtue of the assignation and obligation which on their part existed at the time when this claim was first made. They have done no more, therefore, than perform the duty which was incumbent upon them; they have paid the party as between themselves that which he was entitled to [51] receive; then the appellant brings them here without any thing to ask as against them, because he does not ask for the £40 against them, but for the £40 against Dunnet, so far sanctioning the receipt by Dunnet of that which Williamson's trustees have paid. On this ground, therefore, I also think it is quite clear that the Lord Ordinary, though that is not made the subject of any complaint, has done quite right in not making the parties pay the costs. The Lord Ordinary gave neither party their costs; he seems to have found (but it is not necessary to enter into that) there was some reason which should preclude these parties from having those costs. The complaint is, that they ought to have been made to pay costs, and I think that the pursuer has very good reason to be satisfied with that, so far as regards Williamson's trustees.

The other question, as to denying those costs, is not now under your Lordships' consideration; it is quite sufficient therefore to say that the interlocutor appears to be quite right, at all events in not ordering costs.

My Lords, this exhausts all the points to which it is necessary now to advert. If your Lordships agree with me in the views that I take, your Lordships will affirm the interlocutor with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant: And it is further ordered, [52] That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—SPOTTISWOODE and ROBERTSON, Solicitors.

# [53] APPEAL FROM COURT OF SESSION, SCOTLAND.

SIR CHARLES HALKETT, *Appellant*.\*—Sir William Follett—H. Robertson; the TRUSTEES of the late WILLIAM NISBET and Others, *Respondents*.—Attorney General (Campbell)—Solicitor General (Rutherford) [28th February 1839].

*Service—Entail—Teinds (Augmentation of Stipend)—Warrandice*.—A. being infeft in an entailed estate, and becoming afterwards entitled to another entailed estate, devolved the first to his brother under burden of debts, for which it was afterwards brought to sale by his brother's apparent heir. Neither

entail contained the statutory letters against alienation and contracting debt. Upon A.'s death, B. his son was served lawful and nearest heir of line, taillie, and provision to him, in special, in the estate last above mentioned, and was infeft therein accordingly: Held (affirming the judgment of the Court of Session) that B. was liable in an obligation of warrandice against future augmentations granted by an ancestor of A. in the first-mentioned estate.

*Practice.*—Additional printed cases having been lodged by permission of the Court, without objection, containing a ground of action not originally founded on; Per L. C. A Court of Appeal will not readily listen to an objection of this kind, not made in the Court below, if it appears from the whole case presented to said Court, that no injustice has been done.

In the year 1682 John Wedderburn, then of Gosford, sold to Sir John Nisbet of Dirleton the lands, lordship, [54] and barony of Innerwick, and others, with the parsonage and vicarage teinds of the same, being a part of the parsonage and vicarage teinds of the parish kirk and parish of Innerwick, which of old were part of the patrimony of the abbey of Paisley, and thereafter pertained to James Earl of Abercorn as part and pertinent of the lordship of Paisley, together with the advocacy, donation, and right of patronage of the said parish kirk and parish of Innerwick.

The deposition contains this clause: "And in regard the foresaid teinds are disposed by me for the same price that I got for the stock, therefore I bind and oblige me and my foresaids to warrant the foresaid teinds, parsonage, and vicarage of the lands and baronies above disposed from all future augmentations of ministers stipends or schoolmasters salaries, and from all annuities of teinds payable to his Majesty or his donators," etc. etc.

John Wedderburn (afterwards Sir John Wedderburn) was succeeded by his next brother Peter, afterwards Sir Peter Wedderburn, Bart., who married Dame Janet Halkett of Pitfirrane.

In September 1706 Sir Peter and Dame Janet Halkett executed mutual taillies of their respective estates of Gosford and Pitfirrane in the form of procuratories of resignation.

The entail of Lady Halkett's estate of Pitfirrane proceeded on the narrative, that it was granted "for certain onerous causes, good respects, and considerations me moving," etc.; and therefore Lady Halkett with consent of her husband, granted procuratory for resigning her estate of Pitfirrane for new infeftment to be granted to herself and husband, and [55] longest liver of them, in life-rent, and to Peter Wedderburn their eldest son in fee, and to the heirs male of his body; which failing, to the daughters or heirs female of his body successive without division; which failing, to their second and the other substitutes therein specified, under provisions and conditions,—first, of assuming and bearing the surname, title, and arms of Halkett of Pitfirrane; secondly, that the estates of Pitfirrane and Gosford should be kept separate and disjoined, or if they should coincide in one heir, provision was made for their separation in the succeeding heirs; and, thirdly, a prohibition to alter or infringe the taillie, and an irritancy in case of contravention.

By the other entail, executed in 1706, Sir Peter Wedderburn, then called Sir Peter Halkett, granted procuratory for resigning his estate of Gosford in favour of himself in life-rent, and Charles Wedderburn his second son in fee, and the heirs male of his body; whom failing, to the daughters or heirs female of his body without division; whom failing, to James Wedderburn his third lawful son, and the other substitutes therein specified. The clauses in this taillie are the same as in the taillie of Pitfirrane, *mutatis mutandis*.

There was a provision in the taillie of Gosford for the separation of the two estates in the following terms:—In case failing of the said Peter Wedderburn and the heirs of his body, the said estates shall happen to coincide and be united in the person of the said Charles Wedderburn, then and in that case it shall be in the option and election of the said Charles either to keep, hold, or retain his right and possession of the said estates of Gosford, in which case he shall be holden and obliged to denude himself, *omni habili* [56] *modo*, of the said estate of Pitfirrane," etc. in favour of the said "James Wedderburn and the other heirs of taillie and provision

substitute to him, with and under the haill conditions and provisions contained in the foresaid taillie thereof; or otherwise it shall be leisom to the said Charles to enter to the right and possession of the said estate of Pitfirrane and others contained in the foresaid taillie thereof, in which case he shall be holden and obliged to denude himself of the said estate of Gosford and others above written contained in the present taillie, haill rents, etc., from the time of the succession foresaid, *omni habili modo*, in favour of the said James Wedderburn," etc. etc.

And providing that the "said Charles shall make his election of the said estate of Pitfirrane within the space above appointed, then and in that case it shall not be leisom nor lawful to him to burden and affect the said estate of Gosford, or his succession therein, with any debts or deeds to be contracted or done by him the said Charles after the right of succession to the said estate of Pitfirrane happens to devolve, viz., after the decease of the said Peter Wedderburn, the said James being always bound and obliged to free the said Charles and to disburden the estate of Pitfirrane of any debts or deeds contracted or done by the said Charles during his remaining in the right of the estate of Gosford before the right of succession to the estate of Pitfirrane be devolved on him as said is," etc.

The statutory fetters against alienation and contracting debt were not inserted in either of these entails.

In 1725 Sir Peter executed a disposition in favour [57] of Charles, proceeding on the narrative that he had thought fit, for the better preservation of their name and family, to settle Gosford on Charles, and the heirs of his body, in manner mentioned in the bond of taillie, and that he had disposed to Peter, his eldest son, his furniture, etc. at Pitfirrane, with the rents of Pitfirrane due at his death, and various other sums, for the payment of certain debts specified in the disposition; and that it was just and reasonable that he should also secure Charles in the goods, etc. after assigned "for the better enabling him to pay my debts, wherewith I have burdened him in manner after specified;" he therefore assigns to Charles and his heirs several bonds and sums, among which there was a wadset for 62,000 merks over Dirleton, besides all debts and sums of money "which pertained to Sir P. Wedderburn, my father, or John Wedderburn, my brother; it being specially provided and declared, that the said Charles Wedderburn and his foresaids, by their acceptation hereof, are and shall be burdened with, and bound and obliged to pay, my haill just and lawful debts that shall happen to be resting at the time of my decease, excepting allenarly in so far as the said Peter Halkett, my eldest son, stands bound to pay by a bond of relief granted by him to me."

Dame Janet Halkett was succeeded in 1713 by her eldest son Peter, afterwards Sir Peter, who married Lady Emilia Stuart, daughter of the Earl of Moray. A charter and infeftment were expedite upon the procuratory in the entail of Pitfirrane, in favour of the said Sir Peter Wedderburn; and thereafter Sir Peter and Lady Emilia executed a post-nuptial contract of marriage, whereby he granted procuratory for surren-[58]-dering the estate of Pitfirrane "to himself and his heirs male already procreated or to be procreated betwixt him and the said Lady Emilia Stuart and the heirs whatsoever of their bodies; whom failing, to the heirs male of the said Peter Halkett, etc.; whom failing, to the other heirs of taillie appointed to succeed by the above taillie of Pitfirrane, 1706."

Of this marriage there were three sons; viz., first Peter, second Francis, third James. Peter the eldest son being fatuous, his father, Sir Peter, executed in 1751 a new entail of his estate upon Francis his second son, and the same series of heirs, and under the same conditions as in the taillie of 1706.

Sir Peter the father was killed in America in the year 1755; and upon his death his second son then Major Francis Halkett expedite a charter and sasine of the estate of Pitfirrane in his favour, in virtue of the procuratory contained in the entail of 1751, and continued to possess the estate till his death in 1760 without issue. His youngest brother James died two years before him, in 1758, also without issue. Thus all the family of Sir Peter Halkett and Lady Emilia Stuart became extinct, except the eldest son, Sir Peter, who was fatuous.

Charles the second son of Sir Peter Wedderburn and Dame Janet Halkett his wife, succeeded to Gosford, and had two sons, John the father of the appellant, and Henry father of Lady Cumming.

Charles Wedderburn died in 1754, without having made up titles. A charter was then expedite upon the procuratory in the entail of Gosford in favour of the appellant's father John Wedderburn, afterwards Sir John Halkett, on which charter he was infeft in Gosford in [59] 1754. In the following year he sold part of the estate for £8854, and he retained possession of the remainder till the death of his cousin Major Francis Halkett of Pitfirrane in 1760. He then claimed Pitfirrane as heir under the second entail, but his succession was suspended by a decree of reduction of that entail at the instance of Sir Peter Halkett, who was cognosed, and his tutor at law.

The decree of reduction having been reversed upon appeal, and Sir Peter having died about the same period, John Wedderburn made up titles to Pitfirrane, and executed a deed of devolution of Gosford in favour of Henry, and he also conveyed to him the above mentioned wadset over Dirleton for 62,000 merks, but subject to a reserved security over said estate of Gosford, and wadset for relief of the debts attachable thereto.

Henry Wedderburn died in 1777, when the estate of Gosford was brought to judicial sale by his apparent heir Lady Cumming. John Wedderburn, then Sir John Halkett, ranked upon the estate for the debts above mentioned, and he also obtained a reconveyance of the wadset. The balance of the price of Gosford, after satisfying these debts, with interest, was carried off by a creditor of Henry.

In 1793 Sir John died, having executed a conveyance to trustees for payment of debts of his whole estate and effects, with the exception of Pitfirrane and furniture, etc., pertaining thereto; and in the following year the appellant expedite a special service, and was retoured as "*Legitimus et propinquior hæres lineæ, talliæ, et provisionis speciali dicto demortuo Domino Joanni Halkett de Pitfirrane, baronetto, patri suo, in totis et [60] integris dictis terris et baronia de Pitfirrane,*" etc., and soon afterwards he was infeft in said estate on a precept from chancery proceeding on the said retour, and his infeftment duly recorded.

The lands of Innerwick continued in the Nisbet family without any augmentation of the stipend until the year 1790, in which year, and subsequently in 1807 and in 1813, augmentations were granted, and a portion of each was finally localised upon the lands of Innerwick in 1825. The excess of stipend having been paid by Mr. Nisbet during his life, and after his death by his daughter and heiress the respondent Mrs. Ferguson, her trustees, along with himself and husband, in 1832, raised an action of relief against the appellant under the warrandice contained in the disposition of 1682. The Lord Ordinary having made avizandum to the Lords of the Second Division, their Lordships, after allowing additional Cases, (in which there was urged for the first time without objection the reconveyance of the wadset in connexion with the deed of 1751 as a further ground of representation,) pronounced the following judgment on the 20th February 1835:—"Decern in terms of the libel as to the pursuer's (the respondent's) right of relief, and remit to the Lord Ordinary to ascertain the amount of the sums due, and to proceed as his Lordship shall deem just, and decern; but find no expenses hitherto incurred due to either party."

The appellant appealed.

*Appellant.*—The defence chiefly relied upon by the appellant is, that he does not represent the granter of the [61] disposition in 1682, so as to be liable in the obligation contained in it (*Horne v. Sinclair*, 23d Jan. 1835, 13 S., D., and B., 296). The appellant in no shape represents John Wedderburn, the granter of the obligation in 1682: he has inherited none of his property; he has made up no title as his heir; and therefore it is impossible on this ground to maintain the present claim against the appellant.

The facts are not disputed; and it is not alleged that the appellant, either at the present period or at any time, inherited or enjoyed any part of the property belonging to the Wedderburns of Gosford.

An important distinction exists between the present case and every other which has hitherto occurred in Scotland relative to relief from augmentations. There have been several such cases, in which severe and unexpected claims have been sustained under ancient obligations; as, for example, in the case of the trustees of the Earl of Aberdeen against the Trustees of Lord Belhaven (*Shaw's Rep.*, 22d Nov. 1821), where a claim of relief was sustained in 1821 on an obligation of warrandice dated ninety

years before ; and in the case of Justice against Callender (Shaw's Rep., 1st Dec. 1826), where effect was given to a similar claim at the distance of eighty years. But in these and all the other cases of the same kind which have occurred, there was property of the original obligants extant, which fell justly to be subjected for his debts and obligations, if these were onerous and effectual in law.

The present is entirely a different case ; the appellant neither is nor ever was in possession of any property of [62] the original obligant ; on the contrary, the whole of his property was carried off by legal attachments of the creditors of the heir last in possession of Gosford, upwards of fifty-two years prior to the institution of the present suit.

It has been urged by the respondents that, whatever may be the succession or inheritance of the appellant, at least his father Sir John Halkett intromitted with property and funds of the Wedderburns to a large amount ; and it was further assumed that the appellant represents his father universally, and so is liable to the same claims that his father would have been.

But the appellant denies expressly that he represents his father universally, and no sufficient evidence has been produced or referred to in order to fix such representation on the appellant ; nor have the respondents attempted to shew that the appellant on his father's death took up any property from him (Sir John), other than the lands and estate of Pitfirrane, which was destined to and tailzied upon the heir male of the family, under the deeds of tailzie and provision before specified. On the contrary, the appellant stated on the record that his father Sir John Halkett, prior to his death, "conveyed all his property, heritable and moveable, to trustees, excepting always 'the entailed estate of Pitfirrane, thereby expressly reserved from the trust' for payment of the various debts, annuities, and provisions which he became bound to pay. He also excepted the household furniture, bed and table linen, books and plate, and farm stocking of Pitfirrane, which he conveyed to the defender ; but this was under burden of his paying such balance of [63] his debts and annuities as the trust funds and estate might be insufficient to answer ; and that balance far more than absorbed the moveables assigned to the defender."

The respondents' plea is of a technical and very rigid nature ; viz., that he was served and retoured "ut legitimus et propinquior hæres lineæ, talliæ, et provisionis in speciali, dicto demortuo Domino Joanni Halkett de Pitfirrane, baronetto, patri suo, in totis et integris dictis terris et baronia de Pitfirrane," etc. It has been argued, that the terms of the retour fix indelibly on the appellant the character of universal heir and representative of his father Sir John Halkett. But if the whole scope of the instrument be carefully taken into view in connexion with the subject matter to which it refers, it will be seen that the appellant was not served as a universal representative, his service was a special service in the lands of Pitfirrane only, connecting him with the tailzie executed by his great grandmother Dame Janet Halkett, and with no other right ; it never was intended to have, and in point of fact has not, any other effect than simply to vest a title in the appellant as heir of tailzie and provision in the estate of his great grandmother Dame Janet Halkett.

The question then is this, Whether a special service as heir of line, tailzie, and provision to an ancestor in certain lands descending to heirs of tailzie where the ancestor left no property descendible to heirs of line, and where, even if he had left such property, the heir would have been bound to have made it over to trustees of the ancestor, subjected the heir so served universally to the ancestor's debts ? The appellant conceives that [64] such severe responsibility is opposed to every principle and authority in the law of Scotland (Maitland of Pitrichie, 1757, Mor. 11166 ; *Blount v. Nicholson*, 26th Feb. 1783, Fac. Col. 9. 159. No. 100., Mor. 9731 ; *Lord Fife v. General Duff*, March 1828, 6 S. and D. 698).

*Respondents.*—John Wedderburn, the granter of this warrandice, was succeeded by his younger brother Sir Peter Wedderburn, who in the year 1688 made up titles to him by service as his heir of line, thus unquestionably representing him in all his debts and obligations.

As heir of provision in Gosford, Charles would assuredly have been liable, supposing the warrandice to have been brought into operation during his possession, at least to the value of that estate ; and, as grantee under a general disposition with the express burden of debts, his liability must have been held to extend to all the obliga-

tions of his father ; for, whatever may be the case of an ordinary simple disposition, *omnium bonorum*, the insertion of a clause burdening generally with all debts must, if it be allowed any force at all, be effectual to create an universal liability. It is, in fact, a contract between the parties, whereby the receiver of the right, in consideration of the benefits which he obtains, engages to become responsible for all the grantor's debts, without limitation or restriction of any kind. It is in this manner and in this sense that the respondents maintain that Charles Wedderburn was his father's general representative, and liable for his debts and obligations.

If the liability was once clearly in Charles, by what [65]—ever title or on whatever grounds established, it is obvious that in order to transmit it against the appellant, no more can be required than to shew that he stands related, by service as heir of line, taillie, and provision, to a party who was Charles's universal representative.

Now the intermediate person who formed this link of connexion was Sir John Halkett the father of the appellant, and who was Charles's eldest son, and made up titles by a general service to him as heir of line, taillie, and provision, thereby at once establishing in his person a right to the unexecuted procuratory in the settlement of 1706, upon which he obtained a charter and was infeft, and at the same time fixing upon himself the character of his father's universal representative. In this way he not only became liable, as Charles's heir of line, for all the debts which he had contracted, but, by taking directly as heir of provision of his grandfather Sir Peter under the investiture of Gosford, he incurred a clear representation of that party also, and a consequent liability for all his debts and obligations ; and thus, when he succeeded to Pitfirrane he united in himself every ground of representation, whether derived through the line of the eldest or of the second son of Sir Peter and Lady Halkett. He died in the year 1793, and was succeeded by his son Sir Charles, the present appellant, who made up titles to him by special service as nearest and lawful heir of line, taillie, and provision ; and the only question that remains in this case is, whether Sir Charles thereby represents his father to the effect of being liable in this obligation. He took Pitfirrane as his father's heir of taillie and provision, a character in [66] which it seems impossible to deny that he represents him, and is answerable for all his debts and obligations, from whatever source derived, at least to the value of the succession. There is no proposition more absolutely fixed in the law of Scotland, than that an heir of provision under any settlement short of a strict entail, is liable to that extent. But it is not contended that the settlement under which Pitfirrane has descended to the defender is at all of the nature of a strict entail ; it is, in reality, a simple destination, not containing any of the usual prohibitions against selling and contracting debt ; and this is most material in a question of representation. Sir John Halkett's creditors might have carried off the estate by diligence, or he might have charged it with his debts, or sold the whole of it, without risk of challenge from any of the substitutes ; and shall it be said that, because, instead of allowing it to be affected in any of these ways, he has chosen to transmit it entire to his son, it is no longer to be liable in that son's person for any of the father's debts or obligations ? The debts of the ancestor, so long as they remain undischarged, must be burdens upon his successors and the estate which they inherit ; and it matters not in what way these debts may have originated,—whether in the act and deed of the last predecessor himself, or of some remote party, a stranger, possibly, in blood to him, but with whom he is connected by a progress of titles through intermediate heirs ; and the only point to be looked to in a question with a creditor is, whether it was truly an obligation on the predecessor or no. If that point be fixed, the liability which attached to him is transferred to his heir, and the estate, if not protected by the sanctions [67] of a strict entail, must be answerable for the debt to the last farthing of its value. Upon these facts, and under these circumstances, the respondents contend, that, as heir of line and intromitter with the moveable estate, Sir Charles represents his father universally ; and even as heir of provision in the estate of Pitfirrane he is liable to the full value of the succession (*Stair*, b. i. tit. 7 sec. 13 ; *Gordon v. Maitland of Pitrichie*, 1st Dec. 1757, *Fac. Col.* 2. 101. No. 63, *Mor.* 11161 ; *Blount v. Nicolson*, 26th Feb. 1783, *Fac. Col.* 9. 159. No. 100., *Mor.* 9731).

Lord Chancellor.—My Lords, the only point in this case which requires particular observation is, whether the appellant Sir Charles Halkett is liable to the obligation



of warrandice entered into by Sir John Wedderburn in 1688; for of the respondent's title under it there does not appear to be any doubt, notwithstanding the defences which were set up against their claim.

Sir Peter Wedderburn, the brother of Sir John, was served heir to him as heir of line; he therefore, by the law of Scotland, was clearly liable to all the obligations of Sir John, and amongst others to the warrandice in question without regard to the value of the property he inherited. Sir Peter settled the estate of Gosford upon his second son Charles; another estate, Pitfirrane, the property of his wife, being settled upon his eldest son. He also settled other property, including a wadset right to 62,000 merks Scots, which had remained unpaid of the purchase money upon the sale of the estate as to which the warrandice had been given, upon his son Charles, upon condition of Charles taking upon himself the payment of all his debts. Charles, upon Sir Peter's [68] death, entered into possession of and enjoyed the Gosford estate and the other property, including the wadset, till his death, but did not make up titles to the estate. Upon his death in 1754 his son John made up his title by a general service to him as nearest heir male of line, of taillie, and provision, and succeeded to the estate of Gosford and the other property settled, whereby he became heir of provision to his grandfather the entailer, and universal representative of his father Charles. He afterwards sold part of the estate to Lord Elibank for £8855.

At a subsequent period, namely in 1770, Sir John was infeft in the lands of Pitfirrane, which had been enjoyed by the sons of the eldest son of Sir Peter Wedderburn. Both estates being thus united in Sir John Wedderburn, he surrendered Gosford to his younger brother Henry, and assigned to him the wadset for 62,000 merks. He took upon himself all the obligations to which Sir John was subject, as had been provided for in the original settlement of Gosford. Upon the subsequent bankruptcy of Henry £17,205 was claimed and allowed to Sir John on that account, and the wadset was again assigned to him in part satisfaction of that sum.

This state of circumstances seems to leave no doubt of the liability of Sir John the defender's father to the obligation in question. Upon his death the defender was served heir of line, taillie, and provision to his father, and succeeded to Pitfirrane and the other property, which imposed upon him the liability to all the obligations to which his father had been subject, and amongst them to the charge in question, although the event which has occasioned the demand had not then [69] occurred. The estate of Pitfirrane, to which the defender succeeded, though subject to a destination, was not secured against a sale or the contracting of debts by the party entitled.

It was contended that the judges below were not justified in founding their judgment upon these circumstances, inasmuch as it was not properly put in issue that Charles the son of Sir Peter had taken upon himself his father's debts, or that Sir John, upon the sale of Gosford, received part of the proceeds, and that the deed of the 27th of October 1725 was not in issue. This objection, it was said, was not relied upon below; and it appears, in the case laid before this House on the part of the appellant, that, upon the production of the documents relied upon to prove these facts, permission was given to both parties to add to these cases, and the appellants accordingly prepared an additional case with reference to those documents, in which the objection to their admissibility upon the ground of their not being in issue does not appear. A Court of Appeal will not readily listen to an objection of this kind which was not made in the Court below, and in a case in which it appears that no injustice has been done, both parties having had and having availed themselves of the opportunity of discussing the facts alleged not to be regularly in issue.

It is true the ground upon which the defendant's liability is now contended for differs materially from the grounds insisted upon by the pleas in law, inasmuch as the documents produced in the progress of the cause, and which form the substance of the additional cases, shew that Charles the son of Sir Peter, when he took the [70] Gosford estate, took also the wadset and other property, and by the acceptation thereof he and his heirs and assigns whatsoever became burdened with and bound and obliged to pay all the debts whatsoever of Sir Peter which might happen to be existing at the time of his decease; for such are the words of the disposition and assignation of 27th October 1725. The debts and obligations of Sir Peter, of which the warrandice in question is one, became the debts and obligations of Charles, and Sir John the son of Charles was his heir, and made up his titles as heir of line and provision to him, and

the defender was son and heir to his father, and made up his title as heir of line to him. So that if the obligations in question became the debt of Charles, the liability of John his son and heir, and the defender his son and heir so claiming *titulo universalis*, seems sufficiently clear.

It is however to be observed that these additional facts are no more than additional evidence to prove the representation upon which the pursuer founded his original claim, and that if they are to be considered as raising a new ground of claim, they were by leave of the Court made the subject of additional cases on each side; and although the fact of their not being in issue is stated in the additional case of the appellants, no objection appears to have been raised or relied upon below upon that ground, but each party having exhausted their observations and arguments upon those additional documents, the judgment of the Court was taken upon the whole case. Under these circumstances I cannot suppose that your Lordships will think it right to give any weight to this objection; but, if [71] satisfied of the liability of the defender upon the whole of the case, that your Lordships will think it right to affirm the interlocutor appealed against, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutor, so far as therein complained of, be and the same is hereby affirmed, with costs.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.

## [72] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

JAMES FARQUHAR GORDON and Others, Trustees and Executors of the deceased DAVID CLYNE, *Appellants*.—Tinney—James Russell; DAVID CLYNE (poor), *Respondent*,\*—A. Haldane [18th March 1839].

[Mews' Dig. i. 350, 431; xi. 115. S.C. 6 C. and F. 539. As to pauper appeals to the House of Lords, see Annual Practice, 1901, Vol. II. 660; as to non-appearance of parties, see *Sherburne v. Middleton*, 1842, 9 Cl. and F. 72; and as to costs, St. O.H.L. 10 and *Manchester, etc., Ry. Co. v. Doncaster* (1897), 1 Q.B. 117.]

*Death-bed*.—A party, in the event of his predecease, made a conveyance to his parents and the survivor, whom failing, to any persons whom he might name, whom failing, any person they might name. His parents predeceased him, leaving a trust conveyance of their whole property in favour of trustees named. He thereafter executed a deed on death-bed, conveying his whole estate to trustees named, declaring the purposes, and revoking all former settlements so far as they interfered therewith.—Held (affirming the judgment of the Court of Session) that the first deed, neither singly, nor taken in connection with the second deed, was effectual to disinherit the heir, and that the death-bed deed could not be coupled with the first, or with the first and second deeds, so as to exclude a challenge of it by the heir.

*Practice*.—In a reduction the defender pleaded certain pleas, which he designated preliminary. A record was ordered to be made up on these pleas, upon which the defender reclaimed, when the Court (on the ground that the defences pleaded as preliminary were the only defences pleadable *in causa* upon which it might be necessary to make up a record) adhered. The record was then prepared, and the defender repeated his former pleas, but without again designating them as preliminary. The Lord Ordinary "repelled the dilatory defences," [73] reserving a question arising out of these pleas to be discussed with the defences on the merits, and found expenses due. On reclaiming, the Court adhered. Held, that an appeal against the judgment was competent without leave of the Court.

*Execution Pending Appeal*.—Incompetent to appeal against a warrant of the

\* 15 D., B., and M., 911.

Court of Session for interim execution and payment of costs, so as to stay execution of such order as has been thereon made.

*Pauper—Costs.*—No objection to a warrant for interim execution that a printed copy of the petition has not been laid before each of the Judges, nor is it an objection to such warrant for payment of costs, that the party obtaining the warrant has sued *in forma pauperis*, and that his own agent alone signed the bond of caution.

*Pauper.*—A respondent suing *in forma pauperis*, allowed to be heard on presenting his printed cases at the bar, but costs refused him on that account, although there were otherwise sufficient grounds for awarding them in his favour.

On the 22d of August 1815 the late Mr. David Clyne, S.S.C., executed a disposition whereby, in the event of his predeceasing his parents without leaving lawful heirs of his body, he gave, etc. etc., to and in favour of William Clyne his father and Margaret Swanson his mother, "during their mutual lives, and the longest liver of them two; and after the death of the longest liver, to and in favour of any person or persons, or for such uses, ends, and purposes, as I (Mr. Clyne) may name and appoint by any deed I may execute at any time of my life, and even on death-bed; and in case of my dying without having executed such deed, then to and in favour of such person or persons as shall be named and appointed in any deed that shall be executed (according to law or agreement [74] between themselves in such deed) by my said parents, and for the same uses, ends, and purposes, with the same powers, and under the same provisions and declarations; which deed of theirs, when so executed, I do hereby declare shall form a part hereof, and that this my deed shall be as effectual for conveying my whole means and estate, and regulating the succession to the same, in the same way and manner as shall be appointed by the said deed of my parents as if their said deed were already executed and herein copied verbatim, any law or practice to the contrary notwithstanding." The deed then proceeds to convey his whole estate, heritable and moveable, real and personal, wherever situated, and of whatever description, which then belonged, or which might belong to him at the time of his death; and he farther appointed them (his parents) and the foresaid persons to be named by himself, and failing such nomination, the persons to be named by his parents in their deed, his sole executors and intromitters; and containing other usual clauses, with a reservation of full power, at any time of his life, to revoke, alter, or innovate, in whole or in part, as he might think fit, and in so far as not altered or revoked should be valid and effectual, and dispensing with the delivery.

On the 13th September 1815 Mr. Clyne's father and mother executed a mutual trust disposition and settlement, by which, on the narrative of the love and affection which they had to each other, and to David Clyne, S.S.C., their only surviving child, and for other causes and considerations, they with consent severally give, grant, assign, dispoise, convey, and make over to and in favour of each other during their lifetime, and to the [75] longest liver, and after the death of the longest liver to and in favour of the said David Clyne, and the heirs of his body, and his assignees, whom failing, in favour of certain other persons as trustees, for the uses, ends, and purposes therein mentioned, their whole estate, heritable and moveable, and all their other property and effects, and, *inter alia*, for the purpose of converting their effects into cash, and after deducting debts and expenses, with instructions to divide the produce into ten parts, whereof one tenth part was declared to be payable to the children of the deceased Alexander Clyne, late tenant in Sordale, of which family the respondent is the eldest son.

The deed contained the following reservations:—"Reserving to us and the survivor of us, at any time of our life, to appoint, as we may see fit and necessary, other persons as trustees for the purposes aforesaid, either in addition to or in room and place of the trustees before named, which trustees so to be named shall have the same powers as the trustees hereinbefore named, etc.; and farther reserving full power and liberty to them and to the survivor, but only with the express advice and consent of the said David Clyne, and not otherwise, at any time of our lives, and even on death-bed, to alter, innovate, or revoke the same in whole or in part, and declaring

that any alterations we may make, if done by a regular writing subjoined hereto, or by a paper apart, shall be as valid and effectual as if they were engrossed in this deed, under which declarations these presents are granted, and not otherwise." Then follows the usual clause declaring the deed valid, in so far as not altered, and dispensing with delivery.

[76] To this deed a codicil was subjoined, bearing to be subscribed by Mr. Clyne's parents and himself, who also wrote it, dated the 30th October 1826, whereby the said "William Clyne and Margaret Swanson, with mutual advice and consent, and with the express advice and consent of our son David Clyne," nominated and appointed three trustees in room of two who had died, and one whose appointment was thereby recalled; and they also, with advice and consent before mentioned, revoked and altered the bequest of one tenth share of their estate, and appointed it to be distributed in proportion to the remaining shares.

On the 1st November 1833, Mr. Clyne executed a trust deed of settlement, which proceeded on the following narrative; viz.—"Considering that circumstances have occurred to render necessary various alterations in the settlement of my means and estate since the deed of 22d August 1815 years was executed by me, and also since the death of my mother on the 15th day of January 1828, and the death of my father on the 30th day of December 1829 years; I do therefore hereby, and for other good causes and considerations me hereunto moving, give, grant, assign, dispoise, convey, and make over to and in favour of the appellants, and to the survivor or survivors of such of them as should accept, the major part alive and accepting being a quorum, and to such other person or persons as they or I myself may afterwards appoint as trustees," his whole means and estate, and particularly a house in Albany Street, therein specially described, for the uses, ends, and purposes therein mentioned, and, *inter alia*, for payment of an annuity of £10 sterling to the appellant.

[77] The deed concluded with the following clause:—"And I do hereby revoke and recall the foresaid settlement executed by myself on 22d August 1815, and another settlement executed by me in voluntary concurrence with my parents upon the 30th day of October 1826 years, and all other deeds and settlements, if any, in so far only as they interfere with the present deed," reserving power of alteration, but declaring always that the same, in so far as not altered, should be valid and effectual.

The deed contained also the following clause:—"But if any of the smaller annuitants or legatees should alter or attempt to alter this deed, in whole or in part, by action or otherwise, in any Court whatever, it is hereby expressly provided and declared that such party or parties so attempting to alter or repudiate shall *ipso facto*, amit, lose, and tyne all right and interest whatever hereby conferred upon them, and the residue shall go in manner already pointed out by me in the present deed."

Mr. Clyne died on the same day on which the above deed of settlement was executed, and in April 1835, the respondent, who is the cousin and heir of conquest of David Clyne, having been admitted to the benefit of the poor's roll, brought an action of reduction of this deed of settlement on the head of death-bed, in so far as the heritable property was concerned, against the appellant and the other trustees and executors of Mr. D. Clyne.

In defence the appellants set forth three pleas, all of which they designated as preliminary: 1. Want of title, in respect the respondent was concluded by the deeds of 1815. 2. Want of interest, in respect the value of [78] the heritage was less than what he took under the deed attempted to be reduced. 3. That the said deed was executed in virtue of reserved powers in the deed of 1815, and so not liable to challenge. The Lord Ordinary having ordered condescendence and answers, the appellants reclaimed to the Second Division of the Court, when their Lordships (20th November 1835) pronounced this interlocutor:—"The Lords, etc., in respect it is admitted by the defenders that the deed under reduction was executed on death-bed, and that it appears the defences now pleaded as preliminary are the only defences pleadable *in causa* upon which it might be necessary to make up a record, adhere to the interlocutor complained of, refuse the desire of the note, and remit to the Lord Ordinary to proceed accordingly."

Condescendence and answers were then given in, and the appellants repeated

the three preceding pleas in law, with the addition of a fourth, simply to the effect that the pleas of the respondent being groundless, the action should be dismissed, but he did not designate any of these pleas as preliminary. The record being closed, and printed cases afterwards lodged, the Lord Ordinary, on the 24th December 1836, pronounced the following interlocutor:—"Repels the dilatory defences, and decerns, but without prejudice as to any question which may arise respecting the amount of the heritage claimed by the pursuer, which is hereby reserved to be discussed with the defences on the merits or otherwise hereafter: Finds the defenders liable in expenses; appoints an account thereof to be given in, and, when lodged, remits the same to the auditor, to tax and report.

[79] "Note.—It is stated by the defenders that there is no heritage, except a house in Albany Street, Edinburgh, and that this is not so valuable as the annuity of £10 which the death-bed deed gives the pursuer, though he be about fifty years old. The Lord Ordinary wished this matter of fact to be fixed before deciding any thing else, but both parties were averse to this, and therefore, as its determination is not necessary for the disposal of the dilatory defences, it, or any such matter, has been reserved."

The appellants presented a reclaiming note to the Second Division of the Court, but their Lordships on the 12th May 1837 pronounced the following interlocutor:—"Adhere to the interlocutor of the Lord Ordinary submitted to review; refuse the desire of the reclaiming note, and decern: Find additional expenses due; allow an account thereof to be given in, and remit the same, when lodged, to the auditor, to tax and report." The report of the auditor having been brought before the Court, their Lordships, having heard objections by the appellants, on the 31st May 1837, "approve of the account, and decern for payment to the pursuer of £191 0s. 8d. of taxed expenses, with three guineas as the expense of discussing the objections and the expense of extract, and allow the decree to go out and be extracted *ad interim*."

The respondent afterwards applied to the Court of Session for interim execution under the stat. 48 Geo. 3. c. 151, and their Lordships, on the 7th July 1837, granted warrant for immediate execution, so as to enforce payment to the petitioner of £191 0s. 8d. of his taxed expenses of process, he finding caution for the repetition of the same, with interest thereon, in [80] case of a reversal of the judgment of this Court by the House of Lords, and decern."

Caution having been presented and approved, the decree extracted, and letters of horning raised thereon, a charge to pay was given to the appellants, who thereupon presented a bill of suspension, on considering which the Lord Ordinary on the bills (Lord Fullerton) pronounced the following interlocutor, on the 15th September 1837:—"Refuses the bill: Finds the suspenders liable in expenses; allows an account to be given in, and remits the same, when given in, to the auditor, to tax and report.

"Note.—The words of the statute are conclusive against the suspenders. The judgment in the case of Lady Haddington, 20th November 1811 (Fac. Coll.), is exactly in point. The Court were not called upon to find any thing as to the absolute incompetency of the appeal, though that opinion is ascribed to them in the report; but the judgment, allowing the extract to be issued, clearly and necessarily implied their opinion on the point, which certainly was within their cognizance, and warranted by the terms of the statute, viz., that it was not competent by appeal to stay the execution of their former order. Considering the terms of the judgment and order for interim execution here, and the admission of the bond of caution by the proper officer, the other reasons of suspension are obviously inadmissible."

The defenders presented a second bill of suspension to the succeeding Lord Ordinary (Lord Meadowbank), when his Lordship pronounced the following interlocutor:—"29th September 1837.—The Lord Ordinary having considered this bill, with the former bill and answers, and writs produced, refuses the bill."

Against these interlocutors the defenders presented a reclaiming note to the Second Division of the Court, upon advising which their Lordships, on the 5th December 1837, pronounced the following interlocutor:—"The Lords having considered this reclaiming note, with the minute and answers and other proceedings, refuse the desire of the note; adhere to the interlocutor reclaimed against; find

additional expenses due; remit to the Lord Ordinary on the bills to proceed accordingly."

The appellant brought three separate appeals against the proceedings above detailed, which came on to be heard at the same time. The first against the judgment adhering to the Lord Ordinary's interlocutor, which repelled the dilatory defences as above mentioned and the previous interlocutory judgments in reference thereto, and embracing also certain judgments pronounced as to the respondent's admission to the poor roll; the second against the judgment awarding interim execution; the third against the judgment adhering to the Lord Ordinary's judgment refusing the second bill of suspension.

*Appellants.*—The settlement by Mr. Clyne in 1815 constituted a complete and absolute *mortis causa* disposition of his whole means and estate; the terms used reach a great deal farther than a mere disposition to his parents in the event of his predeceasing them. The condition annexed to the deed relates exclusively to the disposition to the parents; his predeceasing his parents was the only contingency upon which it was [82] possible they could succeed to his means and estate. The deeds of Mr. Clyne and his parents must be taken together, and when so taken they evidently provide as well for the survivance as the predecease of Mr. Clyne.

The deed by Mr. Clyne constituted an effectual feudal conveyance, and might have been rendered effectual by an express nomination under it. Mr. Clyne's parents were the parties first named, on whose failure the destination to parties unnamed was to take effect. An entail to A. B., whom failing to a series of heirs to be named, is a good entail, though A. B. should never take. Mr. Clyne expressly reserved power, in his deed of 1815, of naming the party who was to take after his parents, and that on death-bed. A deed not effectual as a conveyance may be sustained as a nomination, for the greater includes the less. Either the destination by Mr. Clyne to trustees to be nominated by himself was effectuated by the deed attempted to be reduced, or the nomination by his parents was equivalent to a nomination by himself. Mr. Clyne indicated his intention to exclude the respondent in a deed not challengeable as on death-bed, and having done so the respondent cannot object to his merely effectuating that previously declared intention. There is no essential distinction between a conveyance to trustees for purposes to be declared and a conveyance to parties to be named, because in the one case as much as in the other it requires the execution of another deed to exclude the heir. The heir will take in both cases, except for the execution of a subsequent deed.

The deed attempted to be reduced cannot operate as a revocation of the former deed. The revocation is not absolute. There is no evidence of intention to [83] revoke irrespective of the death-bed deed. These deeds are not inconsistent with each other; the trustees are different, but the objects of trust are nearly identical (*Colquhoun v. Colquhoun*, 8th July 1831; *Brack v. Hogg*, 23d Nov. 1827, 6 S. and D. 113; *Coutts v. Crawford*, (12th June 1795,) as reversed, 2 Bligh, 655; *Mure v. Rae Mure*, 15 D., B., and M., 581; *Rowand v. Walker*, 15 D., B., and M. 563; *Kerr v. Vaughan*, 24th Feb. 1829, 9 S. and D. 454; *Fordyce v. Cockburn*, 5th July 1827, 5 S. and D. 897; *Willock v. Auchterlony*, 14th Dec. 1769, Mor. 5539; *Pennicuick*, 18th Jan. 1687, Mor. 3243; *Cuninghame*, 10th June 1748, Elch. Death-bed, No. 19, affirmed; *Anderson v. Fleming*, 17th May 1833, 11 S. and D. 612).

(Second appeal.) The application for interim executions was irregularly made: 1. Because no copy of the petition of appeal was presented to the judges at the time the warrant was granted in terms of 48 Geo. 3, c. 151, s. 17. 2. Because the dues of Court were not paid. The respondent's privilege as a pauper ceased on his obtaining decree. 3. Because the powers given to the Court pending appeal are limited to the case where money has actually been expended in costs by or for behoof of the party, 48 Geo. 3, c. 151, s. 17. 4. The agent, being the party to receive the costs, is himself the cautioner for their repayment (*Beveridge's Forms of Process*, vol. ii. p. 640; *Juridical Styles*, 2d ed., vol. iii. t. 5, sec. 4, p. 881-2).

(Third appeal.) An order of service of an appeal by the House of Lords, and service following thereon, necessarily stops all procedure on the decree of the inferior Court until the appeal be decided. It has never been disputed that from the time at which the Court of last resort entertains and resolves to decide on an appeal, the

case is altogether removed out of the jurisdiction of the Court below ; that it remains in dependence before the higher tribunal ; and that all [84] diligence, execution, or action must remain in the state in which they are at the time when the respondent is made a party to the appeal, until the cause is decided.

It has been already decided by this House that the statute 48 Geo. 3, c. 151, s. 17, does not deprive the party of his remedy by appeal against a decree for interim execution. In the case of *Milne* against *Imlay*, 25th January 1822 (*Milne v. Imlay*, 25th Jan. 1822, 1 S. and B. 268), the judgment of the Court of Session having been appealed from to the House of Lords, and interim execution awarded to the successful party, *Imlay* appealed against the interlocutor awarding it. *Milne* presented a petition to the House of Lords, praying that the appeal might be dismissed as incompetent ; but the House of Lords adjudged, " that the said appeal is competent," and ordered that " the prayer of the said petition be not complied with." A similar decision was given by the Committee of the House of Lords in the case of *Clyne* against *Sclater*, 7th August 1833 (*Clyne v. Sclater*, 13 S. and D. 1008), in which the competency of an appeal against interim execution was sustained. There is no case to be found on the records of this House in which the competency of such an appeal in the abstract has ever been decided in the negative.

*Respondent.*—The appeal is incompetent in respect that the judgments appealed from are interlocutory merely, and no leave to appeal has been asked or obtained from the Court below in terms of 48 Geo. 3, c. 151, s. 15, and 6 Geo. 4, c. 120, s. 5.

The doctrine contended for by the appellants, if given effect to, would go entirely to subvert the law of [85] death-bed, inasmuch as it would enable a person in *lecto* to nominate disponees to take his property, although he had not excluded the heir from taking by a deed executed in *liege pousie*.

The condition of Mr. Clyne's predecease in the deed of 1815 applies to the nominees of Mr. Clyne as well as to the other substitutes in the deed ; and that condition never having been purified, it is plain that even an express deed of nomination by Mr. Clyne, executed in *liege pousie*, would have been totally inoperative.

The deed by Mr. Clyne's parents had reference only to their own property, and could not possibly operate as a nomination of disponees to the property of their son. If it could be assumed that it did so operate, then it would clearly have been revoked by the death-bed deed. But in fact both of the deeds of 1815 were absolutely non-existent at the time when the death-bed settlement was executed. Whether these deeds are considered as separate and independent settlements, or as linked together in the manner contended for by the appellants, still the effect is the same—they were not legally in existence at the time referred to. The deed of the son had lapsed from the non-occurrence of the event in which alone, whether as a separate or a conjunctive deed, it was to operate, namely, his predeceasing ; and the deed of the parents had operated by carrying their property to the son, and had thereby become exhausted.

Mr. Clyne's intentions can only be collected from the deeds which he executed. If Mr. Clyne intended to exclude his heir, *quod voluit non fecit*.

(Second Appeal.) It has been expressly provided by the statute 48 Geo. 3, c. 151, s. 17., which regulates this [86] matter, that it shall not be competent to appeal against an order of the Court below allowing interim execution pending appeal.

The obvious meaning of that clause is, that the matter of interim execution shall be left in the discretion of the Court of Session, that an appeal against any such order is incompetent, but that the House of Lords will consider and regulate that matter, on hearing the appeal against the principal judgment in the cause.

In the case of the *Countess of Haddington v. Stein*, 20th November 1811 (Fac. Coll.), the Court, pending an appeal against their decision in a suspension of a charge on a bill, granted warrant for interim execution, in favour of the charger. An appeal against this warrant was presented, and an order of service obtained and intimated ; but it does not appear that the statutory incompetency of this appeal was brought under the notice of the House of Lords. The clerks in the Court below having had some difficulty in extracting the warrant in the face of the appeal, the charger applied to the Court to ordain them to give extract, and " the Court were of opinion that the second appeal was incompetent, and ordained the clerks to issue the extract."

Although it may be true that a copy of the petition of appeal was not presented to each of the judges, yet it cannot be denied that a copy of the petition of appeal,

duly certified by the clerk of parliament, was produced in process, and laid before the Court along with the petition for interim execution; and this is precisely in terms of the statute 48 Geo. 3, c. 151, s. 17.

[87] A party on the poor's roll must be held entitled to the statutory benefit of interim execution, unless he has been expressly excluded from that benefit by the terms of the statute itself. The statute makes no such exclusion, but, on the contrary, provides the benefit to all parties, whatever their circumstances may be, who are in possession of a decree of the Inferior Court for expenses.

(Third Appeal.) It is quite unquestionable, under the provision of the statute 48 Geo. 3, c. 151, s. 17, already referred to, that an appeal against interim execution does not stop execution in the Court below.

Lord Chancellor.—My Lords, in this case of *Gordon v. Clyne* your Lordships have lately heard three appeals; the subject matter of the contest between the parties being, according to the case made by the defender, property of less value than a life income which the pursuer is entitled to under the deed in question. It is true, that on the part of the pursuer it was stated that the property was of much larger value, but the defender, the present appellant, contends, that the property is of less value.

The first appeal, (which is that which raises the question,) was objected to upon the ground of incompetency, inasmuch as it was alleged that the adjudication was upon a mere preliminary defence, and not touching the merits.

The facts, so far as it is necessary to consider that part of the case, are these:—The pursuer (respondent), seeking to reduce a deed upon the ground of death-bed, is met by an allegation that there was another deed, a valid deed, which, if the latter deed were impeachable, would be a [88] bar to his claim,—namely, a deed of 1815, which it is alleged would equally preclude him from claiming the heritage; so that under those circumstances he would have no interest in impeaching the deed challenged upon the ground of death-bed. This was made the subject of preliminary pleas. The Lord Ordinary decided (which was afterwards affirmed by the Inner House), that that ought not to be treated as a preliminary defence, inasmuch as it went to the whole merits of the case, there being no doubt that the latter deed, the deed to be challenged, was a deed executed so recently before the death of the party as to be void, provided the heir was in a situation to be at liberty to challenge it. The whole case, therefore, turning upon the right of the pursuer, the heir, to challenge and reduce that death-bed deed, it was obvious that that embraced the whole matter in contest between the parties; and therefore the Court was of opinion that they ought not to treat it as a preliminary objection, but that it should be considered as constituting the whole substance and merits of the case. Upon this the defender put in pleas in law to the whole case, and repeated the objections which he had before made as preliminary objections.

Now, my Lords, the four pleas were these:—"First, The pursuer is barred from challenging the deed libelled on, in consequence of the settlements executed by Mr. Clyne and his parents in 1815. These settlements were not absolutely revoked by the deed under reduction, but only in so far as they interfered with the last deed; so that if this settlement could be reduced by the pursuer the former settlements would revive." "Second, The pursuer has no real or [89] legitimate interest to challenge the deed libelled on, as his interest is much greater under the last settlement than it would be under the former deeds, which would necessarily regulate Mr. Clyne's succession, if the settlement now under reduction were reduced." Upon that second ground no judgment has been pronounced, but the inquiry as to the facts is reserved for further consideration. Third, "The deed under reduction having been executed agreeably to reserved powers in the settlements of 1815, and as appears from its narrative being intended to effect certain alterations on these deeds, and the said deeds being all linked together, the defenders have in their persons a sufficient title to exclude the challenge here brought forward on the part of the pursuer." Fourth, "The pleas of the pursuer, being groundless both in law and in fact, ought to be repelled, and the action dismissed."

The result, therefore, is that upon these four pleas judgment has been given against the defender on the first and third. The second has been reserved for further investigation; and upon the fourth, which is merely raising a question upon the



validity of the case set up by the plaintiff, no judgment has taken place. It is therefore undoubtedly an adjudication upon the merits, though an adjudication not exhausting the whole; that is to say, it is an adjudication upon part of the case, which in all probability will leave little or nothing to be hereafter adjudicated upon; but still it is an adjudication upon the merits of the whole case, the whole case being discussed by both parties.

Upon this state of the proceedings two questions were decided by the Court below. Two questions, there[90]-fore, are raised for your Lordships' consideration; the first being, whether the deed of 1815, and the subsequent deed executed by the parents of the party deceased, are such as to bar the heir, provided the death-bed deed did not stand in his way; or, in other words, whether, supposing the death-bed deed never had been executed, the title of the heir would have been excluded by these transactions of 1815. The second question raised is, whether the deeds of 1815 may be coupled with the death-bed deed, so as to exempt it from the operation of the law respecting death-bed.

My Lords, it appears that the party deceased having certain property of his own, and his father and mother having certain property belonging to them, that this arrangement took place: the first deed which was executed was the deed of August 1815, by which David Clyne, the party deceased, disposed of his property in these terms:—"In the event of my predeceasing my parents without leaving lawful heirs of my own body, I do hereby give, grant, assign, dispose, convey, and make over to and in favour of William Clyne, merchant in Thurso, my father, and Margaret Swanson his spouse, my mother, during their mutual lives, and to the longest liver of them two, and after the death of the longest liver to and in favour of any person or persons, or for such uses, ends, and purposes as I may name and appoint by any deed I may execute at any time of my life, and even on death-bed, and in case of my dying without having executed such deed, then to and in favour of such person or persons as shall be named and appointed in any deed that shall be executed (according to law or agreement [91] among themselves in such deed) by my said parents." The fact which happened was, that the parents predeceased this David Clyne.

In the month of September in the same year a deed of disposition and settlement was executed by the father and mother; and they, although it is stated that they had no heritage, use terms which, if they had any, would have operated as a disposition in favour of David Clyne their son, and the heirs of his body; whom failing, in favour of other persons. The terms used are,—“property which shall belong to us, or either of us, at the time of our death.” That provides, therefore, for such property as they might have at a future time; and if the son had died before the parents, and the parents had become possessed of the property, which in that event was destined to them by his deed of August 1815, their deed might have operated upon property so passed to them; but the facts are, that the father and mother died before the son, the consequence of which may be, that the deed of 1815 failed to have any operation at all, being entirely conditional, namely, made in the event of his predeceasing his parents; that, however, is a matter of contest at the bar. But one point cannot be a matter of contest, namely, that the estate to be acquired by the parents was conditional upon their surviving their son, and that by the death of the parents before the son that disposition in their favour fails; and another point will be equally clear, that the power intended to be given to the parents over the estate was also conditional, and could only operate in the event of their being possessed of that estate, which they were to have only in the event of their surviving their son.

[92] The first point, therefore, contended for, namely, that these two instruments operated, in the event that happened, to disinherit the heir, and that the heir therefore would have no title even if the death-bed deed had had no existence at all, I apprehend wholly fails; and therefore that impediment is removed out of the way of the heir, and he therefore stands in the situation of being a party interested in disputing the validity of the death-bed deed, the prior deeds not being of a nature to deprive him of the right of heirship.

My Lords, then it is said that that being so, although the second deed, namely, the disposition by the parents, cannot be considered as operating upon this property so as to remove the title of the heir; still the deed of August 1815 is a disposition of the heritage, and as such is not open to the objections that are made by law to death-bed

deeds. That was the ground principally contended for by the appellant. That argument is founded upon this supposed state of the law, namely, that a party, although he cannot dispose of his estate within sixty days of his death, may execute a deed beyond the limited time, and that then he may, by a deed within sixty days, do that which would perfect that instrument; and in the course of that argument cases were cited to show, that by the law of Scotland, if the whole heritage,—the feudal title, is disposed of by a deed not objectionable upon the ground of death-bed, the trusts may be declared by a deed within the period, or by a will executed in England and according to English forms.

My Lords, I apprehend that those cases have no reference to the present, because in those cases the whole feudal title was complete by the original deed; [93] and it is very similar to the law existing in this country, namely, that a will disposing of real estate must be executed and attested in a certain form; that being done, and it being part of the provision of such a deed, that the estate shall be subject to the payment of legacies to be afterwards bequeathed, a legacy given by an instrument not properly attested is valid, and will operate upon the property devised, because it is devised by a properly executed and attested instrument. So in this case, provided the heritage be legally divested, and is passed by a deed executed within a period sufficiently long before the death of the party as not to be objectionable on the ground of death-bed, the party may declare the trusts of it by an instrument not executed according to the forms which the law of Scotland requires in passing heritage.

One case, and one case only, was referred to, which seemed to open any argument upon the ground contended for, and that was the case of Fordyce (5th July 1827, 5 S. and D. 897). Now the case of Fordyce was this: A party, by a deed not objectionable upon the ground of death-bed, had conveyed his estate to trustees, of whom a Mr. Cockburn was the survivor; afterwards a will was made, professing to give the estate to the same Mr. Cockburn and another trustee. That other trustee predeceased Mr. Cockburn, so that at that time Mr. Cockburn was the surviving trustee named in the will; and it was contended at the bar, that, being the trustee named in the will, he had asserted a title to the estate in that character, and that title was recognized; but, upon examination, it turns out that Mr. Cockburn's title was as trustee named in [94] the deed; he had a title entirely independent of the will, which was invalid as a conveyance of heritage upon the ground of death-bed.

My Lords, a case was referred to, namely, that of *Crawford v. Coutts*, 2 Bligh, p. 688, where Lord Eldon, (in discussing the question whether a death-bed deed revoking a former settlement, and professing to dispose of the property, can be bad as to the disposition, but good as to the revocation, so as to let in the heir,) puts this case, which I think your Lordships will see is identical with the present: He says, "In Scotland no man can make a valid liege poustie deed in this form: 'Know all men by these presents, that I do hereby reserve a power to dispose of my estate at any time of my life, *et etiam in articulo mortis*.' The liege poustie deed must be some actual deed of disposition existing at the death of the grantor." My Lords, the argument here is, that the party has said precisely what Lord Eldon supposed a party to say, namely, by the language of the deed of August 1815, "I hereby dispoise of my estate to such persons as I may hereafter name." No dispoinee being named you must look, therefore, to the death-bed deed for the dispoinee. It is, therefore, neither more nor less than what Lord Eldon supposes the party to say: "I hereby reserve a power to dispose of my estate at any time of my life, *et etiam in articulo mortis*." There is no instrument existing anterior to that death-bed deed which disposes of the heritage; there can be no disposition of the heritage without a dispoinee. There is no existing instrument which can take the title from the heir, unless you have recourse to the death-bed deed, which is now challenged.

[95] My Lords, if, therefore, the case and the arguments raised at your Lordships' bar rested upon those two deeds alone, I should have no hesitation in advising your Lordships that the judgment of the Court below should be affirmed; but there is another ground alluded to in the short note (15 D., B., and M., 915) which we have of the opinions of the Learned Judges below, and I cannot, therefore, entirely pass that over. According to the argument contended for by the defenders the effect of the deed of August 1815 would be this,—to reserve to himself the power on his death-bed of naming the dispoinee. To carry that intention into effect one would expect

to find a deed performing that service, either referring or not referring to the prior deed (it is not absolutely necessary to refer to it), and naming the donee to take under the prior disposition. Instead of that we have a deed in which the party states that it is necessary to make alterations in his settlement; and he proceeds actually to dispose of and convey his estate, without reference to any power reserved to him, and not only without reference, which would not be necessary, but the deed actually revokes the former deed so far as that is inconsistent with the present: in fact that deed is absolutely and entirely inconsistent with the death-bed deed. According to the argument he would have nothing to do but to name the donee; instead of which he conveys and disposes *de novo*, and recalls the former deed so far as that is inconsistent with the latter deed.

My Lords, it was said, when I suggested that to the learned counsel at the bar, that that objection ought to be taken with a good deal of caution, because it had [96] not occurred to any of the parties below. I was rather anxious to find out how that matter stood, and upon looking through the papers I find that it was alluded to below. I find this in the 11th page of the appellants' case:—"It may be objected to this argument, that Mr. Clyne intended to make a new deed, not to exercise a faculty reserved in a former one. The defenders would reply, in the first place, that it was decided, in the case of *Willock v. Auchterlony*, that such a faculty may be exercised without a special reference to it. But farther, the greater includes the less. It was meant both for a disposition and a nomination. It may stand for a nomination, just as it will stand as a testament, although as a disposition it should be revocable, and, as the deed of 1815 is declared to be revoked only so far as inconsistent with that of 1833," etc. That very point is raised; and when the Learned Judges below are found expressing an opinion that the deed of August 1815 was absolutely revoked, they were perfectly warranted in that opinion.

My Lords, this, in my view of the case, would exhaust the first appeal, with one exception, to which I am about to call your Lordships' attention. It would also dispose of the matter as far as relates to the merits. But I cannot but observe that this appeal also includes a great variety of interlocutors; I believe there are not less than twenty called in question by these appeals. Three interlocutors are appealed from which relate to the pursuer being upon the poor's roll. The counsel at your Lordships' bar have had sense and discretion enough not to advert to that point at all; I cannot but [97] observe that they are not properly brought as matter of appeal to your Lordships' bar.

My Lords, the second and third appeals are open to very much the same observations, the Court below having decided in favour of the pursuer, to the extent to which their decision goes, under the authority of an act of parliament which directed that there should be a payment of the expenses decreed, notwithstanding an appeal. My Lords, that was made a matter of appeal, and the appeal was attempted to be supported on the grounds, first of all, that there was no printed copy of the appeal appended to the proceedings below.

Now, there was a copy of the appeal; that is not in dispute; and the whole argument is, whether there should be a printed copy, there being nothing in the act of parliament requiring that a copy should be printed. The party being poor and suing *in formâ pauperis* every unnecessary expense was very properly avoided; and the Judges were informed of the appeal, as the act of parliament requires, by having a copy of the appeal presented to them, but the party did not think proper to incur the expense of printing it, and that is made a subject of appeal to your Lordships' House.

There is another ground, and one only, I understand, upon which that appeal is attempted to be supported; namely, that the order is for payment of costs incurred. They say that the party was suing *in formâ pauperis*, and he could therefore have no costs incurred; just as if any party, whether suing *in formâ pauperis* or not, could prosecute any appeal without incurring some expense. It was endeavoured to draw into discussion the amount of some of the charges in the bill of costs; the learned counsel's attention was drawn to that, and [98] he said that he could not raise at your Lordships' bar any argument upon that subject. The question, then, is, whether your Lordships are to take for granted that which every body knows not to be the fact, that a party can sue *in formâ pauperis*, or prosecute a proceeding in a court of law,

without incurring some costs. The costs incurred are all which the Court of Session has ordered to be paid.

The question as to directing interim execution or withholding it is entirely left to the discretion of the Court; they are to have the whole case brought before them, and they are to have liberty, if they think proper, to direct interim execution.

My Lords, the Court having decided against the case made by the defenders to withhold this interim execution, they were not satisfied with that decision, and appealed to your Lordships' House. They then brought two bills of suspension; the first, the Lord Ordinary decided against,—that was abandoned; and then they brought another, which was brought into the Inner House. The ground of suspension was this: that having appealed against the order of interim execution, it was not competent for the parties to proceed any further; that is to say, that the act of parliament giving the Court a power at their discretion to award interim execution, and the party being dissatisfied with that order, and appealing against it, that second appeal acted as an estoppel. If that had been so it would obviously have had the effect of destroying the discretionary power granted to the Court; but the act of parliament very wisely guarded against that, and by the 18th section it provides, that no appeal against such an interim order shall stay process: the provisions of the [99] act of parliament very clearly state that. The 18th section, however, was not enough to satisfy the defenders, for they not only brought these two bills of suspension in the Court below upon that ground alone, but they make the decision of the Court against them on that subject a ground of appeal to your Lordships' bar.

My Lords, these two last appeals were for a long time undefended; the party did not appear; and no doubt the appellants would have been in a situation to have had the case heard *ex parte*,—certainly without any probability of success; and it may have been upon the certainty that the respondent, namely, the pursuer, felt that this House never would assent to the proposition of the appellants, that he abstained from appearing to defend those two appeals. In point of fact, he never did appear till the case was actually called on at your Lordships' bar; then the pursuer, the respondent, did appear, and having printed his cases asked leave to present those cases. Your Lordships finding that he was actually there, and that no delay was asked, thought it more advisable to give him the opportunity of appearing than to hear the case *ex parte*,—your Lordships at that time not knowing the nature of the case, which if your Lordships had, you would not probably have thought it necessary that any party should appear to resist those appeals. Now the question is, whether, as those appeals, if the respondent had appeared regularly, would unquestionably, I apprehend, have been dismissed with costs,—whether under those circumstances it is proper that your Lordships should dismiss these appeals with costs. Upon the merits they ought no doubt to be dismissed with costs; but the only ground upon which your Lordships would pause before giving an [100] opinion upon that subject would be this, that if the respondent had appeared, perhaps the appellants might have withdrawn their appeal, and not have come to your Lordships' bar at all. Upon these grounds I am inclined to think, that your Lordships having extended to the respondent the indulgence to which he had no claim, of being permitted to come in at the last moment, it would be perhaps imposing too heavy a liability upon the appellants, to dismiss the appeals with costs. Upon the original appeal I apprehend your Lordships will entertain no doubt that it ought to be dismissed with costs.

Lord Brougham.—My Lords, having attended the greater part of the hearing of this case, though not the whole, and a small part only of the hearing of the two later cases, upon which my noble and learned friend has pronounced his opinion so clearly and distinctly, and in a manner so satisfactory, I may dispense with the necessity of entering at greater length into the particulars of the case than is sufficient for the purpose of stating my own opinion, and the grounds upon which I have arrived at that opinion.

The importance of questions relating to the law of death-bed, whether to the application of the law in particular cases, or to the nature and constitution of the law itself, is manifest, and it is considerable. It is a peculiarity in Scottish jurisprudence, and it is a peculiarity which appears to me most useful and honourable to that system of jurisprudence that distinguishes it from ours and from all others. Our law throws a protection round the death-bed of parties, by requiring certain solemnities to be

observed before they can pass real estate,—formerly their real estate only,—now, by [101] the late act of parliament, their personal estate also. We all know,—those who have practised in Courts, whether of equity, or of law, or of both (which has been my lot),—all well know, how very ineffectual those conditions imposed upon parties in order to their validity conveying their estates oftentimes prove. For as it is not difficult to obtain the assistance of three witnesses, the number formerly required, or of two witnesses, the number now required, as a conspiracy may very easily be effected,—and I am sorry to say that there are constant instances of it in practice, no character whatever being required to belong to those witnesses except that they should be witnesses of credit, that is to say, that they should not be disqualified by a sentence of an infamous nature from being witnesses,—so it becomes no very hard matter to obtain a will passing large estates, whether real or personal, from a man or a woman in such circumstances, at the close of life, as shall leave the gravest suspicion upon the minds of those who have to deal with and to give effect to that instrument, whether they were in a condition or not to dispose of any part of that property. A much more effectual protection is thrown round that period of human life, a much better security is afforded to the rights of the heir at law, by the Scottish system, which requires, by a most rational and sensible arrangement, that a certain time should elapse, namely sixty days, between the execution of the instrument and the decease of the party, otherwise it shall be void and have no effect. Unless the fact be such as to make presumption yield to it,—the incapacity presumed by the law inures for sixty days. The rule laid down is, that the only fact to which the presumption of incapacity [102] shall yield is the appearing at kirk or market unsupported during those sixty days; that being taken as the test of *liege poustie*, or that state of mental capacity which gives the party the power of lawfully and validly disposing of his heritable property. This rule is confined to heritage in Scotland, the old law there, as here, taking no cognizance of personal property, which was then of such trifling amount in the transactions of men as not to be deemed worthy of consideration by the legislature.

Such being the general law, in construing any particular matter with a view to ascertain whether it comes within it or not, we are to keep the purpose and intention of the law constantly and steadily in view, in order to see whether or not the law applies in the manner asserted. Now, it is a law for the protection of the heir at law; hence the first conclusion is, that nobody but the heir at law has a right to avail himself of it to reduce *ex capite lecti*. Hence a second proposition follows,—that if the heir at law has been already validly excluded, *cadit questio*, there is an end of the *reductio ex capite lecti*; he has no interest and therefore no *locus standi*. But if the deed set up is of such a nature as that it does not exclude the heir, then the law of death-bed applies. Hence a third proposition of necessity follows,—that no man can make, while in *liege poustie*, such a deed as shall exclude the heir generally, by merely indicating an intention on his part to work an exclusion of the heir. The exclusion must not only be intended by the maker of the deed, but it must be executed; the heir at law must be effectually excluded; and the intention to exclude him is good for nothing unless the exclusion is operated and effected against him. Hence it is perfectly clear,—I can hardly say as a [103] fourth proposition, for it follows as a parcel of the last which I have stated, as is laid down by Lord Eldon in *Crawford v. Coutts*, which was referred to by my noble and learned friend,—that a man cannot say in *liege poustie*, “Know all men by these presents, that I intend that the law of death-bed shall not apply to any disposition which I may make within sixty days;”—for what would that amount to? It would amount to this, that instead of saying, “Be it therefore enacted by his Majesty, with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled, that the law of death-bed shall be repealed generally,” it would be saying, “Know all men by these presents that I repeal the law of death-bed in my particular case.” Now no man can do that; he must conform himself to the law. But it also follows as another proposition, which I take to be quite clear, that no man can work the disinherison of the heir, and exclude the application of the general law of death-bed, by merely saying, “I disinherit the heir;” he must disinherit him by conveying the estate out of him, and conveying it to somebody else. Hence it is another, and it is the last proposition bearing upon this question with which I shall trouble your Lordships, viz., that it is clear that no man can make a deed in *liege poustie* which is blank in the name of the disponent,—I hold

that to be quite clear,—that no man can say, “I disinherit the heir in favour of blank,” and then within sixty days fill up that blank: I take that to be clear.

But, my Lords, I must add, that it is not at all necessary for the disposing of the present case that I should affirm or prove the latter of these propositions; [104] it is otherwise with respect to powers reserved. If in *liege poustie* you create a valid power, you may reserve the moment of the execution of that power till within sixty days, just as my noble and learned friend has most properly stated; and moreover I may add this,—you may constitute a trust, and if you, by the constitution of that trust, take out of the heir his succession in *liege poustie*, you may operate upon the trust so created within sixty days, and it cannot be reduced as *ex capite lecti*. But why? Because you have validly effected your purpose. You not only have moulded it so as to shew entirely in what way your bounty is to be distributed, but you have entirely defeated the right of the heir by vesting the estate in trustees. You may afterwards declare a *cestui que* trust, or at all events you may declare the various burdens and legacies connected with it, and the other matters which unite themselves with the disposition of the property: So in England the protection of requiring three witnesses signing in the presence of the testator (now reduced to the number of two by the late law (7 W. 4, and 1 Vict. c. 26)) is analogous to the protection afforded by the law of death-bed in Scotland to the dying moments of a sick person. If I, by will, executed by three witnesses in my presence, or now, by the late change in the law, by two,—if I validly constitute a trust in favour of A. and B., and afterwards, without the three witnesses or the two witnesses, make any legacy connected with it, that will hold without the presence of two witnesses, as the law at present is, or three as the law formerly was; for the instrument which executes the entire purpose of disposing of the [105] property being a complete disposition of the property, and that being attested now by two and formerly by three witnesses, that is sufficient,—but without that it would not be sufficient. Now, such is the general principle upon which I take this law to be established, and in support of which I would only refer to a very learned and accurate note (for I have looked into the original book) by Mr. Ivory in his edition of Erskine's Institutes (Ersk. (Ivory's Ed.) b. 3, tit. 8, sect. 98, n. 549), which states it pretty nearly in the same manner:—“Under a trust disposition of heritable property, with reserved power to regulate the administration of the trustees and the application of the trust estate by a testamentary deed”—(now he clearly means here testamentary, as contradistinguished from *liege poustie*, that is to say, a deed within the sixty days,)—“by a testamentary deed containing a special declaration of uses and purposes, or directing the payment of legacies, donations, etc., such a testament, if executed in *liege poustie*, will effectually exclude all challenge by the heir, notwithstanding the trust deed was an undelivered document.” But he goes on to say, “And where the trust conveyance so disposes of the primary interest in the estate”—(what he means by the primary interest is what we should call the legal estate)—“as by its own force, in default of exercise of the reserved power, to exclude the heir at law, the reserved power may be exercised even on death-bed.” Why? Because the primary interest, the legal estate, has been validly taken out of the heir at law by the first deed, the valid deed in *liege poustie*, and consequently the [106] intention operates, and the deed made in *liege poustie* will validate and give effect to the death-bed deed.

Now, my Lords, such being the principles upon which this law is framed, and upon which it is to be applied *casibus omnibus*, I have now simply to state to your Lordships my opinion upon the present case, by referring to the very distinct statement of my noble and learned friend of the facts of the case, where those facts are totally undisputed. Upon one point your Lordships may observe there is a difference, namely, whether the construction of this deed, taking it altogether, is such as to make it founded upon the event of predecease. But upon the other point, the more essential point of the two, there is no dispute, nor can there be any dispute; I allude to the two deeds, the one of August and the other of September in the year 1815, and which are both of them *liege poustie* deeds: “I, David Clyne, solicitor in the Supreme Courts of Scotland, in the event of my predeceasing my parents without leaving lawful heirs of my own body, do hereby give,” and so forth; and then he adds a disposition to his father and mother during their joint lives, and to the longer liver, “and after the death of the longer liver to and in favour of any person or persons, or for such uses, ends, and purposes, as I may name and appoint by any deed I may execute at any time of my

life, and even on death-bed; and in case of my dying without having executed such deed, then to and in favour of such person or persons as shall be named and appointed in any deed that shall be executed (according to law or agreement between themselves in such deed) by my said parents."

[107] Now, this I take to be perfectly undeniable, that two events must concur, two facts must happen. I know that taking it altogether a dispute has been raised upon this, but I hold it to be quite clear that two facts must concur, that two events must happen, before this deed can have any operation at all. What are these two events? That the son, the maker of the deed, shall predecease his parents, and that he shall predecease his parents without issue. Then a third event must be added to these two before the operation of the September deed can take place, that is to say, before there shall be any thing upon which that deed, whatever it is, can operate,—before that can exist,—before that can come in use as a subject matter for the parents' deed to work upon. What is that third event? His predeceasing is the first; his predeceasing without leaving a lawful heir of his own body is the second; his dying without executing any deed himself is the third. These three events must all concur: his predecease,—his predecease without issue,—his predecease without issue and without any appointment, without executing any deed himself. All these must concur before the parents can have any one thing upon which their deed operates.

Now, my Lords, in the year 1828 the father dies; in 1829 the mother dies; in 1833 the maker of the deed dies; consequently there is an end of the first material event—the corner stone of the whole of this conveyance,—it all falls to the ground,—for instead of predeceasing them he survived them both. It is not material whether he executed any disposition or not; it is immaterial whether he died without heirs; the predecease never happened.

[108] Now, it has been contended, that the first condition did not override the whole case; but has it ever been contended that it does not override the father's and mother's deed? The father and mother execute a power. Upon what to operate? Upon the estate of the son. There were other estates upon which it was to operate, independent of the estate of the son, but it could only have any thing to operate upon in the son's estate, in the event of the son's predecease; but they predecease, and therefore it has nothing to operate upon.

My Lords, these are the short grounds upon which I hold that the heir is not excluded here from suing, and upon which I also hold that the law of death-bed here plainly applies. I find that in the Court below, though we have not a very full account (as we have often to lament) here of what passed, we have a very distinct statement, a very intelligible and concise statement, of the reasons of the Learned Judge Lord Glenlee, than whom a more able and learned judge never was upon that or any other bench, in which he says, alluding to the arguments at the bar, "If it had been distinctly made out that the pursuer was barred by a subsisting deed"—there was no subsisting deed, for there was nothing for it to operate upon,—"which would have prevented his claim on the reduction of the death-bed deed, the defenders might have succeeded in their argument; but it has not been made out that such deed was in existence at the date of the last settlement, and therefore the pursuer is not prevented from claiming" (15 D., B., and M., 915) [1837, 15 Dunlop 915].

[109] With respect to the other causes, and also to a very great deal of the oppressive litigation in this cause among the eighteen or twenty interlocutors brought before us, I entirely concur with what my noble and learned friend has stated in expressing my great disapprobation, and I will go so far as to say my reprobation, of these proceedings. The first of these appeals ought to be dismissed with costs; that no man can doubt: I only have a doubt whether the second and third ought not also to be dismissed with costs. My first impression was, that they ought. My noble and learned friend has somewhat weakened that impression, by reminding me that it is barely possible that the defenders, the present appellants, if they had seen that the respondent was going to meet them, and that these two cases were not about to be set down and heard *ex parte*, might have thought better of it, and might not have proceeded. It ought to be observed, however, that that does not apply to any thing but the hearing, and that is to be considered. And for the purpose of further considering it I will beg my noble and learned friend to agree with me, that before finally saying whether or not the respondent should have the costs of the second and third appeals, we should take a day or two to consider

that; because if costs would have been incurred by the respondent up to the moment of coming to the bar, all that the appellants at the last moment could have done might have been not to have had the appeals heard here.

Lord Chancellor.—They had not appeared.

Lord Brougham.—Oh! they had not appeared to the appeal; then my observation is misplaced, undoubtedly. That does introduce a very considerable [110] doubt in my mind. Then I rather agree with my noble and learned friend, that it will be difficult to give costs; but we had better take a little time to consider that. I should very much regret, and so I am sure does my noble and learned friend, if, under the circumstances of this case, we cannot call upon the appellants to pay the costs of the second and third appeals.

Now, my Lords, having disposed of those cases, it is fit that I should state an impression upon my mind, connected with the name of the most learned and venerable judge whose opinion I have just cited, I mean my Lord Glenlee, who has given a very concise, but a most correct and well grounded, judgment in this case, agreeing in every respect with that which your Lordships have now affirmed, and distinctly applying itself to the principal and main ground of the present affirmance. There never was upon any bench, in any country, a more reverend, a more able, a more learned judge. He is a man thoroughly imbued with the most profound, extensive, and masterly knowledge of all the jurisprudence of his own country, and of all the general principles upon which all systems of jurisprudence are grounded. He is a man whose knowledge is not confined to the jurisprudence of Scotland, or even to law in general, but he is one of the most profound scholars in all the most difficult branches of science to which the human faculties can be applied. I know that he has passed his days and his nights in those profound, most difficult, and most sublime investigations; I know that there exists not within the bounds of this country at this moment a man so deep a mathematician (I mention it to his honour) as he has been all his life in the *horae subsecivae* of his judicial pro-[111]fession; I know that up to this last month, from direct communication with that learned judge, his mind is as vigorous and as entire as it was forty years ago.

My Lords, I stand here to perform an act of justice, and of strict justice only, in giving vent to these sentiments of my mind. If there be any man who knows Scotch law better than I do,—if there be any man of any age, of any amount of experience, of any extent of inquiry, in any other place, who from his own personal observation has found reason to look down upon Lord Glenlee, to raise himself above him, and hold that he, this observer, is entitled to pass sentence upon the state of the faculties of that most able, most learned, and most venerable judge,—if any such person knows science so profoundly,—if any such person is so much better versed in Scotch law than the humble individual who now deems it his duty, and his painful duty, to address your Lordships in the performance of an act of strict justice alone,—if any such person, in any other place, shall have taken upon himself the office of pronouncing sentence upon the continuance or the discontinuance of the judicial capacity of that judge,—all I can say is, to that higher authority, to the superior illumination of mind, to the greater knowledge of law, to the larger, and more full endowment of science of that individual, I shall bow with the deference which is due to it from me. But until I am otherwise instructed, and until I have lost my memory, and until my faculties are gone, so that I shall no longer know right from wrong, or a sound judgment such as this, which your Lordships are now occupied in affirming with costs, upon the same grounds upon which he gave it,—or until I know not how to read a letter written three weeks ago upon a scientific topic, or think [112] the writer of that letter knew not what he was writing,—I am bound to hold by my own opinion; and it is an opinion which I have deliberately formed, and which I now without hesitation pronounce.

My Lords, an accident prevents your Lordships from having laid before you the testimony of other learned judges concurring in the same opinion. I have had correspondence, and very lately, with them too; and my noble and learned friend who immediately preceded me in the highest judicial office in this country was to have attended to-day for the express purpose of bearing his testimony, much more valuable than mine, to the continuing capacity of these learned judges to exercise the judicial office. Having accidentally not been present at the hearing of this par-



ticular cause, he did not think that he ought to come down (and I agree with him, though I lament his absence,) to take part in this interlocutory or rather accidental appendix to the judgment; but I have Lord Lyndhurst's authority for stating that his Lordship has been in recent correspondence with one or two of those learned and reverend judges, that he has been in recent correspondence with the chief of that Court, and that he gives it as his most decided and deliberate opinion, that the great faculties and enlarged mind of that illustrious person, the head of the Scottish law, are as I have described the others to be.

My Lords, it is no light matter to have such things as these fabricated, and such opinions, if I may dignify them by such a name,—things which merit no such respectable appellation,—to have such matter (to give it no more offensive name) vented, and vented in high places. Much depends upon the fancies of men,—much upon their casual impression: promulgate [113] the notion that the mind of the soundest man in England who is called upon to deliver judgment is gone, or is going,—I will venture to say, be it the soundest that ever inhabited the frail tenement of a human body, provided age has come upon that body, there will not be wanting people to fancy, and even very honestly to believe, that they see symptoms of failure. I have seen it over and over again in private, when I happened to know that there was not the slightest foundation for it, because the party survived years and years in the full possession of his faculties.

But, my Lords, it is no light matter to have judicial character carped at in such a way; and God forbid that I should ever live to see the day in this country when the conduct of judges should be attacked otherwise than in the manner that the laws and constitution of the realm have provided for its being attacked, namely, an address by both Houses of Parliament; that is the legal remedy,—that is the proper mode. What avails it to the independence of the bench, the most important of all the benefits which the constitution showers down upon us,—what avails it to the independence of the judicial character, that the law says that a judge shall not be removed during his life, and during his good behaviour, if he is to be flung at, if he is to be attacked, if he is to be held up to derision and contempt, more unbearable than public hatred and scorn itself, as one who has survived his intellects, and who sits upon the bench that he can no longer adorn, in order that by neglecting his judicial duties, by filling the place which an abler and [114] fitter man ought to occupy, he may have a pretext for receiving the public money in consideration of a duty which he no longer has the capacity to perform? I had rather at once be impeached,—I would rather hold up an arraigned hand at your Lordships bar, where I could defend myself, and where I could appeal to your Lordships for justice, which I know I should have,—than I would submit to be the butt of such shafts, and the victim of such attacks.

My Lords, I have filled the highest judicial office in this country for a longer period of time than any man now living. Had my noble and learned predecessor, who filled it so much longer, the late Lord Eldon, been alive, I should not have been the person to deliver these sentiments before your Lordships. No man better knew than he the great faculties and extraordinary merits of those learned and reverend persons; but he is now taken from us, and the duty devolves upon me, which I have now painfully performed before your Lordships, except that no man ought ever to feel any pain while he knows that he is conscientiously discharging an important duty. It is your Lordships bounden duty, as you have now and then to reverse the judgments of the Court below,—as you have occasionally to differ from those learned judges,—(and you have always respectfully expressed that difference of opinion, and always reluctantly altered their judgments.)—so it is your bounden duty, as it is your special and your precious privilege, to defend, to sustain, to protect those learned judges when you know that they are so foully, falsely, and most unjustifiably assailed. I have received a letter from [115] Lord Lyndhurst, begging that I would make known his entire coincidence of opinion with me. We have talked over the subject repeatedly.

My Lords, in the case of *Gordon v. Clyne*, in which there were three appeals, your Lordships have some doubt with respect to the costs of the second and third appeals. Your Lordships disapproved of the proceedings of the party in bringing those appeals; but as there had been no appearance made for the respondent until the case

came on for hearing, the consequence was, that it might naturally enough be said by the appellants, *non constat* that we should have gone on had we known that the other party meant to defend; and consequently the delay of the respondent in making that appearance, although not blameable in him, considering the poverty of the client, who sued in *formâ pauperis*, nevertheless has the effect of raising a defence against costs on the part of the appellants. In order to consider whether it was possible to overcome this objection, which at first appeared almost insuperable, it was agreed that we should postpone that only point for the consideration of the House for a few days. My noble and learned friend and I have agreed upon the subject, that we do not find that we can overcome that difficulty; and therefore, however reluctant we are, and confessing out reluctance to refuse the costs, we find that we have no other course open to us. As to the costs of the first appeal there can be no doubt, and those have been already disposed of.

Lord Chancellor.—My Lords, I entirely agree with the opinion of my noble and learned friend as to the order now to be made; at the same time expressing my [116] regret that the parties who have brought an appeal of this description to your Lordships House should escape without payment of costs. But I think it is quite clear under the circumstances that your Lordships cannot make any other order.

First appeal.—The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed, with costs, to be paid to the respondent within one calendar month.

Second appeal.—The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

Third appeal.—The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

DEANS and DUNLOP—JOHN ALISON, Solicitors.

## [117] APPEAL FROM COURT OF SESSION, SCOTLAND.

WILLIAM MACKENZIE and Others, *Appellants*.—Knight Bruce—Dr. Lushington; Mrs. JANET ORR or GORDON, Widow, and Others (16 D., B., and M., 311), *Respondents*.—Sir William Follett—M. Smith [26th March, 1839].

*Competition*.—A party lending a large sum over an estate possessed in fee simple stipulated to receive as part security, in addition to a bond and disposition in security in his favour, assignments to certain incumbrances of a prior date. The incumbrances were paid by the trustee and agent of the borrower, but it did not appear with whose money. In a question between a party holding an incumbrance intervening between the assigned incumbrances and the bond and disposition in security,—Held that the presumption was, that the prior incumbrancers were paid with the money of the assignee; and, as there was no evidence to the contrary, that (affirming the judgment of the Court of Session) the assignment conferred a preference over the intermediate incumbrancer.

Arrears due on the prior incumbrances mentioned above were, from omission, not assigned till a subsequent period, when they were separately conveyed to the same party.—Held (also affirming the judgment of the Court of Session) that the lender was not bound to compute payments of interest, previous to the assignment of the arrears on the sum lent by him towards extinction of these arrears, in diminution of his security.

The late Alexander Hume Macleod, of Harris, by a deed of settlement dated the 17th June 1811, con-[118]-veyed the estate of Harris, in which he was infeft, to his

eldest son Alexander Norman Macleod, subject to certain burdens therein specified, and, *inter alia*, of an annuity of £300 payable to his youngest son Donald Hume Macleod during his life, and in the event of his having lawful children living at the time of his death to such children, equally amongst them, during their respective lives

On the death of Mr. Macleod, in 1811, he was succeeded by Alexander Norman Macleod, who was infest on the above disposition and deed of settlement, under the burden of the provision or annuity in favour of his brother Donald Hume Macleod and his children.

On the 17th September 1812 Alexander Norman Macleod executed a heritable bond in corroboration of the annuity of £300. This deed contained warrant for infesting Donald Hume Macleod in the estate of Harris in security of the annuity, and he was duly and validly infest accordingly, conform to instrument of sasine dated the 13th November 1812.

At Whitsunday 1828, Mr Donald Hume Macleod conveyed, by a trust disposition, the above annuity and arrears thereof to the appellant and another trustee (since deceased), and the survivor of them. These trustees were duly infest on the trust disposition in the month of July 1829.

On the 3d November 1817 Alexander Norman Macleod granted a heritable security over the lands of Harris in favour of Mr. Grant of Kilgraston for £25,000, then borrowed from Mr. Grant, who was infest thereon on the 9th February 1818. After the death of Mr. Grant the bond passed into the hands of trustees appointed by his settlements, who completed their title [119] to it, and subsequently granted, in the month of November 1823, a disposition and conveyance thereof in favour of Mr. Gordon of Milrig, who was infest thereon, and the infestment duly recorded in the month of March 1824.

Besides the original security thus vested in Mr. Grant, there were in existence four different bonds and infestments affecting the estate of Harris, which had been granted by Mr. Alexander Hume Macleod in the years 1804, 1807, 1808, and 1810; and it was stipulated in the treaty for the loan of £25,000, that these securities were to be conveyed to Mr. Grant, and to be held by him as collateral securities for the £25,000 and interest. These securities were conveyed to Mr. Dallas, the trustee and agent of Mr. Macleod, by whom they were conveyed to Mr. Inglis, who succeeded him as agent and trustee, but there was no direct evidence to show with whose money they had been procured from the holders. There were also in existence certain other securities granted in favour of several members of Mr. Macleod's family, which were of a date posterior to the collateral securities thus held by Mr. Grant.

The heritable bond and disposition in security, dated 3d November 1817, as well as the interest of the trustees of Mr. Grant in the collateral securities, are now duly vested in the respondents, who are the accepting trustees under the settlement of the late Mr. Gordon of Milrig.

In a process of ranking and sale instituted by creditors, the estate of Harris was sold to the Earl of Dunmore for £60,000; but this sum proved insufficient for the payment even of the heritable debts secured over it.

[120] The appellants claimed to be ranked and preferred on the price obtained by the sale of the estate of Harris, according to the priority of their sasines; while the respondents contended that they were entitled to be ranked, in virtue of the collateral securities vested in them, according to the priority of the sasines in favour of the original creditors therein.

On the 6th December 1837 the Lord Ordinary made avizandum to the Lords of the First Division, who, on the 16th January 1838, pronounced the following interlocutor:—"The Lords having advised the competition with the claim for the trustee of Mr. Macleod, and also for the trustee of Gordon of Milrig, repel the objections stated to the interest and claim of preference for Gordon of Milrig's trustees, and rank and prefer the said trustees in terms of their claim, and decern and remit to the Lord Ordinary in the ranking to proceed farther as shall be just."

Against this interlocutor the appellants appealed.

*Appellants.*—The collateral securities founded on by the respondents, which are prior in date to the infestments founded on by the appellants, were conveyed to trustees for Alexander Norman Macleod, who was the debtor in these securities, and

they were thereby extinguished; for the same party is not capable in law of sustaining at one and the same time the characters of debtor and creditor in the same debt, or of being debtor to himself or creditor to himself, and a conveyance to a trustee for a party is in its legal effects the same thing as a conveyance to the party himself.

[121] According to the settled law of Scotland, where debts are acquired by the debtor therein, where "the same person becomes both debtor and creditor in them, and so is not only vested active with the right of the debt, but passive subjected to the payment of it," the debt or obligation is dissolved and extinguished confusione, "for no person can be debtor or creditor to himself." (Ersk. b. iii. tit. 4. sec. 23. and 27.; citing 21st Dec. 1680, Cuninghame (Dict. 3038), *Kerr v. Turnbull*, 15th Feb. 1758, Dict. 15551; *Devaynes v. Noble* (Clayton's Case), 1 Merivale Reports, 604.)

Supposing that the respondents were entitled to found upon the collateral securities in competition with the appellants, deduction ought to have been made from their amount, or credit given, to the extent of the interests which the respondents have received on the debt for £25,000, since the said securities were acquired by them, instead of their being allowed to rank for the total amount of the collateral securities, accumulating the annuities and interests from the date at which they were conveyed to them to the present time.

*Respondents.*—As the collateral securities, with the infestments thereon, have been transferred to and are now vested in the respondents, they are entitled to be ranked on the price of the estate of Harris, in preference to the appellants.

The infestments on the collateral securities have never been extinguished by confusion or discharged by deed, and they remain as preferable burdens on the estate, and as such have been validly conveyed and assigned to the respondents, who were entitled, in virtue of the personal obligation contained in their bond, to [122] apply the interest received by them in extinction of the interest accruing on the principal debt. They were not bound to apply it in extinction of the annuities or interest due on the collateral securities, which they were entitled to keep up as debts against the estate to their full extent as securities for payment of the principal sum (Johnston, 20th July 1610, Dict. 3035; Ersk. b. iii. tit. 4. sec. 24, 26, 27).

Lord Chancellor.—My Lords, this case, which was argued before your Lordships some considerable time since, involves a question which appears not to be a subject of much discussion in Scotland, but which is not of unfrequent occurrence in this country, the contest being between different incumbrances on an estate which was made the subject of a family settlement in the year 1811. It appears that the father of the author of that settlement had contracted various debts, which he had made charges upon the estate to which he was absolutely entitled. In 1811 the settlement was made, under which interests are claimed by the younger branches of the family, those parties contesting with a creditor of a subsequent date, that is, of the year 1817, for a sum of £25,000; the contest not being with respect to the instrument creating the debt of £25,000, but between the family, who claim under the settlement of 1811, and the creditor for £25,000, who, in addition to the security which he had taken from the then owner of the estate, had assigned to him the securities for a debt anterior to the year 1811, namely, four securities, one of the year 1804, another of 1810, another of 1807, and another of [123] 1808; and the question is, whether as between the parties claiming under the settlement, and the creditor for £25,000 under the instrument of 1817, that creditor for £25,000 is entitled to avail himself of the securities for the debt anterior to 1811? The author of this settlement was absolutely entitled to the estate. If he had not been absolutely entitled to the estate according to the law of Scotland and to the law of this country, there can be no doubt that on paying off the prior debts it would be competent to such a party to deal with these securities, either for his own benefit or for the purpose of conferring a prior claim on other creditors to whom he might become indebted; but the question is, whether he, being the absolute owner of the estate, under the circumstances which appear upon these proceedings, was entitled, by assigning these prior securities to the creditor of 1817, to give him a priority over those who claim under the settlement of 1811.

My Lords, if the case had simply been that the owner of the estate had paid off those debts and taken the assignment for his own benefit, then a question would have

arisen under the law of Scotland, which appears not to have been the subject of discussion in that country. I find that the Lord President and the other Judges differ in opinion as to that, and no case was cited at your Lordships' bar, or appears to have been cited below, as to what would have been the effect of an assignment under these circumstances. In this country the law would have been perfectly well known, inasmuch as it has been the subject of decision, that, as between parties claiming incumbrances on an estate, the owner of the estate being absolutely entitled [124] to it subject to charges, if he pays off the prior charges cannot set up those prior charges for his own benefit as against those who claim subsequent incumbrances upon the estate. My Lords, upon the view I take of this case, after a careful examination of all the papers and all the facts as they appeared before the Court of Session, it does not appear to me that your Lordships will be called upon to consider that question, because one proposition appears to be common to the law of both countries, namely, that if a subsequent incumbrancer advances money, and it is part of his contract that he shall have an assignment of the prior incumbrance, that then he is entitled to stand in the place of that party whose debt is paid off by the money which he advances, and whose incumbrance he procures to be assigned to himself.

One difficulty in this case is, to ascertain accurately and satisfactorily out of what funds these prior incumbrances were paid off; because it is quite clear that the four several securities became the subject of regular conveyance from party to party, without ever having come into the hands of the owner of the estate, Mr. Macleod, but having come certainly into the hands of a Mr. Dallas, who was a trustee and agent for Mr. Macleod. The title to the securities is transferred from the original creditors to other persons, then to Mr. Dallas, then to Mr. Inglis, and ultimately to Mr. Grant, through whom the parties claim the title to the £25,000. Looking, therefore, to the titles as they appear upon the record, the present claimant would appear to be entitled to these incumbrances, which we find vested in certain creditors of debts anterior to the date of the settlement; for instance, [125] one of the securities was a security of December 1810, which was a heritable bond for £1500 granted to Mr. Dallas, but not in his character of trustee for Mr. Macleod, but, upon the face of it, as trustee for a person of the name of Bowie. It appears that in 1813,—that is after the settlement, and therefore after the intervention of the now contending claim,—Dallas conveyed to Bowie, son of the party for whom he was originally trustee; that in 1815 Bowie was paid; and in 1817 Bowie conveyed again to Dallas, it then appearing upon the face of the instrument that he had been paid, and it being stated that Dallas had paid that £1500. From Dallas the security was conveyed to Inglis, from Inglis to Grant, and from Grant the present parties derive their title. I have stated the history of that incumbrance as being one of the most simple; and it is unnecessary for me to occupy your Lordships' time in tracing the others, which are, some of them, more complicated in their nature; but the same observation applies to them all,—that they are traced from hand to hand, none of them distinctly coming into the hands of Mr. Macleod.

Then, my Lords, it is said that though they never came into the hands of Mr. Macleod they came into the hands of Dallas, and that they came into the hands of Mr. Inglis, who succeeded Mr. Dallas as agent and trustee for the Macleod family; and that it is therefore the same thing, whether we trace the securities into the hands of Mr. Dallas the trustee, or into the hands of Mr. Macleod, the cestuique trust. My Lords, as I observed in the commencement, if the question turned upon that it would be necessary for your Lordships to consider how the rule of law ought to be laid down as appli-[126]-cable to these transactions in Scotland; but if, although the securities became vested in Mr. Dallas, who was in fact the trustee for Mr. Macleod, your Lordships have reason to believe, and you are satisfied, that they did not come into the hands of Dallas as trustee for Mr. Macleod, namely, as being the agent who applied the money of Mr. Macleod for the purpose of paying off those incumbrances,—but that it was part of the specific transaction that the other parties who were to advance the money should, for their better security, have that money applied in the payment off of the prior securities, and that they should have an assignment of the securities so paid off, it does not appear that there is any difference between the law of this country and of Scotland upon that subject; but that the law of either of the two countries is, that the party advancing the money would be entitled to have

the benefit of the securities paid off with that money, and of which he had obtained an assignment.

My Lords, this creates some difficulty in investigating the facts of the case, inasmuch as it is not very easy to reconcile the dates with the supposition of Mr. Grant's money, in the latter instance, and Mr. Newte's money, in the first instance, having been applied in paying off and satisfying those prior incumbrances. But in dealing with the facts upon which the evidence is not very satisfactory, your Lordships will take into your consideration on whom the burden lies of proving the fact one way or the other. I have stated to your Lordships, that according to the conveyances they are all traced from hand to hand, from those who were clearly entitled to hold them as against those interested under the settlement until they come into [127] the hands of those now claiming under the settlement. Assuming for that purpose Dallas to be a stranger, and not affected by his character of trustee of Mr. Macleod, the title therefore apparently is good, and it lies upon those who impeach that apparent title to show that those parties, some of them at least,—Dallas, for instance, was not entitled to hold these adversely to those claiming under the settlement, because he was trustee for Mr. Macleod. Now, if those who are to impeach the *prima facie* title have not satisfactorily made out a case which would justify your Lordships in considering that *prima facie* title as affected by anything appearing upon the record, the title of course will stand, because there is no case in equity to affect that legal right.

Now, in the first place, nothing can be more improbable than that which must be assumed as fact in order to suppose Dallas to have held simply as trustee for Mr. Macleod. It appears that this was a property very much incumbered; it is very evident that the owner of the estate was subsisting in fact by means of what he derived from the estate; he was not a man who had much command of money, and when it was necessary to procure money for the purpose of paying off one incumbrance he was under the necessity of applying elsewhere for a loan of money in order to do it. In short there is nothing which appears to render it probable that Mr. Macleod, the owner of the estate, had money to put into the hands of Dallas, as his agent, to pay off these incumbrances. In some cases,—in the case of the £10,000 procured in the year 1813 from Newte, out of which several prior incumbrances were paid, it is on the face of it stated that the £10,000 was applied [128] in paying off Mr. Howard's incumbrance of £2000 in part; and other advances are subject to the same observation. But then, again, if we merely look to the dates, it will not be very easy to reconcile them with the supposed history of the transaction. But of that fact there is no doubt, because it is actually recited upon the face of the deeds; and when we come to Mr. Grant, who advances £25,000, there is a great discrepancy between the dates as they appear and the supposed period at which the money must have been advanced to pay off the prior incumbrances. But there is an account stated in the papers showing the periods at which Grant advanced part of the money, and there is a memorandum which shows that although the money came under the administration of Dallas in the first instance, and of Inglis afterwards, that it was money not put into their hands as the money of Mr. Macleod, but put into their hands as money to be applied for the purpose of paying off the prior incumbrances with a view to the security of Mr. Grant, who was advancing the £25,000. It appears, for instance, that in November, 1817, £3200 was advanced, and that at subsequent periods, going through the latter end of 1817 and into January 1818, other sums were advanced, in the January of 1818 the sum of £10,000 being advanced; and there is this note:—"The loan, with deduction of the £3200 received on 3d November, was lodged with the Commercial Bank of that date, on their note payable on demand to Mr. Grant's agents and deposited with J. R. and W., with declaration of trust that the money was to be employed at our joint sight in paying off certain existing incumbrances." Now that corresponds with the statements in some of the deeds, [129] and is not met by any evidence on the other side, except that which might be derived from the different periods at which the securities appear to have been executed.

Now, that undoubtedly may to a certain degree be accounted for by the necessity of having the money at command before the prior incumbrances could be bought up; and of course those who had the prior incumbrances were not likely to part with

the legal security unless they had the money in hand which was to be the purchase money of those securities. But whatever difficulty there may be in reconciling the case, I have in vain looked for any evidence on the part of those interested under the settlement to shake that which not only is the probable state of the case, but which is actually proved to be the case in more instances than one, and which from the memorandum which I have now read appears to have been the course adopted, as naturally might be expected, namely, that the parties advancing the money put the money *in medio*, not in the possession of the debtor Mr. Macleod, but under the control of persons, and in trust till it could be applied for the purpose for which it was intended, namely, buying up the prior incumbrances, which were to be assigned to the new creditor.

My Lords, in the Court below there was a difference of opinion: the Lord President differed in opinion from the three other learned judges, and in delivering his judgment his Lordship says:—"I consider this case to be attended with great difficulty; there are questions of much nicety involved, but the inclination of my opinion is that the collateral securities were extinguished at the time the original debts contained in them were paid and the debts and securities [190] conveyed to Dallas. It is not disputed that Dallas was the mere trustee of Mr. Macleod." Now, it was not disputed that Dallas was the trustee of Mr. Macleod: he was in one sense undoubtedly acting as the trustee of Mr. Macleod, but it is quite contrary to the whole evidence in the case to assume that he was the mere trustee of Mr. Macleod in this transaction, and that money in the hands of Dallas was as if it had been in the hands of Mr. Macleod. But, however, the Lord President appears to have considered that such was the result of the evidence:—"Dallas did not advance funds of his own in paying off the debts of Mr. Macleod which were conveyed to him; these debts were paid off with money borrowed by Mr. Macleod under a new loan." His Lordship there says, that the fact was satisfactorily proved to his mind that the debts were paid off with money advanced. Now, if that were the real state of the transaction it is perfectly incredible to suppose that the party advancing the money, intending that the old securities should be bought up, should put that under the control of Mr. Macleod: the two propositions are perfectly irreconcilable with each other; and "it seems to me that matters are substantially in the same situation as if Mr. Macleod, being debtor in various heritable debts, had borrowed money, paid the debts, and been assigned to them." Undoubtedly, if he had done that, there would have been no title in the parties to stand in the situation of original creditors. But that not only is not proved, but the converse appears, as far as the evidence goes, to be satisfactorily established, and it is that which, according to the ordinary dealings between man and man, would have been the course of [131] proceeding. "But if that had been the precise shape of the transaction it is difficult for me to understand how he could thereby keep up the debts and securities against himself and his fee simple estate. I never heard of such an attempt having been made: it is quite different where there is an entailed estate."

The other learned judges differ in opinion from his Lordship, and seem to me to put it upon a ground which is much more satisfactory, much more consistent with the evidence as it appeared before the Court, and much more free from any of those violent suppositions which must be entertained if you suppose the party to have advanced the money, not taking care to have it kept safe till it was applied in buying up the securities, but putting it at once into the hands of the debtor; the effect of which would have been, that, having no security whatever for the payment off of the prior incumbrances, the £25,000 would have been advanced not only without the security of the earlier deeds, but actually subject both to the incumbrances under the settlement and the charges to the prior creditors. Mr. Grant, and those who acted for him in advancing £25,000 upon the estate although encumbered by creditors to a very great extent and by the charges of the settlement, must be supposed to have advanced that money not only without taking care to stand in the place of the original creditors, but to come third, namely, after the prior creditors and after those named in the prior settlement, inasmuch as he, whatever he might have intended, would have no security for being paid till the other parties had been paid out of the money so advanced.

Now, my Lords, that supposition appears to me [132] to be very incredible, and

to be contrary to the evidence, as far as it can be considered as proving the nature of the transactions between the parties; and it is contrary to what is proved by some of the deeds; and though there is some confusion in the evidence with respect to the dates, yet I cannot think that your Lordships would feel yourselves safe in proceeding upon an assumption which is totally different from that which appears to be the nature of the transaction in those particulars, so far as you are able to trace it. Upon the law there is no question, because, independently of that point to which I have adverted, which appears to me not to arise in this case, there is no doubt that if the money was advanced for the purpose of taking up the prior securities,—that being part of the contract,—and if the money was applied to that purpose, and those prior securities were afterwards conveyed and assigned to the parties advancing that money, there is no doubt that the original incumbrances existed, and existed for the benefit of the parties who had advanced the £25,000; and beyond question they would be entitled to preference over those who claim under the settlement.

My Lords, it is said that this is a case of great hardship upon those who claim under the settlement. That argument will not influence your Lordships in your decision upon this case, because that decision must be regulated by the principles of law. But it is not easy to see how the hardship exists: the other parties take under the prior incumbrances, which were effectual for the benefit of those who were the original creditors, namely, Mr. Howard and other persons who held the securities anterior to the date of the settlement: the [133] interests of those claiming under the settlement are not prejudiced by having the securities transferred to other persons; they come with an equal degree of priority upon the estate; whether Mr. Howard claims his debt, or whether those who now claim the benefit of that incumbrance stand in his place, their interest is the same.

My Lords, there is one other question, and only one, to which I will call your Lordships' attention, though it was one not much pressed in the argument, and does not appear to me to create any difficulty in the decision: it is with reference to the interest of those securities. The original debt of £25,000 had interest paid up to a certain time,—the date is not material; the securities were assigned; but it appears there was an omission in the assignment, and there being arrears of interest due upon those securities, it was not until a subsequent period, I think in the year 1834, that the arrears of interest were assigned upon the securities which had been the subject of a prior conveyance. One point which is made is, that the interest which had been paid upon the £25,000 ought to be applied in reduction of the interest upon the securities, and not in reduction of the interest upon the £25,000, the effect of which of course would be to increase the debt and diminish the securities; whereas it is obviously the interest of those who claim the benefit of the £25,000 to reduce the debt and increase the securities. What appears to me to be a very satisfactory answer, provided the facts were such as to make it necessary to give that answer, is, that the party receiving interest or receiving any money,—there being two accounts to either of which it may be applied, is entitled to refer it to that one for [134] which he has the least available security, and of course it would be his interest to apply it to the £25,000, and not to the reduction of the securities for that £25,000. It appears to me that there is another answer to the argument raised against the party now claiming under the £25,000, namely, that the interest was paid, and paid upon the £25,000, anterior to the period at which the securities were assigned. The interest ran upon the securities, and increased the debt secured by those instruments; it was an addition to the heritable bond; it was an additional charge upon the estate; and when they were assigned to the parties now claiming the benefit of them, it was an assignment of that which the parties to whom they were assigned, not having had the possession of, even if they had been compelled so to do, had not the means of applying in satisfaction of the interest of the £25,000. It appears to me, therefore, that they did not come into hands which could have applied them in satisfaction of the interest of the £25,000; and if they had, the party receiving that interest was undoubtedly entitled to apply it in satisfaction of that debt for which he had the least available security. My Lords, under these circumstances, though it could have been wished that the facts had been such as would have enabled your Lordships to come to a more clear and satisfactory conclusion, yet it does appear to me that there is quite sufficient evidence to lead your Lordships to the conclusion, that the decision of the majority of the learned



judges of the Court below is right and that the present interlocutor ought to be affirmed.

My Lords, there having been a division of opinion in the Court below, perhaps your Lordships will be [135] of opinion that the interlocutor should be affirmed, but with no costs.

It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor, so far as therein complained of, be and the same is hereby affirmed, without costs.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.

# [136] APPEAL FROM COURT OF SESSION, SCOTLAND.

MATTHEW MONTGOMERIE, Assignee of JOHNSTONE or CURRIE and others,  
*Appellant*.—Pemberton—Sandford; Sir JAMES BOSWELL, Baronet, *Respondent*.—Attorney General (Campbell)—Maconochie [23d April 1839].

*Practice—Jury Trial*.—In an action, in which the main question in dispute was, whether a party had intromitted with his father's effects, the Lord Ordinary found, 1st, "That further investigation is necessary;" and, 2d, "That no sufficient cause is assigned for departing from the general rule for ascertaining disputed questions of fact;" and therefore remitted the cause to the Jury Roll. On reclaiming, the Court refused the desire of the note as incompetent; *Quoad ultra*, of consent recalled the interlocutor of the Lord Ordinary *hoc statu*, in so far as it contains findings in the cause, and remitted to proceed as shall be just. An application was then made to retransmit the cause to the Ordinary Roll of the Court of Session, which was refused. On reclaiming, the interlocutor refusing was recalled, and the Court remitted to the Lord Ordinary to retransmit the cause to his Lordship's Court of Session Roll, and to order a proof by commission. The House of Lords reversed the judgment, but on the ground that the Lord Ordinary was right in directing a trial by jury, as the question was one which it was fit and proper so to try.

Question, whether an interlocutor of a Lord Ordinary directing trial by jury in an unenumerated cause can competently be submitted to review?

[137] The late Sir Alexander Boswell of Auchinleck was at the time of his death, in March 1822, indebted to Alexander Boswell, writer to the signet, in the sum of £2794 10s. 8d.

At the date of his death Sir Alexander was possessed of the entailed estate of Auchinleck and also of unentailed heritable property to a considerable extent.

Sir James Boswell, son and heir of Sir Alexander, made a proposal to the personal creditors of his deceased father, under which he offered to pay them a certain composition, on condition of his obtaining a discharge, and being thereby enabled to take up the whole succession of his father unburdened by any claim of personal debt.

In pursuance of this arrangement, Sir James paid the greater proportion of the creditors the stipulated composition, with the exception of Mr. Alexander Boswell, who refused to accept.

The appellant, Mr. Montgomerie, being a creditor of Mr. Alexander Boswell, used arrestments in the hands of Sir James Boswell of all sums due by him to the said Alexander, either personally or as representing his late father; and these arrestments were followed up by an action of multiplepinding.

It having been made a question in this action whether Sir James Boswell represented his father, a commission for recovery of written documents was granted in the course of the proceedings, and the Lord Ordinary after hearing parties pronounced the following interlocutor:—"19th December 1835.—Finds, that the question mainly

\* 14 D., B., and M., 378; *ibid.* 681; 16 S. C., D. and B., 395; *ibid.* 1086.

in dispute between the parties is the question of fact, whether or not the nominal raiser of the multiplepoinding and defender in the furth-[138]-coming, Sir James Boswell, intromitted with the unentailed property and effects of his late father Sir Alexander Boswell: finds, that Mr. Montgomerie, the real raiser, and the pursuer of the furthcoming, declines to confine himself to the evidence in support of his case already recovered under the diligence formerly granted: finds, that no sufficient ground has been stated for departing in this case from the usual course for ascertaining disputed questions of fact, and therefore remits the case to the jury roll."

Against this interlocutor Sir James Boswell presented a reclaiming note to the First Division of the Court, praying their Lordships "to recall the remit to the jury roll, and to remit to the Lord Ordinary with directions to grant a diligence to both parties, and to grant a commission for a proof, in so far as the testimony of witnesses may be offered or required by either party."

On this reclaiming note their Lordships pronounced the following interlocutor: "29th January 1836.—Recall the interlocutor of the Lord Ordinary, and remit to his Lordship to grant diligences to the parties, or to grant a commission for proof, or to proceed otherwise in the cause as to his Lordship shall seem just."

The appellant, Mr. Montgomerie, being apprehensive that this interlocutor might be held, in the circumstances, entirely to preclude his being allowed the benefit of a trial by jury in the case, presented a petition for leave to appeal as from an interlocutory judgment; and the following interlocutor was then pronounced: "10th March 1836.—The Lords having [139] advised this petition with answers thereto, and heard counsel, refuse the desire of this petition, in respect that, according to the true meaning of the interlocutor remitting the cause to the Lord Ordinary, diligence should in the first place be granted for recovering documentary evidence; and that on considering such evidence the Lord Ordinary should judge whether any farther investigation should proceed by a proof on commission or otherwise."

The case having returned to the Lord Ordinary, a fresh commission for recovery of written documents was granted; and parties having been again heard, the following interlocutor was pronounced by his Lordship: "5th December 1837.—In respect that the pursuer does not confine himself to the written evidence now in process, but demands a farther proof by witnesses, and that the defender does not maintain that the said written evidence is such as to exclude parole proof, finds that farther investigation is necessary; and finds that no sufficient cause is assigned by the defender for departing from the general rule for ascertaining disputed questions of fact, and therefore remits the case to the jury roll." \*

\* " *Note.*—The question between the parties is truly a question of fact, viz. whether or not Sir James Boswell, the defender in the action of forthcoming and the nominal raiser in the multiplepoinding, took possession of the unentailed property of his late father Sir Alexander Boswell and intromitted with his personal effects. Under the diligence originally granted, and that which has been since issued agreeably to the remit from the Court, a vast mass of papers, consisting of letters, vouchers, and accounts, has been recovered. But, on the one hand, Mr. Montgomerie, who is truly the pursuer, states that he does not confine himself to that written evidence, and proposes to fortify it by the examination of witnesses; on the other, it is not contended by Sir James Boswell that the documents are conclusive of his defence, and are such as to exclude parole proof. There being no doubt, then, that some farther investigation is necessary, the only point is, whether it shall proceed by jury trial or by proof on commission.

"In considering this point it must be kept in view, in the first place, that this is not a case in which both parties concur in resorting to a proof by commission; and secondly, that the jury trial is demanded by the pursuer, who manifestly has a legitimate interest to insist in a course of investigation peremptory in its forms and conclusive in its results, in preference to that required by the defender, which in practice admits of being indefinitely protracted, while the conclusion of it only forms the opening of a litigation on its import competent in every successive tribunal from that of the Lord Ordinary to the Court of last resort.

"In these circumstances the Lord Ordinary thinks that nothing short of a conviction that the case was absolutely unfit for the consideration of a jury would warrant

[140] Against this interlocutor Sir James Boswell again reclaimed to their Lordships of the First Division, and the following interlocutor was pronounced: "27th January 1838.—The Lords having advised this [141] reclaiming note, and heard counsel for the parties, refuse the desire thereof as incompetent, in so far as it reclaims against an order remitting the cause to the jury roll. *Quoad ultra*, of consent recall the interlocutor of the Lord Ordinary *hoc statu*, in so far as it contains findings in the cause; and remit to the Lord Ordinary to proceed as shall be just."

The case having again returned to the Lord Ordinary, the respondent, Sir James Boswell, moved that the cause should be retransmitted from the jury roll to the ordinary roll of the Court of Session. The Lord Ordinary pronounced the following interlocutor: "14th February 1838.—The Lord Ordinary, having heard parties procurators on the motion of the defender to retransmit the case to the ordinary roll on the ground that it involves matters which cannot be satisfactorily investigated by a jury, in respect that the pursuer does not confine himself to the written evidence now in process, but demands a further proof by witnesses, and that the defender does not maintain that the said written evidence is such as to exclude parole proof, finds that further investigation is [142] necessary; and finds that no sufficient cause is assigned by the defender for departing from the general rule for ascertaining disputed questions of fact by the verdict of a jury, and therefore refuses the motion." \*

him to depart from the ordinary course; and after hearing the matter argued, he remains of the opinion that there is no sufficient ground for refusing the pursuer's motion.

"In the first place, though there are now recovered and put into process on the part of the pursuer an enormous collection of papers, which from their nature might perhaps afford the materials of a very intricate accounting, that does not appear to be the true character of the inquiry. There is no question here as to the amount of the intromissions with which the pursuer is charged, and no pecuniary result, in the proper sense of the term, is sought to be inferred from these papers by the pursuer. The only point which he seeks to establish is, that the defender took possession of the unentailed estate and personal property of the late Sir Alexander Boswell. The Lord Ordinary understands, that these documents, or part of them, are to be adduced in support of that averment, and, for any thing yet seen, the use to be made of those materials may be such as to render a very limited selection of them necessary; and the combined investigation of them and of the parole evidence of the factors, managers, or other witnesses examined in relation to them may turn out to be a much more convenient and satisfactory procedure for reaching the truth than a proof by commission.

"Secondly, the demand of the pursuer is unquestionably agreeable to the general rule, sanctioned by statute, for the investigation of disputed matters of fact; and it would seem inexpedient and improper to adopt a different course in opposition to that demand, founded on what at best must be but a presumptive and hypothetical view of his case. The Lord Ordinary is not entitled to anticipate, and the pursuer cannot be called upon, at present, prospectively to open the kind of case he is to submit to the jury; and when the proper time comes for his doing so, and if it shall turn out from the statement for the pursuer that it is utterly unsuited for the consideration and determination of a jury, experience has shown that there are practically the means of obliging the pursuer to withdraw his case from that tribunal, and to adopt a course of investigation better fitted to do justice between the parties.

"On these grounds the Lord Ordinary does not conceive himself warranted in refusing the pursuer's motion for a remit to the jury roll."

\* "Note.—As by the former interlocutor of the 5th of December 1837 the Lord Ordinary did not merely remit the case to the jury roll subject to the contingency of being retransmitted, but found expressly, after an argument on the point, that it was fit for the consideration of a jury, he considered that the interlocutor might be competently brought under review,—and indeed he so expressed it,—for the very purpose of enabling the defender to take the opinion of the Court, as had been done before. But as that procedure was found incompetent, and as the question has now been again raised in the form of motion to retransmit to the ordinary roll, he sees no reason to alter his former opinion; and therefore repeats the interlocutor, *mutatis mutandis*, and the reasons given in his former note."

Against this interlocutor Sir James Boswell reclaimed to the First Division of the Court, and their Lordships pronounced the following judgment: "12th May 1838.—The Lords having considered this reclaiming note, and heard counsel for the parties, alter the interlocutor reclaimed against, and remit to the Lord Ordinary to retransmit the cause to his Lordship's Court of Session roll, and to order a proof by commission."

Against this interlocutor the appellant appealed.

The parties put in issue the general question of competency of reviewing a Lord Ordinary's interlocutor ordering a cause to be tried by jury, but the House of Lords reversed, simply on the ground that the Court were in error in considering the question between the parties not fit to be tried by jury. An analysis of the statutes bearing upon the general question, with some valuable observations, will be found at the close of the Lord Chancellor's speech.

[143] *Appellant*.—1. The interlocutor of the Lord Ordinary was incompetently altered, inasmuch as under the statutes passed with reference to jury trial in Scotland the appointment by his Lordship of a jury trial was final and conclusive.

The temporary statute 55 Geo 3, c. 42, which established trial by jury in Scotland in ordinary civil causes, was superseded by the 59 Geo. 3, c. 35, which permanently created the jury court.

By the first section of this act it was rendered imperative on the Lord Ordinary to remit certain specified cases (being all of the nature of actions of damages) to the jury court in order to be tried by a jury; by the fourth section it was declared to be discretionary to the Lord Ordinary also to remit all other cases in like manner, and by the fifteenth section it is declared incompetent to bring under review the Lord Ordinary's interlocutor making such remit.

Then followed the 6 Geo. 4, c. 120, the fifteenth section of which provides in express terms, "that where the parties differ as to facts which require to be ascertained by jury trial, the Lord Ordinary shall have it in his power either to remit the whole cause to the jury court for trial, or to send to that court a particular issue or issues, in order to have such matter of fact ascertained as he may deem necessary for deciding the cause; and the order by the Lord Ordinary, in so far as it thus remits a cause, shall be final."

The next statute bearing upon the point is the 1 Will. 4, c. 69, by which the jury court was entirely abolished as a separate tribunal: it was declared, "that the jurisdiction for trial by jury in civil causes [144] shall be united with and shall form part of the ordinary administration of justice in the Court of Session in Scotland." Since the passing of this act, in place of there being a jury court to which cases were transmitted by the Lords Ordinary, each Lord Ordinary has possessed a jury roll, to which causes appropriated to jury trial are remitted by him; he himself thereafter proceeding to mature these cases for trial in the same way in which the now abolished jury court would have done.

Where the interlocutor of the Lord Ordinary remits a case to the jury roll on the ground of its being proper for jury trial, no reclaiming note to the Inner House is competent against that interlocutor; and this being so, it is difficult to perceive how the power of review should be gained merely by directing the reclaiming note against the interlocutor of the Lord Ordinary refusing to retransmit the case to the Court of Session roll as unfit for jury trial. The refusal to retransmit is in fact, like the remit itself, a finding by the Lord Ordinary that the case must be tried by jury. The twelfth section of the 59 Geo. 3, c. 35, which appears to have given rise to some misapprehension in the Court of Session, does not apply, as the jury court has ceased to exist as a separate tribunal.

2. Supposing the Inner House had a discretionary power of review, the interlocutor was erroneously altered, inasmuch as the case was an apt and proper one for a jury trial, and not for a proof on a commission.

In order to entitle the respondent to obtain the judgment under appeal, the onus lay upon him to prove in a clear and satisfactory manner that the case was one which was not fitted for trial by jury. The [145] general rule established by the statutes, and by the practice of the Court of Session following on those statutes, unquestionably is, that all cases involving disputed matters of fact must be tried by jury; and in order to withdraw any individual case from a jury, it is necessary to substantiate good and sufficient reasons for holding that case to form an exception to the general

rule; the now settled system of the Court of Session is to send all cases involving disputed matters of fact to a jury, unless very sufficient grounds are shown for an opposite course.

This case is of a character which renders it peculiarly fitted for the cognizance of a jury, as it is one in which the whole question is substantially one of fact, and hinges upon the mere fact of intromission by the respondent with the estate and effects of the deceased Sir Alexander Boswell his father. Assuming that a question of law might arise, this forms no reason whatever why the case should not be tried by jury, for in almost every case which is tried by jury a question or questions of law are involved; and as cases are sent for trial on a general issue, there can scarcely occur one in which there is not matter of law for the direction of the judge; and if this were a reason for withdrawing cases from the cognizance of a jury, there would be scarcely a single case tried. So little has the objection now considered weighed in the practice of the Court with reference to a case of the present kind, that the very issue of vitious intromission, out of which a question of law too delicate for a jury is supposed to arise, is in use to be sent to trial as matter of ordinary course. A case is reported in which the issue runs in these identical words:—"Whether [146] subsequent to the death of the said Robert Penman the defenders or any of them vitiously intromitted with the funds and effects of the said Robert Penman?" (*Kerrs and Co. v. Penman*, 11th Jan. 1830; Murray's Jury Reports, vol. v. p. 143).

The mere amount of documents recovered under a commission in the preparation of a cause forms no sort of test whatever of the extent to which these documents will afterwards be used in the actual trial; the commission forms the mere instrument for the recovery of such documents as by possibility may be used on the trial. It is employed to recover all manner of writings, without any discrimination, in the first instance, between what is admissible and what is inadmissible evidence; and from this mass the selection is made at the trial, of what is to be given in as evidence; and in this way a very large mass of recoveries often presents the smallest possible extent of actual available documents (*Ersk. b. iii. tit. 9, sec. 49, 53, and note; Macfarlane, Practice in Jury Causes; Scott v. Lord Belhaven*, 25th May 1821; *Forbes v. Forbes*, 12th June 1823; *Bald v. Kerr*, 19th June 1837, 3 Sh. and Maclean, 1; *Sir Gibson Craig v. Sir Wm. Rae*, 5th Feb. 1822, 1 Shaw, 270, new ed.).

*Respondent.*—1. It is admitted that by the law and practice of Scotland the Court of Session has power to ascertain disputed facts by ordering a proof to be taken on commission, by remit, or *in presentia*, in all causes, with the exception of those appropriated to jury trial by special statutes; and it will be kept in view that the Court of Session possesses the powers and jurisdiction both of the Courts of Common Law and the Courts of Equity in England, besides deciding admiralty and consistorial questions, including a vast [147] variety of cases to which trial by jury cannot be beneficially applied.

By the twelfth section of 59 Geo. 3, c. 35, it was provided, "that it shall be competent for the Jury Court, when it appears to the said Court in the course of settling an issue or issues that a case turns upon matter of complicated accounts, or other matter to which trial by jury is not beneficially applicable, to remit back the whole process and productions as aforesaid with their report thereon, in order that the division, Lord Ordinary, or Judge Admiral may proceed with the same in such manner as shall appear to be most expedient for the administration of justice."

By the thirteenth section of the same statute it is expressly declared, "that nothing in this act contained shall extend to prevent the Court of Session in either of its divisions, or the Lords Ordinary (save and except in the cases concluding for damages herein-before enumerated), or the Judge Admiral, unless otherwise instructed as aforesaid by the Court of Session, to take proof on commission by a remit or *in presentia*, and thereafter disposing of the cause in the manner now practised in such cases."

These provisions shew that the Court has full discretionary power to ascertain disputed facts without resorting to a jury trial in all cases except those specially enumerated in the statute.

The twenty-eighth section of the 6 Geo. 4, c. 120, declared, that the actions there enumerated "shall be held as causes appropriated to the Jury Court, and shall for the purpose of being discussed and determined in that Court be remitted at once to that [148] Court in manner herein-after to be directed." In all other cases the Court

of Session was left in possession of full discretionary power to take proof on commission by remit, or *in presentid*, and the Jury Court was authorized as before to retransmit all causes to which trial by jury was not beneficially applicable. By the 1 Will. 4, cap. 69, trial by jury was united to the ordinary jurisdiction of the Court of Session, and under this statute the whole powers formerly possessed by the Jury Court have been transferred to and are now exercised by the Court of Session.

These statutes do not make it imperative on the Court of Session to send a cause for trial before a jury unless it happen to be one of the enumerated actions which have been expressly appropriated by the legislature to that mode of trial; and this construction of the acts of parliament has never been called in question; on the contrary, it is confirmed by numerous decisions of the Court (*Barker*, 27th Feb. 1834, 12 S. and D. 500; *Kerr*, 10th March 1837, 15 D., B., and M., 784; *Hutcheson v. Tod*, 2 S. and D. 318, affirmed 15th June 1824, 2 Shaw's Appeal Cases, 386; *Ralston v. Farquharson*, 7 S. and D. 812; *Buchanan*, 17th Dec. 1836, 15 D. and B. 286).

2. The course of proceeding adopted by the Court of Session in refusing to send this case to be tried before a jury was highly proper and expedient, because the question turns upon an investigation of numerous and complicated accounts and a great and intricate mass of documentary evidence, so that the cause is one to which trial by jury is not beneficially applicable. The terms of the statute 59 Geo. 3, c. 35, itself are a declaration by the legislature, that there are causes to which jury trial is not beneficially applicable, [149] as it has expressly recognised their existence, and given directions for disposing of them.

By the above statute the discretionary power of retransmission to the ordinary roll is still possessed by the Court of Session, and has never been limited or taken away by any of the statutes which regulate the system of jury trial in Scotland; and the respondent submits, that the present case is one which ought to be retransmitted to the ordinary roll of causes in the Court of Session under the provision of the statute now alluded to, because the question in dispute is one to which trial by jury is not beneficially applicable. If there is one case more than another to which jury trial cannot be beneficially applied, it is the case now under consideration. The enormous mass of papers which the appellant has forced into process could not be explained or made intelligible to a jury during the period of a trial; and, therefore, unnecessarily to subject the cause to this form of trial would be to inflict a serious injury upon the parties concerned, and expose the respondent to the hazard of an ill-considered, rash, and unjust judgment. If this cause be sent back to be tried by a jury, various intricate and important questions of law must be brought under the decision of the judge trying it, and among other questions which would arise, there would be one which this House in a recent case thought it necessary to remit back to the Court of Session, viz., the question of vitious intromission by a minor (*Kerr v. Bremner*, 14th July 1837, 2 Shaw and Maclean, 895).

Lord Chancellor.—My Lords, it is unnecessary [150] to state to your Lordships the course of pleadings in this cause, which are complicated; the result, however, of the proceedings in the cause is to raise a question on the part of the appellant, who contends that the respondent, Sir James Boswell, by having intromitted with the estate of Sir Alexander Boswell, has made himself liable for debts due to the appellant as a creditor of that estate. After a voluminous delivery of documents in the cause, the Lord Ordinary considered it a case to be tried by a jury, and accordingly he remitted it to the jury roll for that purpose. There had been an intermediate application to the Court of Session which came to nothing; they considered that at the time it was not proper to be remitted. The Lord Ordinary pursued the inquiry for the purpose of the production of original documents, and then the object of the party having been accomplished by that production he again remitted it to the jury roll to be tried. From that order of the Lord Ordinary the parties appealed to the Inner House, and the judges were of opinion that under the act they had no jurisdiction to interfere with the interlocutor of the Lord Ordinary; and accordingly they declined to interfere with what he had ordered.

An application was afterwards made to the Lord Ordinary for the purpose of transferring this cause from the jury roll into the Court of Session roll, the effect of which would have been, that it should proceed as a Court of Session cause, and not

proceed as a cause to be tried by a jury. The Lord Ordinary, adhering to the opinion he had before expressed, that it was a proper cause to be tried by a jury, refused that application; from which order of his refusing the application, [151] the parties again applied to the Inner House; and the Inner House thought they had jurisdiction to interfere with that order of the Lord Ordinary, and therefore they remitted it back to him with directions to have the cause transferred from the jury roll to the Court of Session roll; which was the main object of the parties who made the application interfering with the order of the Lord Ordinary, and effected the object of the parties, who wished it to be tried by a proceeding in the Court of Session and not by a jury. Against that last order the present appeal is presented.

My Lords, there were two questions discussed at your Lordships' bar: the first was, whether under the section of the act of parliament, the Court of Session had power so to deal with the order of the Lord Ordinary; that is to say, whether by the course adopted they had the power of interfering and altering the decision of the Lord Ordinary directing the cause to be tried by a jury? The second was, whether, if that jurisdiction existed, it was wisely exercised in the particular case in question? I shall call your Lordships' attention to the second point first, because, if your Lordships should agree with me in the opinion I have formed as to the nature of this cause and the proper tribunal before which it should be tried, it will not be necessary for your Lordships to come to any decision upon the first point. The question between the parties is simply this: the appellant says, you the respondent have so dealt with the estate of your father, by interfering with the personal estate and by interfering with the real estate, that you have by the law of Scotland made yourself responsible for all the debts for which your father was liable. That depends upon the fact of how far the [152] respondent has or has not interfered with his father's property.

My Lords, we have in this country a case, not frequently arising, very similar in its nature, namely, a claim made against a party charged as executor; that is, a party who has taken upon himself to interfere with the administration of the effects, and by so doing become responsible to those who have claims against the estate. It is true the law upon the subject is not the same, but the question to be tried is identically the same in both cases; both depending upon the fact how far the party sought to be charged has or has not interfered with the estate of the deceased. The consequences are very different according to the laws of the two countries, but in considering what is the proper tribunal to investigate such claim the question to be tried is very much the same. By the laws of this country, these are questions which are almost uniformly the subject of action, and the subject, therefore, of a trial and investigation before a jury: they turn entirely upon matters of fact. It is true a question of law founded upon those facts may arise, but it is absolutely necessary to ascertain the facts before the law can arise. What degree of interference, and what particular circumstances connected with that interference, will make a party liable as executor for his own acts in this country, and what interference will make a party liable in Scotland who takes upon himself to deal with the estate of his ancestor without authority so to do, will be matter of law; but, speaking of intromission, the circumstances connected with it are purely matter of fact, to be established by the evidence of those who can speak to them, or by the production of documents [153] by which it will appear what course has been adopted. There has been a large production of documents, which has been complained of on both sides. On the part of the appellant it has been complained that those who were called upon to produce documents had taken upon themselves to introduce many which were not required; but they say, you asked for all documents, and all documents you shall have. The party seeking the documents says, there have been more produced than were required; as on the part of those ordered to produce it is said, there has been an extravagant use of the power the Court gives of calling for the production of documents. Undoubtedly in point of number a great many have been produced, but for the purpose to which they may be used in investigating the facts it is very likely that very few will be required, except such documents as may prove the act of the respondent in interfering with the estate of the deceased. There is no question of accounts which can arise in the course of this cause. The mode in which particular sums have been dealt with,—whether, for instance, they have been received by a factor or an agent,—whether they have been received by that factor or agent

on account of the estate, and assuming an authority to interfere with the estate,—or whether they were received by the factor or agent as dealing with the party sought to be charged, namely, the respondent, and acting for him,—may be undoubtedly ascertained by reference to some of those documents; but the purpose for which these documents have been used, and the character in which the property has been interfered with, are undoubtedly facts to be tried between those parties.

My Lords, the judges of the Inner House appear to [154] have been impressed up to the last with a conclusive opinion that this was not a case to be tried by a jury, but that it was expedient to carry the investigation further, in order that it might be ascertained whether reference to a jury should be ultimately necessary or not. My Lords, there is a marked difference between the course the statutes prescribe to the Court of Session, in directing cases to be tried by a jury, and that which prevails in courts of equity in this country. The courts of equity in this country, except in cases where the question of *devisavit vel non* arises, exercise their own judgment first upon the matters proved, and they resort to reference to a jury only, where, from the facts brought in the course of the hearing before it, the Court feels that it cannot come to a satisfactory conclusion. Then it is in the habit of sending an issue to be tried in order that the facts may be investigated by the *vivâ voce* examination of witnesses in the presence of a jury, and the finding of the jury upon that evidence may give the Court better information upon the facts than the Court might be able to obtain by the mere production of the documents. But the acts of parliament with reference to the Courts of Scotland do not look to that course of proceeding; they enumerate certain actions in which proceedings by trial before a jury are directed without any discretion to be exercised by the Court; then in all other cases it is left to the discretion of the Court; but not to the discretion of the Court, after the Court itself has endeavoured to ascertain the facts and to decide upon them, but to a discretion to be exercised according to the nature of the case and the issue joined between the parties; that discretion being exclusively in the first instance to be exercised [155] by the Lord Ordinary, unless he feels it necessary from the difficulty of the case not to decide the case himself, but to report to the Inner House.

The first question to be considered is, what is the issue between these parties? Now, in looking through the case as stated on the one side and the other, there is no doubt that the safest way of ascertaining that, is, by referring to one or two statements to be found in the proceedings in the Court below and the mode in which these statements were made; and I think your Lordships will have no difficulty in saying that the whole question to be tried is, how far the respondent in this case has or has not intromitted, and under what circumstances he has intromitted, with the estate of the party in question?

My Lords, in the revised condescendence of Mathew Montgomerie, the appellant, there is this statement:—"Sir Alexander Boswell also left behind him moveable property and funds to a large extent. This comprehended a valuable library and household furniture, and also a right to a large sum of money, estimated at £3500, part of the fortune which came to him with Lady Boswell his wife, which was payable on the death of a Mrs. Cumming, then a very old lady." This article is denied, with the exception "that Sir Alexander Boswell was possessed of a library and household furniture, which were sold by the late Mr. Hamilton Douglas Boswell, the executor creditor of Sir Alexander. It is admitted also that Sir Alexander Boswell had a reversionary right, which was lately recovered by Mrs. Hamilton Douglas Boswell, the executrix creditor of Sir Alexander, for behoof of Sir Alexander's creditors, and which [156] amounted to about £2300 sterling. The respondent believes that the whole of Sir Alexander's personal funds and property were considerable." The fifth article of the condescendence is in these terms:—"On Sir Alexander Boswell's death the nominal pursuer Sir James Boswell, his son and apparent heir, by himself or by others on his behalf intromitted with the whole or with part of the moveable property left by his father, taking possession of and realizing the same, and paying therefrom alleged claims and debts to some extent." The answer to that is: "The statements in this article are wholly unfounded and are expressly denied."

The next allegation is in these terms:—"In regard to the unentailed heritable property of the deceased, the nominal raiser Sir John Boswell also by himself or by others in his behalf entered into possession thereof in whole or in part, and drew



the rents. In or about the month of October 1822, a deed of factory was executed by Sir James, under which the rents were collected by the factor appointed by him and accounted for to him or his agents; more particularly there were so drawn the rents of the before-mentioned lands of Willochshill, Dalgere, and Howford, over which there was no heritable burden, and to which there was no title on the part of any one, except that possessed by Sir James on his apparency." The answer to which is: "The statements here made are also untrue, and are denied."

The next allegation is, "That in the year 1824, and in or about the month of October thereof, arrangements were made between the creditors of Sir Alexander Boswell and the pursuer, or those acting for [157] his behoof, under which a dividend of 2s. per pound was paid to the personal creditors of Sir Alexander. In the scheme of division Mr. Alexander Boswell was, after having made affidavit to the debt, ranked as a creditor for the above-mentioned sum of £2794 10s. 8d., and on the 11th of January 1825 he drew the sum of £276 18s. 4d., being the dividend corresponding to the said claim;" therefore charging the present Sir James Boswell as a party in the arrangement. The answer to that is: "It is denied that any arrangement whatever as there stated was entered into between the creditors of Sir Alexander Boswell and the respondent. The respondent believes that a scheme of division of part of the personal estate of Sir Alexander Boswell was made up by Mrs. Hamilton Douglas Boswell, the executrix creditor of Sir Alexander Boswell, and in that scheme Mr. Alexander Boswell was ranked for the claims here set forth, and drew the dividend stated," but not under his authority. This, therefore, leaves no doubt as to what is the nature of the case. There is a further statement in the condescendence, thus: "In consequence of the said transaction Sir James Boswell not only acquired right to the other personal funds of Sir Alexander Boswell, mentioned in the said letter of 1828, but has actually realized the same to a considerable extent, and in particular a sum of not less than £2300." That is also denied.

My Lords, upon this view of the case it appears, therefore, that the contest between these parties might have been purely a matter of fact, namely, whether Sir James Boswell had or had not done that which these allegations charge him with having done, and [158] which he denies. The Lord Ordinary thought that a proper question for investigation before a jury. I do not find any substantial reason stated why it should not be tried before a jury: if it depends upon documents, the documents may be produced before the jury, or the fact may be proved of his having taken the management of the estate by those who will state whether they had so managed on the authority and under the direction of Sir James Boswell or under other authority; which will exempt him from the consequences of the intromission with the property of the deceased. I see no reason why those facts should not be tried by a jury in Scotland, in the same manner as a question of the same nature would be tried in a cause in this country raising that question. The reasons given by the learned judges who have given an opinion that it should not be tried by a jury appear to rest in a great degree on the supposed difficulty of bringing this case before a jury, arising, as I apprehend, from the suspicion that it is a little complicated, because there has been a great number of documents produced; documents which both parties agree were, by far the greater number of them, wholly inapplicable to the present case.

I find the Lord President says: "I think it clear that a case of this kind should not be sent *per aversionem* to a jury. It is chiefly written evidence, apparently, that will require to be considered, and in applying the law to the facts of intromission which may thereby appear I think there is no need for the intervention of a jury." Lord Gillies says: "I am not sure but that a general question, whether there has been vitious intromission or not, may not be [159] quite proper for a jury to try, but in this special case I disapprove of the general remit which has been made." Lord Mackenzie says: "I think it would be following an inexpedient course to send this case as it stands to a jury; I think it would be inconvenient for a jury to try. It would be better to allow a proof on commission in supplement of the written evidence, if this should be necessary." Lord Balgray concurred.

My Lords, it appears to me pretty obvious that if the question had been simply whether on such an issue it was proper to refer the case to a jury, the judges would not have come to the conclusion they did after hearing what can be said upon the

documents by the counsel on either side. Looking to the nature of the documents, it appears to me that it is scarcely possible that many of them should be submitted to a jury; but even if a large portion of them were to be submitted to a jury, I cannot see any reason why they should not be submitted accompanied with such observations as may be called for in order to enable the jury to come to the right conclusion on the question, whether the one party or the other is justified in the allegations they have made; namely, whether Sir James Boswell has or has not so intromitted with his father's estate?

My Lords, it is very desirable that cases which in their nature are proper to be tried by a jury, should be sent to that tribunal, not only because it would come to a much more speedy conclusion, but that it would generally come to a much more satisfactory conclusion. The parties know the issue to which the case has come, and see whether they can prove it on the one side, and [160] on the other. The Learned Judge who tries the case directs the jury, and if he mistakes there are obvious means of setting that right, instead of incurring the expense and delay which arise from proceedings in the discussion of the evidence submitted to the Court. I see nothing in the nature of the cause, no peculiar circumstances in this case which appear to deprive it of the character of causes which ought to be tried before a jury; therefore, I am of opinion the Lord Ordinary came to a right conclusion upon the form of issue joined between the parties, when he decided that a jury was the proper jurisdiction to which this case should be referred. If your Lordships concur in that opinion it will be decisive of the present case, for all your Lordships have to do is to decide between the opinion expressed by the Lord Ordinary, and the opinion expressed by the judges of the Inner Court who took into consideration the interlocutor of the Lord Ordinary.

My Lords, on the second point, therefore, or rather the first, as it was argued at your Lordships' bar, it will not be necessary to come to any decision, but at the same time I think it right to make some observations on the construction which has been put on the acts of parliament relative to trials by jury in Scotland; because this case exhibits, what one is very sorry to see, a direct contradiction in the proceedings in the very same cause. I will refer presently to the directions in the acts of parliament; but if your Lordships will permit me, I will first call your attention to the two interlocutors as they stand, and nobody can doubt, looking to the acts of parliament, that the object and intent of those who framed those acts of parliament [161] were, that your Lordships should not have to exercise the jurisdiction which you are now called upon to exercise; that the object was to make the consideration of the preliminary point of the jurisdiction by which the cause was to be tried conclusive, in order to avoid the great delay and great expense which arise upon appeals on interlocutory matters. It was seen that if, in every instance in which a question arose whether it was to be tried by a jury or heard before a division of the Court of Session, the cause were remitted in the first instance from the Lord Ordinary to the Inner House, and from the Inner House appealed to your Lordships, that course would be attended with great expense and delay; when your Lordships had decided that question, the cause would have in fact to be commenced. That is attended with an evil too obvious to the parties seeking redress to be permitted, and the statutes were anxiously framed to guard against that consequence.

My Lords, substitution of trial by jury, as your Lordships are aware, was effected by the institution of a separate court for the purpose of trying those issues. The Lord Ordinary deciding that a case was proper to be tried by a jury, the proceeding was immediately remitted to the Jury Court, and the act of parliament declared the interlocutor upon this subject to be final in certain questions, either before the Court of Session, or your Lordships' House; the act so limits the power of appeal from the Lord Ordinary. The Lord Ordinary, in the present case directing it to be sent to the jury roll, which is now substituted for the Jury Court, the Court said, we have no jurisdiction to [162] interfere; the statutes give the Lord Ordinary absolute power on that point; they therefore refused to interfere, thinking, and properly thinking, they had no jurisdiction under the acts of parliament. It being thought expedient that the matter should be well considered, whether they had any jurisdiction to interfere with the Lord Ordinary's order that the case should be sent to the jury roll for the purpose of being tried by a jury, the Lord Ordinary being applied to, refused to transfer the cause from the jury roll to the Court of Session

roll, which had no jurisdiction over it. But though that order stands as a final order by the acts of parliament, and no other judge has a right to interfere with it, there is a subsequent order of the Inner House that the cause shall be transferred to the Court of Session roll. I throw out this, because it is worthy of the consideration of those whose duty it is to come to a decision upon these acts of parliament. It is quite obvious that if that be the proper construction of the statutes, it entirely defeats the professed object of the statutes, viz., that the decision of the Lord Ordinary should be final as to whether the cause should be tried by Jury or not.

It is well known that when the trial by jury was first introduced into Scotland it met with very great opposition on the part of the bar; an opinion fast giving way since the system has come into operation. I wish I could add that it was now viewed altogether with as much favour as I think it ought to be, and that attempts were not made to get rid of the wholesome provisions of the act of parliament giving jurisdiction for the trial by jury in certain cases.

I will very shortly refer your Lordships to some [163] of the provisions of the very few acts which have been passed upon this subject, and I think your Lordships cannot doubt that the intention of the acts was not only that you should never have a question of this kind to decide, but that the order of the Lord Ordinary should be final. The act of the 55th Geo. 3, c. 42, directs, "that it shall and may be lawful for either Division of the Court of Session, in all cases that may be brought before them during the continuance of this act, wherein matters of fact are to be proved, to direct issues." The second section directs the Lord Ordinary "to report to the Division of the Court to which such Ordinary belongs, so that the said Division may determine whether such issue shall be sent to the said Court to be tried by a jury." There the Lord Ordinary had no jurisdiction; the first step was to authorize him to look to the nature of the case, and forming an opinion upon it himself, to report it to the Inner House for their final decision. That act in its fourth section provided "that it shall not be competent either by reclaiming petition or appeal to the House of Lords, to question any interlocutor granting or refusing such trial by jury;" leaving it to the Court of Session finally to decide upon the question, whether the cause should be tried by a jury or not.

The act of 59 Geo. 3, c. 35, altered this scheme in many important particulars: it directed that in certain descriptions of actions, which are enumerated, the Lord Ordinary should remit "the whole process and productions forthwith to the jury court in civil causes, which last-mentioned court is authorized and [164] required, according to rules and regulations which the said Court and the Court of Session are herein-after empowered to make, to settle an issue or issues, and to try the same by a jury, to be summoned and impannelled under the provisions now in force or herein-after enacted for that purpose."

The second section directed, that if questions of law or relevancy arose, the Lord Ordinary was to dispose of them, and then to remit the cause to the jury court; and there is this provision: "that the interlocutor of the Lord Ordinary ordering the cause to be remitted to the jury court, whether with or without reservation of the alleged question of law, shall not be subject to review by representation, petition, appeal to the House of Lords, or otherwise." That related to those actions which were enumerated.

The fourth section related to all other cases. In all other cases where matters of fact were to be proved, the Lord Ordinary was authorized to remit the whole process to the jury court and to direct the matter to be tried, the jury court being to settle the issues.

Then the sixth section gave the Court of Session a similar power to direct issues, and the fifteenth section contained this provision: "that it shall not be competent by representation, reclaiming petition, bill of advocacy, appeal to the House of Lords, or otherwise to bring under review any interlocutor by the said Divisions, Lords Ordinary, or Judge of the Admiralty ordering a trial by jury." Now, my Lords, there can be no ambiguity or doubt upon these enactments.

Then comes what has been thought to be very [165] important in the previous part of the suit. The Lord Ordinary having remitted the whole cause to the jury court to settle the issues and proceed to trial, there is this provision: "that it shall be competent and lawful for the jury court, when it appears to the said Court in the course of

settling an issue or issues, or at any time before trial, in the cases remitted to them as aforesaid, that there is a question or questions of law or relevancy which ought to be previously decided, to remit back the whole process and productions to the Division of the Court of Session, the Lord Ordinary, or Judge Admiral who remitted the same to the jury court, that the question or questions of law or relevancy may be considered and determined there." Then comes this provision in the same clause, which also is relied upon: "and it shall be competent for the jury court, when it appears to the said Court in the course of settling an issue or issues that a case turns upon matters of complicated accounts, or other matters to which trial by jury is not beneficially applicable, to remit back the whole process and productions as aforesaid with their report thereon, in order that the Division, Lord Ordinary, or Judge Admiral may proceed with the same in such manner as shall appear to be most expedient for the administration of justice." Now, this was to arise by an act of the Jury Court after the Jury Court had taken cognizance of the cause, and had proceeded to settle the issues; a proceeding equally well adapted to the then state of the law of Scotland introducing a new system: not that the judges of the Court of Session should do this, but the Jury [166] Court, who were familiar with the whole proceedings of the Court, and, therefore, much more competent in investigating the nature of the case to discover any difficulties in the particular case in hand which prevented the beneficial effect of the trial by jury. The act gave to that Court,—not to the Lord Ordinary or the Court of Session,—but the Jury Court exercising a jurisdiction under the act, a power to send it back not to the Court of Session generally, but to the Lord Ordinary or the Division of the Court of Session before whom the cause had been fully investigated as to that objection which had occurred. If this course had been to be followed this question never could have arisen.

My Lords, other acts of parliament were afterwards passed. By the 6 Geo. 4. c. 120, (the fifteenth section,) it is thus provided: "that where the parties differ about facts which require to be ascertained by jury trial the Lord Ordinary shall have power to remit the whole process to the Jury Court, or send particular issues of fact to be tried, and the Jury Court shall settle the issues." But it contains this particular enactment: "the order of the Lord Ordinary, in so far as it remits the cause, to be final." So the law stands as to any positive enactment respecting the order of the Lord Ordinary being final.

The object of the next statute was to get rid of the Jury Court as a distinct jurisdiction, and to unite it to the Court of Session; and accordingly the act of 1 Will. 4. c. 69, contains this enactment: "That from and after such union all causes and issues, which if they had occurred after the passing of this act must by law have been tried by jury in the Jury Court, shall be [167] tried by jury in the Court of Session, and such causes shall be prepared for trial by the Lords Ordinary respectively before whom such causes shall be pending." That simply unites the Jury Court with the Court of Session, and does not profess to make any alteration in the scheme provided by the prior acts of parliament as to the mode in which the trials should take place. But it seems to be presumed that, because the Jury Court no longer exists as a separate jurisdiction, the positive enactments of prior statutes which made the decision of the Lord Ordinary final no longer exist, and that this question, whether a case should or not be tried by a jury, may by a circuitous mode become matter of litigation and appeal, just as if no such act had been passed.

My Lords, I find the scheme by which this has been attempted explained in Mr. Macfarlane's treatise on jury process; he states this in the fortieth page: "As a remit with a view to trial is a most serious step in consequence of its finality, the Court have suggested that where the remit is objected to, the Lord Ordinary should report the case." He undoubtedly had power so to do, but it was at his discretion whether he should do so or not; and by a previous decision it would appear that where a party is dissatisfied with a remit to the Jury Court, his course is to move to get the case retransmitted, for the purpose of having the question of law or relevancy on which he founds disposed of. "In this way the question of law or relevancy,"—which your Lordships recollect is one of the excepted cases in the prior statutes in which it may be proper to have the opinion of the Court [168] before it is sent to the jury court,—"In this way the question of law or relevancy is brought under discussion, and by section sixty-five of the A. S., 11th July 1828, it is provided, that in all cases

of retransmission by the Jury Court to the Lord Ordinary of the Court of Session, for the purpose of determining any point of law or relevancy occurring previous to trial, the said Lord Ordinary shall report to the Inner House all such matters, and that either verbally or by cases, as to him shall seem expedient; and in case of dilatory defences the Lord Ordinary shall proceed as in the case of dilatory defences in actions before the Court of Session. In all cases, therefore, where a dilatory defence or plea of relevancy or law arises, the course is obvious by which the opinion of the Inner House can be obtained; but the difficulty still remains where expediency merely of a jury trial is questionable and no proper plea of law or relevancy has arisen. It is not to be supposed, however, that the Lord Ordinary will ever refuse, where the circumstances seem at all to require it, to give the parties an opportunity of going to the Inner House on the subject of a remit, either by reporting the case or pronouncing such findings as may be reclaimed against in the manner explained in the following section." Undoubtedly in a case which requires it, the Lord Ordinary would not perform his duty without doing that, and therefore it is not to be supposed he would take the course of declining to give the parties the opportunity of taking the opinion of such Court where the case required it. But the course adopted here makes it feasible in very case. The [169] Lord Ordinary says, this is a proper case to be tried by a jury; accordingly he sends it to the jury roll. This is not subject to appeal; it must stand therefore; the Lord Ordinary's direction that it shall be tried by a jury is not to be questioned. So the Inner House have decided in this very case; but in the very next step of the case an application is made to the Inner House to bring it back again, and that is granted; by which it must be taken to be assumed, not only that it is the matter of a reclaiming note to the Inner House, but of appeal to the House of Lords. It is an expedient, therefore, by which, if successful, the express intention of the legislature will be defeated, and the parties in all cases whose cases have been directed to be tried by a jury, will be coming continually to your Lordships' bar. I am sure your Lordships will not be disposed,—and it is not now necessary to make any further observations upon the subject,—that your Lordships will not sanction a practice which will occasion such consequences as that. If your Lordships should be asked to sanction such a practice, it will then have to be considered, whether it is necessary to make a further legislative provision, if the circumstances in the Court below should appear to render it necessary. I make these observations without feeling it necessary to advert to any opinions which the learned Judges in the Court below have expressed upon this subject, as both parties agree that this point had not been raised in the Court below, and it is therefore one entirely unaffected by the decision of this case; and if that point should arise again, I have no doubt that it will receive all the attention in the power of [170] the learned Judges. It will, however, be unnecessary for your Lordships to enter upon that if you shall agree with me that the facts of this case are such as ought to be tried by a jury.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed.

A. DOBIE—JOHN BROWNLEY, Solicitors.

#### [171]      APPEAL FROM THE COURT OF SESSION, SCOTLAND.

JAMES JOHN FRASER, Writer to the Signet, *Appellant*.—Buchanan; JAMES CARNEGIE and Others, Trustees of the late ALEXANDER STEVENS, *Respondent*.—John Stuart [25th April 1839].

[See *Stuart v. Carnegie*, 1839, Macl. and R. 192.]

*Trust—Fraud*.—A party executed a settlement in favour of certain trustees, who accepted and chose an agent to act for them: the agent in conjunction with one of the trustees, the husband of a *cestui que* trust, who was also heir at law of the truster, procured said *cestui que* trust to make up a title to part of the trust

estate passing over the trust, and thereupon to execute a disposition in his favour, on the ground that it was in security of advances for the trust. The agent thereupon took infetment, and executed a conveyance in favour of third parties: Held (affirming the decision of the Court of Session), that the agent was bound in the first instance, without awaiting the result of an accounting, to restore the estate *in integrum* against the real security created by the disposition and infetment.

The facts, as far as they relate to this appeal, are sufficiently detailed in the note by the Lord Ordinary and in the speech of the Lord Chancellor, but they will also be found at greater length in the next case.

[172] The respondents, as trustees of Mr. Stevens, brought an action of count and reckoning against the appellant for his intromission with his trust estate, in which the Lord Ordinary pronounced the following interlocutor, on the 20th January 1836:—"Sustains the action, without prejudice to any question as to the competency of the said John Stout and James Fyffe resigning their office of trustees in any other matter or discussion; and on the merits of the cause finds, that from the nature of the transaction narrated in the summons no reduction is necessary for enabling the pursuers to maintain the conclusions thereof: Finds, that the defender, being in the full knowledge of the trust deed executed by the deceased Alexander Stevens, and of the acceptance and actual operation of that trust under which he admits himself to have been the acting agent, was in *mala fide* to create or to accept of the bond and disposition in security libelled on, whereby Mrs Jean Stevens or Fyffe, by her title completed as heir at law of the said Alexander Stevens, disposed a valuable part of the trust estate to the defender in security of an assumed debt of £2500, said to be contracted by James Fyffe her husband, who, though named a trustee, was expressly excluded from all personal interest in the trust estate, and by three of the children of the said James Fyffe; suppressing altogether the said trust, and the rights and interests thereby created: Finds, that the said defender farther acted in *mala fide*, in so far as he did take infetment on the said disposition and thereafter assign the same to third parties for valuable considerations, not disclosing to such third parties the existence [173] and operation of the said trust: Finds, that whether the debt acknowledged by the bond was a just debt for money actually advanced to the parties therein mentioned or not, and whatever may be the just state of accounts between the defender and the pursuers on the said trust estate, the defender is bound in the first instance, and without waiting the adjustment of any such accounts, to restore the estate *in integrum* against the real security created by the said disposition and the infetment thereon, as now standing in the third parties his assignees.

"Note.—The Lord Ordinary is convinced that very little is necessary to be said in explanation of the above interlocutor. On the merits of the cause the only difficulty is to imagine how it should be defended at all.

"The short state of the case is this: Stevens the brother of Mrs. Fyffe executed a settlement, by which he conveyed his whole property, heritable and moveable, to the trustees named: the trust was expressly accepted. By the terms of it, there was first a liferent to the testator's widow, and then a liferent to Mrs. Fyffe, and on her death a fee to her children, who were eleven in number at the date of the disposition in security; and the *jus mariti* of Mr. Fyffe (he being bankrupt) was excluded. In this state of things, after the death of the widow and another trustee, Mr. Fyffe, being the only trustee resident in Scotland, employed the defender, as he himself says, as agent in the trust; and it is too clear that the very least of the case is, that schemes were formed for making the trust [174] estate available to Fyffe himself, or to the defender and others advancing money to him, to the prejudice of the wife's liferent and the ultimate purposes of the trust in the disposal of the reversion. Finding that this could not be done directly, the defender devised the plan of making a title in the person of Mrs Fyffe as heir at law, in which of course the trust was not mentioned. The pursuers do not complain of this, because it was in itself useful, and should have been followed by a disposition by her to the trustees; but instead of this the defender immediately took the bond and disposition in security for a debt stated simply as the personal debt of Fyffe himself and three out of his eleven children (even the wife disponent not being stated as a debtor at all), and then having taken infetment assigned

the security to certain creditors of his own, concealing the existence of the trust. How this can be attempted to be justified the Lord Ordinary cannot conceive. The defender says that he had made advances for the better aliment and for the education and outfit of the family, and that there was a power to the trustees in the trust deed to sell or uplift part of the estate for the latter purposes. But was this transaction anything like an execution of such a power? The Lord Ordinary is constrained, however unwillingly, to think that it was, on the contrary, a very deliberate proceeding for defeating the trust, and creating a security by covert contrivance which could not have been created even by the surviving trustees concurring in any direct trust act. But it was known that that could not be even attempted.

[175] "What may have been the state of the defender's advances to Mr. Fyfe or for the family does not appear to the Lord Ordinary to be very material, or indeed at all material, to the chief point involved in this action. The defender's statements on this subject are denied by the pursuers, who state, on very probable grounds derived from documents in process, that the security was truly meant to be given for money to be advanced, and which never was advanced. But supposing it were otherwise, and that the pressure of such a state of advance was the stimulus which led to the extraordinary measure adopted, would that at all justify it, or afford any answer to the demand of the trustees that matters shall be restored to the state in which they ought to have been, whatever other questions may remain?

"The Lord Ordinary had some difficulty as to the correctness of the proceeding without John Stout concurring in the action; but,

"1. There is no plea on the title, or on that as a defect in the form.

"2. The defender could not plead such a point, because his own case requires that he should say that Stout had ceased to be an acting trustee long before his resignation.

"3. The action is by a full quorum of three trustees. Mr. Fyfe is necessarily called as a defender, and the defender Mr. Fraser has by his pleadings in the record rendered it impossible to discuss any question as to the competency of Stout's resignation or the necessity of his being a party. The last plea in law refers to Mr. Fyfe alone.

[176] "If the defender reclaims the bond and disposition ought to be printed."

The appellant reclaimed to their Lordships of the Second Division, who pronounced the following interlocutor, on the 8th March 1836.—"Adhere to the interlocutor complained of; refuse the desire of the note; find additional expenses due; allow the account of expenses to be given in, and remit to the auditor to tax and report. Farther, the Lords having considered the special circumstances of this cause, they, before further answer, appoint the proceedings to be laid before the Keeper of His Majesty's Signet and the Commissioners, in order to report to the Court their opinion thereon with reference to the professional conduct of the defender, and that with their earliest convenience."

Against these interlocutors Mr. Fraser appealed.

*Appellant.*—This action, as laid, cannot be maintained, inasmuch as the documents which have been founded on as instructing a title to pursue confer no such power. The appellant is called to account at the instance of certain individuals styling themselves trustees of the late Alexander Stevens, architect in Edinburgh; whereas these persons neither were originally appointed trustees nor have they by any lawful instrument been properly assumed into the trust.

Neither can this action be maintained, inasmuch as it is altogether "a fraudulent and collusive device between the present pursuers and Fyfe with a view of defrauding the defender of large sums of money [177] *bona fide* advanced." Moreover, it is not "maintainable as laid, Fyfe never having been effectually excluded from the trust."

The Lord Ordinary has found that the action is brought by a full quorum of trustees; but, with all deference, even if a quorum have power to sue alone, which the appellant by no means admits, unless possibly after an application to and refusal by the other trustees to join in the action, it is clear that they ought to have designed themselves as a quorum in the summons, which they have not done.

By the original deed power is given to assume new trustees, "to be joined with themselves in the management of the affairs committed to their care by this deed." The warrant, therefore, which Stout and Fyfe had for nominating new trustees did not empower them to resign the trust, but, on the contrary, expressly recognizes their

continuance in office ; otherwise it would not have declared that the new trustees should be joined with the old trustees in the management. It is one thing to have a power to appoint persons to act along with other individuals, but it is another thing to have a power to appoint persons to act in place of other individuals.

Mr. James Fyffe and his wife were entitled to create an heritable burden in security of such advances ; and inasmuch as the trust deed expressly declares, that " the purchasers shall be noways concerned with the application of the price," the appellant has no concern whatsoever with the manner in which the monies so received were disposed of.

It is said that the appellant as agent, being cognizant of the trust, ought not to have made the advances, [178] and if he did so it must be at his own risk. This proposition, with great deference, is not a correct one. The appellant admits that he was agent under the trust as it then existed ; that is to say, he was the agent of Mr. James Fyffe, who gave himself out and was considered to be the only acting trustee under Stevens's settlement ; and the appellant dealt with Fyffe as a party having full power to deal with the trust estate, and upon that supposition made the advances in question.

The law of Scotland does not, like the Courts of Equity in England, recognize any incapacity in a law agent to deal with his clients ; he is as capable of buying from and selling to them as any other person ; but even the English Court of Chancery would support such a transaction as the present (*Williams v. Piggott*. 1 Jacob, 598 ; *Pitcher v. Rigby*, 9 Price, 79 ; *Montesquieu v. Sandys*, 18 Vesey, 302 ; see *Gibson v. Jeyes*, 6 Vesey, 266 ; *Wood v. Downes*, 18 Vesey, 120 ; *Sugden's V. and P. chap. xiv. sec. 2 ; Gordon v. Trotter*, 11th July 1833, 11 S. D. and B. p. 696).

Without hearing the counsel for the respondents the Lord Chancellor immediately proceeded as follows :—

Lord Chancellor :—My Lords, of all the clear cases which have ever come under my consideration this is the clearest, and admits of the least doubt ; in fact it would be scandal to the law of Scotland if it did admit of doubt. Two courts in Scotland have already decided against the appellant, and in those decisions I do most cordially concur. It has been said that the case ought to be sent to a jury, but the mere statement of the facts would in any civilized country entitle the plaintiffs below to a decree. In opposition to the inter-[179]-locutors of the Courts below it has been said, that they would injuriously affect the character of the appellant. Well, if they do, how can that be helped ? This injurious effect is the necessary consequence of those acts in which he is concerned.

The following are the circumstances of the case to which in particular, my Lords, I would direct your attention. A trust deed was executed by Mr. Stevens to provide for the support of his wife in case she should survive him, and after her death to provide for her children. This deed, after providing for certain contingencies, then proceeds in these terms :—" In the fourth place, after the decease of the said Margaret Stout my wife, and failing children of my body then existing, my said trustees, or survivors or survivor, and foresaids shall apply the free annual produce of my heritable and moveable estate to the ailment, maintenance, and support of Jean Stevens, spouse of the said James Fyffe, my sister, and the ailment and education of her children of the present or any other subsequent marriage, in such way and manner as shall appear to my said trustees best suited to the comfort and advantage of her and her children of the present or any subsequent marriage, in such way and manner " as it is hereby specially provided and declared, that the said James Fyffe during the subsistence of the marriage between him and the said Jean Stevens, or any other husband she may marry in case of the death of the said James Fyffe, shall have no concern with the rents and annual proceeds of my means and effects, heritable and moveable, in virtue of his *jus mariti*, courtesy of Scotland, or any other title whatsoever, and that the [180] same shall neither be liable to their deeds nor subjected to the legal diligence of the creditors of the said James Fyffe, or any future husband of the said Jean Stevens. In the fifth place, after the decease of the said Jean Stevens my sister, my said trustees shall convert my whole subjects and effects into cash, and divide the free proceeds thereof equally amongst the children procreate or to be procreated of the body of the said Jean Stevens of her present or any subsequent marriage, equally betwixt them share and share alike ; whom failing before majority



or marriage, my said trustees shall make over the whole residue of my means and effects to my own nearest heirs or assignees whatsoever. And it is hereby specially provided and declared, that my said trustees, and survivors or survivor of them, and foreaids, shall have full power and liberty, in the event of my leaving no children of my own body, to sell any part of my heritable subjects, or uplift any debts due to me for the purpose of fitting out any of the said Jean Stevens's children in life, putting them to apprenticeships, or such like, or laying out the same in any other way advantageous to her family; on this condition always, that the said Margaret Stout's consent be previously had thereto, and she fully and completely satisfied and secured as to her liferent of the sums so uplifted and applied in manner aforesaid."

He then empowers the trustees to sell and dispose of any part of the property. He then gives powers to the trustees, "and the survivors or the survivor of them, if they think proper, to assume any person or persons to be joined with themselves in the management of the affairs committed to their care by this deed, declaring [181] that such trustees so to be assumed shall have the same powers and privileges vested in them as are hereby vested in my said trustees before named."

Under these circumstances two trustees died: one of the surviving trustees lived in England; the other, Captain Fyfe, was living in Scotland. Unfortunately the management of the property fell to this individual, who by the trust seems to have been in some degree excluded from the management, and who does not appear to have been very fit for the office. It appears that when this management devolved on him he was labouring under difficulties, in fact that he was greatly involved in debt. In these circumstances Mr. Fraser the appellant became concerned as law agent in the arrangement of the trust affairs: so far there is no dispute. It appears that soon after this, a negotiation was commenced to sell part of the property; this failed. An endeavour was next made to raise some money on it by way of pledge or mortgage; this also failed. It appears, however, that at a subsequent period the security was executed under which the present appellant claims. By the bond executed by James Fyfe and three of the children, the appellant had the personal security of those parties, at all events, for the repayment of the advances which he had made. Not content with this, however, he takes also from Mrs. Fyfe a disposition in further security of part of the property as heiress at law to her brother, and without taking any notice of the deed of trust. This is not only important to be considered, but it goes to the substance of this case. Now, it is submitted by the appellant that that is not proved; why, it is the case that is proved, from beginning to end. Then it is said that it is no objection, because it is [182] not unusual where money has been previously advanced for the support of the family to sell a part of the estate for that purpose. That may be often done as to part, where the parties for whose behoof the advances are made have such an interest as will entitle them to dispose of a part, but it goes to the very substance of the present case that these children had only an expectancy. The provision is not for the children of Mrs. Fyfe only by her then husband, but the children she might have by any other husband. If there was an expectancy in the children, and if they had thought proper to bind their expectancy, it is unnecessary to consider what might have been the effect of such a transaction. But it turns out that the deed proceeded on a false recital, that the money was not advanced for three of the children, but for the support of the whole family. Even taking it, according to that which is stated in justification of this transaction, not to have been money advanced, as the deed itself imports, but that the money had been advanced for the support of the family generally, it would have been an advance which the trustees would not be entitled under the trust deed to dispose of the estate to repay, because the trust is only to apply the year's income as it arose for the maintenance of the family. If, therefore, this insolvent husband had advanced money, or Mr. Fraser had advanced money, for the support of the family, there would be no ground for charging on the corpus of the estate any accumulated amount of money so advanced; the trust prohibited that, and the parties, the *cestui que trusts*, would not be liable; and the importance of this false recital is obvious, for if the fact had been correctly recited according to the now representation of the appel-[183]-lant, it would have constituted no debt, and, therefore, no consideration for such a charge.

The security bears date the 1st of May 1830, and there is a letter dated the 24th of June, which I see is in the certified copy of the proceedings, and, therefore, must have

been before the Court below. Now, that letter shows the connexion between that professional person and his client:—

LETTER from Captain JAMES FYFFE to JAMES JOHN FRASER, W.S.,  
then residing in London.

Edinburgh, 24th June 1830.

"Dear Sir,—At a conference a few days previous to your leaving Edinburgh, at which were present yourself, Mrs. Fyffe, and myself, you intimated to us that on the following Monday your clerk would give Mrs. Fyffe or myself the sum then immediately required, and that I might intimate to remaining creditors that on the 20th May last you would pay them off. Confiding, therefore, as I conceived I had every right to do, in your promise so given, I gave the intimation, and Mr. Jamieson was applied to on Monday, who said he had no money then, but to call in a day or two, and he would have funds. After being repeatedly applied to, he ultimately several weeks since, declared that he had no money, and as frequently said that day after day you were to be in Edinburgh. I am, therefore, from the peculiar circumstances under which I am placed, again required to address you in the matter. You were, when you intimated as above to me, perfectly aware of the difficulties under which I labour, and which have been very considerably increased by your withhold-[184]-ing the pecuniary aid promised by you at the two distinct periods as aforesaid, even to my incarceration by one creditor, who, with others, considered that a noncompliance with a settlement on the 20th of May was mere fiction on my part towards them. I feel all this the more grievous, as you know that I have done every thing you required on my part. I am loath to attribute blame in the matter, for perhaps it may be ascribed to negligence in some other quarter; but how is it that you did not make any reply to a letter which I gave Mr. Jamieson to forward to you, which you surely must have received?"

It then goes on to state matters of debt, and then Mr. Fraser's answer, on the 29th June 1830, says: "The person who was to advance the money did not deem the security sufficient; I have not been able to get it elsewhere, but I am in daily expectation of it. I will be in Edinburgh in the course of eight days, when I hope to get matters arranged to your satisfaction." Now, taking the security, that letter, and the answer to it, I think there is no great difficulty in forming a satisfactory conclusion as to the nature of the transaction between these parties.

It is said that Mr. Fraser had no notice or might be supposed to be ignorant of Mr. Stout being a trustee; it does not appear to me to be very material, in the course ultimately adopted, whether that was so represented or not, because he did not take the security from Mr. Fyffe as trustee; if he had, there was no power in Mr. Fyffe to execute any such charge on the estate. What he pretended to take was a security from a married woman and from the three children. Now, to say that a party having a trust deed in his possession, [185] appointing two persons as trustees, is to make a title against the cestuique trusts, because he did not know that one of the trustees had accepted the trust, is absurd, and it is impossible there can be any law or any rule in Scotland which can so affect the rights of parties in Scotland or in any civilized country. The party sees on the deed who are the trustees. If he deals with one without inquiring about the other, he must necessarily be liable to all the consequences that may result from the other being a trustee. If he chooses to assume that he is dead, or that he never was known, or if he chooses to believe Captain Fyffe without inquiry, it is impossible that that circumstance can be taken in his favour. That, however, is not the nature of the transaction: the transaction is a security taken from the wife and children,—the wife who is anxious to protect her husband against his debts, and the children who derive no benefit from the money transaction between Mr. Fraser and the father. Then we have Captain Fyffe in his character of trustee abusing his trust, committing a gross breach of trust, endeavouring to deprive his wife and family of a benefit the settlor intended they should have, and we have Mr. Fraser, either for the accommodation of his client Captain Fyffe, or for his convenience, or for some consideration that might have passed between himself and Captain Fyffe, making himself a party to that transaction, and now claiming against the wife and against the cestuique trusts a title to the property which was the subject of that trust.

Having got this property, he thought the safest way was not to take it to himself, and

passing over the trustees of whom he had most distinct knowledge, he [186] makes up a title in order to extend the fraud to some third party; and therefore making up a title in Mrs. Fyffe as heiress to the settlor, he succeeds probably in representing to some third party advancing the money, that there is a clear title, and of course of the trust deed the party advancing the money had no information. However that may be, an interest is created in a third party, but the cestuique trusts, those who are attempted to be so defrauded, apply and ask for relief; and the relief they ask, so far as it is considered by the interlocutor pronounced, is, that those who have been parties to this transaction may do what is here prayed, in order to restore them to the situation in which they were previously; because it is only the second and third heads of relief to which the interlocutor pronounced applies. The first is not touched; that is left for further consideration. The first is: "That James John Fraser, defender, ought and should be decerned and ordained by the decree of the Lords of our Council and Session to exhibit and produce before our said Lords a full and particular account of his whole actings in regard to the property of the said trust estate, and to hold just count and reckoning with the pursuers as trustees foresaid for the same." That is reserved, and the interlocutor does not touch that.

The next the interlocutor does touch, and it gives the relief prayed: "The said defender ought and should be decerned and ordained by decree foresaid to reconvey, renounce, and give up the title created in his favour by the bond and disposition in security before mentioned, so far as he himself has still any interest therein, and also to free and relieve the said [187] heritable property in Charlotte Street as aforesaid of the burdens constituted over the same by means of the title fraudulently made up as before stated in the person of the said Mrs. Jean Stevens or Fyffe, by discharging and paying off the debts contracted on the faith of that title, and by getting the said heritable securities extinguished, and to make payment to the pursuers as trustees aforesaid of the rents of the property over which the said security was fraudulently created since the date of the said bond and disposition in security. And in the event of the said James John Fraser failing so to do, then and in that case the said James John Fraser and the said James Fyffe ought and should be decerned and ordained by decree foresaid jointly and severally, one or other of them, to make payment to the pursuers, as trustees foresaid, of the sum of £2500 sterling as the loss or damage which the trust estate has sustained through the title fraudulently made up as aforesaid in the person of the said Mrs. Jean Stevens of Fyffe, and the burdens thereby constituted in favour of third parties over the said heritable property, with legal interest of said sum from and since the date of said title till paid."

Now, the substance of that is this;—here has been a charge fraudulently created on this property, you have been instrumental in creating it, having been the instrument by which a fraud has been committed, you are in the first place decreed to relieve the estate from that burden; if you fail in doing that, whether there is a title existing in a third person which you cannot get rid of, or not, if you fail to restore the cestuique [188] trusts to the place in which they ought to be if the fraud had not been committed, you are decreed liable to repay the trust that loss which it sustained by the breach of trust. It is so as against Captain Fyffe the trustee and the professional person who takes a benefit from the trustee. Now, that is according to the ordinary course of proceeding in this country, and there is nothing suggested to show that that most wholesome rule of indemnifying cestuique trusts against any fraud committed by their trustees is not consistent with the law of Scotland, or that it is excepted from the act for the trial by jury. It is compensation for a breach of trust, which in the first instance is directed to be set right by a restoration of the property itself to the party; not by way of damages, but by returning that property which the law will assume to be in their hands, and whether it be money which ought to be in their hands or not, the Court will consider it in their hands, and administer it therefore subject to the provisions of the trust deed.

My Lords, the fourth head is also not touched by the interlocutor, which is, that the defender ought to be decreed to make payment to the pursuers of the expenses; that forms no part of the interlocutor. The first remains untouched; the substantial relief is as expressed in the interlocutor of the Lord Ordinary on the second and third heads. Then the interlocutor being pronounced, and this being carried into the Inner House, there was added to this interlocutor of the Lord Ordinary a reference to the

proper authorities there, to consider the conduct of Mr. Fraser in his professional character. It is quite immaterial [189] and unnecessary to consider whether that could be the subject of appeal, because I feel quite satisfied, if your Lordships by appeal have jurisdiction to entertain the merits of Mr. Fraser in his professional character, that acting for a trustee he was acting for the cestuique trusts. He had a duty to perform, not for Mr. Fyfe for whom he was acting, but for Mrs. Fyfe and the children of that family. That duty he grossly violated, and I think it was an extremely proper course to pursue, to refer it to the proper authorities to consider what course under those circumstances ought to be adopted with respect to him; therefore it is quite unnecessary to consider how far the Court should have jurisdiction. If your Lordships should be of opinion that the Court had jurisdiction, then they most properly exercised it.

Another objection in point of form was, that the present pursuers have no character in which to sue, because they are not properly constituted trustees. My Lords, the trust deed authorizes the trustees to appoint other trustees, who are to have the same power which they had themselves. Now, the argument is, that although there was a power to appoint new trustees to join with the existing trustees, there was no power in the old trustees to retire. Now, whether that be so or not, the record is thus framed: the record is by the trustees appointed, and about the validity of their appointment there can be no question. If there was no power in Mr. Stout to retire from the trust, then Mr. Stout remains a trustee with them; if, on the other hand, Mr. Stout had power to retire from the trust, then the present pursuers are the sole trustees. [190] But supposing Mr. Stout had no power, the result would have been that the present pursuers, with Mr. Stout, will constitute the trustees. The present pursuers are also the major part of the trustees and competent therefore to sue, and Mr. Stout, if a trustee at all, is a trustee out of the jurisdiction of the Court residing in England, and has so little to do with the trust that the foundation of the appellant's case is that he is no trustee at all. It would be strange indeed if that argument should prevail, but it is quite consistent with the fact of Mr. Stout being a trustee manifestly out of the jurisdiction, for the Court to entertain jurisdiction on the application of those who clearly are trustees, whether with Mr. Stout or not, is a matter immaterial for the present purpose.

My Lords, it does not appear to me that there is a shadow of doubt on the propriety of the decision which has been come to by the Court below, and it would be most lamentable if it were otherwise according to the admitted facts. I am not adverting to any doubtful facts; I am adverting to written documents, which show what the history of this transaction was. It is sufficient for your Lordships to come to a decision, that this instrument ought not to exist or to have any validity against the cestuique trusts, that is, against the wife and children of this family, and that those who were instrumental in creating this burthen on the property of the cestuique trusts should be directed to restore the property so injured by them either in specie or by compensation to the amount raised by them. That is in fact the whole case we have to adjudicate on, and if your Lordships agree with me [191] in the opinions I have submitted to your consideration, the course I propose to your Lordships will be, to affirm the interlocutor of the Court below, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed, this house, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

T. C. KER—ROBERT SCOTT, Solicitors.

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## APPEAL FROM COURT OF SESSION, SCOTLAND.

Mrs. BARBARA STUART or HERRIOT, Widow, and Others, Trustees of the late ROBERT HERRIOT, *Appellants*.—Buchanan; JAMES CARNEGIE and Others, the only acting Trustees of the late ALEXANDER STEVENS, and H. M. GIBB and Others,\* *Respondents*.—John Stuart [29th April 1839].

[See *Fraser v. Stevens's Trustees*, 1839, MacL. and R. 171.]

*Inhibition—Arrestment*.—Circumstances in which (affirming the judgment of the Court of Session) inhibitions and arrestments used against trust estates were *simpliciter* recalled.

The late Mr. Alexander Stevens, on occasion of his sister's marriage with Mr. James Fyfe, and being a party to their marriage contract, conveyed to them in conjunct fee and liferent for the husband's liferent use certain heritable subjects in the town of Ayr; and by a subsequent conveyance on the 31st March 1796, he conveyed to the same parties other heritable subjects in the town of Leith in the same terms.

Mr. Stevens, who had no family of his own, previously to his death in the year 1825, executed a trust settlement, whereby he conveyed his whole real and personal property to his wife Margaret Stout, her brother John Stout, merchant in Lancaster, James [193] Fyfe, and John Rhind, writer in Edinburgh, and the survivors or survivor of them accepting, any two to be a quorum while two are in life, to be held for the uses and purposes declared by the deed, which were, in the first place, the payment of the truster's debts; secondly, to apply the free annual proceeds of the property for behoof of his wife during her life.

After the wife's death, and on failure of children of the marriage then existing, the trustees were directed "to apply the free annual produce of my heritable and moveable estate to the aliment, maintenance, and support of Jean Stevens, spouse of the said James Fyfe, my sister, and the aliment and education of her children of the present or any subsequent marriage, in such way and manner as shall appear to my said trustees best suited to the comfort and advantage of her and her family." The legal rights of the husband in virtue of his *jus mariti* or otherwise in the rents and annual proceeds of the property were excluded.

The deed also declared, that "after the decease of the said Jean Stevens, my sister, my said trustees shall convert my whole subjects and effects into cash, and divide the free proceeds thereof equally amongst the children procreate or to be procreated of the body of the said Jean Stevens of her present or any subsequent marriage, equally betwixt them, share and share alike; whom failing before majority or marriage, my said trustees shall make over the whole residue of my means and effects to my own nearest heirs or assignees whatsoever. And it is hereby specially provided and declared, that my said trust[194]-tees, and survivors or survivor of them, and foresaids, shall have full power and liberty, in the event of my leaving no children of my own body, to sell any part of my heritable subjects or uplift any debts due to me for the purpose of fitting out any of the said Jean Stevens's children in life, putting them to apprenticeships, or such like, or laying out the same in any other way advantageous to her family; on this condition always, that the said Margaret Stout's consent be previously had thereto, and she fully and completely satisfied and secured as to her liferent of the sums so uplifted and applied in manner foresaid." The deed farther contains powers of sale generally of the heritable subjects, authority to name factors for collecting the rents, and various other powers and clauses.

Mr. Stevens died in 1825 without issue, and Mr. Rhind and Mrs. Stevens both died in 1826.

On Mr. Stevens's death, in May 1825, Mr. Stout came from England to attend the funeral, and on that occasion signed, along with Mr. Rhind and Mr. Fyfe, a minute containing a *pro formâ* acceptance of the trust by them.

Mr. Fyfe had a brother John Fyfe, a Baron of the Austrian Empire, who resided in Vienna, but was possessed of considerable property in houses situated in Edinburgh.

\* 14 D., B., and M. 670.

He died in 1826, leaving a last will and disposition and settlement, by which he named certain persons as his executors; and among other bequests made the following in favour of Mr. Fyffe:—"I hereby give, grant, bequeath, and dispo[n]e to my brother Captain James Fyffe, his wife Jane Fyffe, and chil-[195]-dren, two third parts of all my houses, shops, and tenements lying in Union Place, Picardy Place, Broughton Place, and Drummond Street."

In 1827 Mr. Fraser became agent under Mr. Stevens's trust, and continued to act until the year 1830, during the whole of which period Mr. Fyffe was the sole acting trustee under the trust; and Mr. Fraser made advances to Mr. Fyffe to the amount of £4600 besides accounts incurred for business done to the amount of near £400.

No title to the property was ever made up in the person of the trustees, and Mr. Fraser having agreed to advance certain sums to Mr. Fyffe obtained from him the absolute conveyance of a house in Charlotte Square, Edinburgh, part of the trust estate of which Mr. Stevens had died seised. The conveyance contained an acknowledgment from Mr. Fyffe of the receipt of £2500, but as this sum was not in fact paid, but was intended to pay debts of Mr. Fyffe at that time unascertained, Mr. Fraser granted to Mr. Fyffe a letter in the following terms:—"You have this day granted me a receipt for £2500, being price of house No. 1, Charlotte Square, sold to me by you as sole trustee of the late Alexander Stevens; and I oblige myself, in the event of its turning out, upon the examination of the cash account of Mr. Stevens's trust estate, that the amount of cash advances to you as trustee as aforesaid does not amount to £2500, to pay you the difference."

On the 1st May 1830 Mrs. Fyffe, under the advice of Mr. Fraser, executed in his favour, with consent of her husband, a bond and disposition in security for the sum of £2500 over the house in Charlotte Square as [196] sister and heir of the late Mr. Stevens; and the disposition bears as its consideration that the said James Fyffe and three of his children had "instantly borrowed and received from James John Fraser the sum of £2500." The personal obligation in the bond was undertaken by these four persons in addition to the heritable security granted by Mr. and Mrs. Fyffe. Mr. Fraser immediately took out from the superiors, the magistrates of Edinburgh, a precept of *clare constat* in favour of Mrs. Fyffe as heir at law of her brother, upon which infetment followed on the 23d June 1830.

In November 1830 Mr. Fraser having obtained an advance of £2500 from the late Mr. Robert Herriot, the husband of the appellant, assigned and conveyed over to him by a regular deed of assignment the sum of £2500, being a part of the debt due to him by Mr. Fyffe.

Differences having arisen between Mr. Fraser and Mr. Fyffe, and Mr. Herriot having demanded payment of the debt contained in the assignation to him, and payment having been refused, Mr. Herriot brought an action before the Court of Session for the purpose of obtaining payment, but before any progress had been made in that action he died, leaving a trust deed under which the appellants were appointed his trustees.

In these circumstances an agreement was entered into between Mr. Fraser and the appellants, by which there was the following arrangement as to the proceedings already instituted: "and it is also agreed, that the proceedings for recovery of debts due to Mr. Fraser and assigned by him to Mr. Herriot, and for which suits have been commenced, shall be carried on by [197] Mr. Fraser in the name of Mr. Herriot's trustees, he relieving them of the expenses."

In pursuance of this agreement Mr. Fraser, who had acted as the late Mr. Herriot's agent, continued to take charge of that action, and had the conduct and superintendence of the proceedings under it, though these were carried on in the name of the late Mr. Herriot's trustees.

During the dependence of this action the appellants applied for and executed against the defenders in the action the diligence of inhibition, by which they were legally prohibited from selling, alienating, or in any way disposing of any of the heritable subjects comprehended under the settlements of Mr. Stevens or Baron Fyffe to the prejudice of the appellants or of the debts sued for. They also obtained the diligence of arrestment, which was duly executed against the tenants of these

different subjects, by which the rents payable by them were legally attached till the issue of the action.

The trust deed conferred no power on the trustees of resigning, but by it an authority is given to the "trustees and the survivors or survivor of them, if they think proper, to assume any person or persons to be joined with themselves in the management of the affairs committed to their care by this deed;" and under this clause Captain Fyffe and Mr. Stout assumed, as sole trustees, Mr. James Carnegie, a clerk in the Commercial Bank, and two persons of the names of Richardson and Anderson, writers in Edinburgh, and upon them they devolved the whole trust powers, rights, and duties. They then resigned their own offices as trustees.

[198] The cause proceeded (Mr. Stout having been called by a supplementary summons), and a record being prepared and closed, the following interlocutor was pronounced by the Lord Ordinary, "20th January 1836.—The Lord Ordinary having considered the closed record, and heard parties procurators thereon, and made avizandum, finds it admitted that the pursuers, Herriot's trustees, can only maintain this action as in the right of James John Fraser, from whom they derive right by assignation, and subject to all pleas and defences competent against him: Finds, that the defender John Stout, called by the supplementary summons, having accepted of the trust under the deed of Alexander Stevens and acted therein, must be considered as having been still a trustee during the whole period within which the debt by advances of money is stated to have been contracted to the said James John Fraser: Finds, that by the terms of the trust deed, in the event which occurred, the whole 'annual produce' of the trust estate was applicable 'to the aliment, maintenance, and support of Jean Stevens, spouse of the said James Fyffe, my sister, and the aliment and education of her children of the present or any subsequent marriage, in such way and manner as shall appear to my said trustees best suited to the comfort and advantage of her and her family,' with an express exclusion of the *jus mariti* of her husband, and of all right in him or his creditors to interfere with the 'rents or annual proceeds' thereof: Finds, that in so far as advances might be made by the said James John Fraser to the extent of the rents or annual proceeds which were applied to the aliment of the [199] said Jean Stevens, or the aliment or education of her children, such advances might become just and lawful debts exigible from the said trustees, and effectual against the alimentary fund under their management in each year. But finds, that it was not competent to the trustees, or a quorum of them, except in virtue of the special power conferred on them and by a regular trust act in conformity thereto, and altogether incompetent to one trustee acting by himself, to pledge either the fee or reversion of the said trust estate or the future annual rents thereof for advances made generally on the order of the said James Fyffe, or of others of the family, in whatever manner the same might be applied, without prejudice always to the personal liability of the parties giving such orders or receiving such advances; and that no third party cognizant of the terms of the trust can be held to have made any such advances on the faith of the trust estate except to the extent above expressed: Finds, that the said trust deed contains a special power to the trustees 'to sell any part of my heritable subjects or uplift any debts due to me for the purpose of fitting out any of the said Jean Stevens's children in life, putting them to apprenticeships or such like, or laying out the same in any other way advantageous to her family,' on condition of the consent of Margaret Stout, the testator's widow, being obtained: Finds, that this power could only be exercised by a regular act of a quorum of the trustees, and to the effect and according to the precise terms so expressed. And in respect that no such act of the trustees was done or executed, and that no such sale or uplifting did take place by [200] authority of the trustees, finds it unnecessary to determine how far the power fell or subsisted after the death of Margaret Stout: Finds, that in so far as the said James John Fraser may have made advances for making up titles to the trust estate, or in the necessary management of the trust, according to the terms and qualities thereof, such advances are just debts against the trustees and the trust estate itself. Therefore finds, that in so far as this action and supplementary action conclude against James Fyffe and John Stout as trustees of Alexander Stevens, or is insisted in against the other trustees now sisted, it cannot be maintained against them, or to the effect of adjudging the trust estate, except to the extent expressed in the previous findings:

Finds, that in so far as the summons concludes against Mrs. Fyfe personally, as proprietrix of an heritable estate, for the purpose of attaching that estate, it was incumbent on the pursuer to show by some act or deed legally effectual that the said Mrs. Fyfe did bind or pledge her said separate estate for the payment of such debt: Finds, that the pursuers have not condescended on any such act or deed: and finds, that Mrs. Fyfe, as a married woman residing with her husband, cannot be made liable either in her person or in her separate estate for personal debts contracted by her husband, whether for the support of his family or for other purposes: but finds, that in so far as any advances may have been made in the management or for the preservation of the subjects belonging to Mrs. Fyfe in her own right, such advances will constitute a just debt against her and her said estate: Finds, that in so far as by the set-[201]-tlements of Baron Fyfe there was any right and interest vested in the said James Fyfe in the estate left by him, the pursuers are entitled to obtain decree in this action against the said James Fyfe for any debt or debts which shall appear to have been legally contracted by him personally, and to the effect of attaching such right or interest in the estate of the said Baron Fyfe: but finds, that in so far as the rights and interests in the estate of the said Baron Fyfe are vested in the children of the said James Fyfe, there is no competent conclusion in the summons under which any judgment can be pronounced to affect the said children, or their rights and interests in the said estate; and with these findings, before farther answer, excepting as after expressed, remits to to examine the accounts and vouchers referred to in the deed of assignation as constituting the debt now sued for, and to report whether or to what extent there was a good and subsisting debt in the person of James John Fraser comprehended in the said accounts in conformity to the principles laid down in this interlocutor, with power to him to call for all books or writings necessary for explaining the transactions to which the said accounts relate, and to call for and receive all explanations from either of the parties," etc.

To this judgment the Inner House, on disposing of a reclaiming note for the pursuers of the action, adhered on the 8th March 1836.

In the month of June following the respondents presented a summary petition, praying the Court "to recal the said inhibition, loose and discharge the said arrestments, and all other arrestments used at the [202] instance of the said trustees, in virtue of the said letters of arrestment, in the hands of the persons above named, or of any others in whose hands they may have been used to affect sums belonging to the petitioners, and that without caution or consignment; to prohibit and discharge the said trustees or their agents from troubling or molesting any of the persons in whose hands such arrestments may have been used as aforesaid, and from using any new inhibition or arrestment in virtue of said letters of inhibition and arrestment or of any other upon the dependence of said action; to grant warrant to the keeper of the register of inhibitions to mark the recal of the said inhibition in the record of inhibitions; to find the said Mrs. Barbara Stuart or Herriot liable in the expenses of this application, proceedings to follow hereon, and of such other expense as may be necessary to get the incumbrance and nexus on the petitioners' property and funds by said inhibition and arrestments completely removed, reserving to the petitioners any claim of damages they may have against the said trustees on account of the said diligence; or to do otherwise in the premises as to your Lordships shall seem proper."

A joint petition to the same effect was presented by the respondent Mr. Gibb, who was a creditor in respect of a bond of £1954, and six of the children of Captain Fyfe, who had regularly assigned their interest to Mr. Gibb.

These petitions also prayed for an order of service both on the appellants and on Mr. Fraser, as being the original creditor in the debts, and the party truly [203] interested in the subsistence of the diligence; and accordingly the Court, on the 23d June 1836, made the following order:—"The Lords grant warrant for serving this petition on the persons within named and designed, and allow them to give in answers thereto within eight days after service."

At the time when these petitions were presented Mr. Fraser was absent in London on business, and a note was put in to the Court in the name of Mr. Herriot as acting



trustee and factor for the other appellants, stating the circumstances and craving time for giving in the answers.

When the case was advised by the Court, no answers had been put in for the appellants or for Mr. Fraser, and no appearance was made for the latter. In that situation the Court, on the 7th July 1836, pronounced the following *ex parte* judgment upon the petition for the respondents Carnegie and others:—"The Lords having considered this petition, with the note for Mrs. Barbara Stuart or Herriot, and other proceedings, and heard counsel thereon, recal the inhibition within mentioned so far as regards Captain James Fyfe as a trustee; loose and discharge the arrestments also within mentioned, and all other arrestments used at the instance of the said trustees, in virtue of the said letters of arrestment, in the hands of the persons within named, or of any others in whose hands they may have been used to affect any sums belonging to the petitioners, and that without caution or consignment; prohibit and discharge the said trustees or their agents from troubling or molesting any of the persons in whose hands such arrestments may have been used, and [204] from using any new inhibition or arrestment in virtue of the said letters of inhibition or arrestment, or of any other upon the dependence of said action; grant warrant to the keeper of the register of inhibitions to mark the recal of the said inhibition on the record of inhibitions: Find the said Mrs. Barbara Stuart or Herriot liable in the expense of this application and the proceedings following thereon, and in such other expense as may be necessary to get the incumbrances and nexus on the petitioners property and funds by said inhibition and arrestments completely removed; allow an account thereof to be given in, and remit the same when lodged to the auditor to tax and report; reserving to the said Mrs. Barbara Stuart or Herriot all claims for relief against James John Fraser, writer to the signet, as accords." On the same day the Court pronounced the following *ex parte* judgment on the petition for Gibb and others:—"The Lords, having considered this petition and the note for Mrs. Barbara Herriot, loose and discharge the arrestments within mentioned, and all other arrestments used at the instance of the said trustees, in virtue of the said letters of arrestments, in the hands of the persons within named, or of any other in whose hands they may have been used to affect sums belonging to the petitioners, and that without caution or consignment; prohibit and discharge the said trustees or their agents from troubling or molesting any of the persons in whose hands such arrestments may have been used, and from using any new arrestment by virtue of the said letters of arrestments or of any other upon the dependence of said action against [205] the petitioners: Find the said Mrs. Barbara Stuart or Herriot liable in the expense of this application and proceedings following thereon, and of such other expense as may be necessary to get the incumbrance and nexus on the petitioners property and funds by said arrestments completely removed; allow an account thereof to be given in, and remit the same when lodged to the auditor to tax and report; reserving to the said Mrs. Barbara Stuart or Herriot any claim for relief against James John Fraser, W.S., as accords."

Against these judgments the appellants appealed.

*Appellants.*—1. The judgments under review having been pronounced *ex parte*, and in absence of the appellants and of Mr. Fraser, they are therefore entitled to have them set aside.

It was impossible for Mr. Fraser to have his answers lodged within the time, while any extension of the time, though specially required by the appellants, was not granted, and the judgments under review were taken by the respondents at their own risk. They are, in every view, judgments in absence of the party having the real interest, and cited as such; and this absence, or the *ex parte* character of the judgments, was wholly occasioned by the fault of the respondents or their agents in pressing and precipitating the order for answers in Edinburgh within so limited a time (*Ersk. tit. i. sec. 69*).

2. The respondents Carnegie and others not being legally appointed trustees by the trustor, or in virtue of [206] powers derived from him or contained in the trust deed, have no legal title to assume the office or powers of trustees, or to act in any matter as such, or to sue or insist in that character in any suit, action, or proceedings at law whatever.

The trust deed contains a power to the trustees named of assuming other trustees

to act with them in the management, and so it makes provision for the case of the trustees named not all accepting, or, where they do accept, of their numbers being diminished by death; but the trustees to be thus assumed were not to come in place of those named by the testator or to supersede or set aside their nomination, and far less was it contemplated that the trustees making the assumption were to withdraw themselves from all farther charge and from all past responsibility, and to surrender the whole trust management into new hands; and no power is given to resign, and much less to make an entire devolution on strangers.

But even if it were true that the respondents had a good title, they have failed to show any legal, just, or relevant ground for the interference of the Court, in summarily recalling the legal diligence used by the appellants as creditors for the recovery or security of their debt.

According to the authorities inhibition or arrestment in security can only be recalled where the diligence is used oppressively, or where it is a superfluous and vexatious precaution; and the instances to which reference is made are, in the first place, where the diligence is resorted to when the debtor is in good credit and his means remain unimpaired; and, secondly, where the creditor is already secured by prior diligence, by [207] some lien over property or effects accessible to him, or by good and sufficient caution. Where the debt sued for is plainly, on the showing of the creditor himself, fictitious or groundless, or exposed to objections instantly verified, the Court will and ought to take into view the character of the claim in judging of the question as to the recal or modification of the diligence. But the Court have seldom or never recalled the diligence without caution or consignment, and the more common course is to restrict the sum for which caution is required, and only to recal on condition of such caution being found (Bell's Principles of the Law of Scotland, p. 668, 669. 671, 672. 680; Duncan, 22d January 1822, 1 Shaw's Rep. 257; Todd, 21st November 1823, 2 Shaw's Rep. 513; Jeffrey, 11th March 1824, 2 Shaw's Rep. 797; Herbertson, 19th February 1830, 8 Shaw's Rep. 564.; *Rose v. Macleay*, 4 Shaw's Rep. 812; affirmed on appeal, 2 Shaw and Maclean, 958).

*Respondents.*—The judgments appealed from were substantially pronounced with the consent of the appellants, who have judicially waived all opposition to the petitions the prayers of which were granted by these judgments; and in as far as the diligences recalled by the interlocutors appealed from had been used against the trust estate of Mr. Stevens, they were rightly and justly recalled, because they were radically void and inept, inasmuch as they were not directed against the proper party, but only against one trustee; while it was found by the final judgment in the action that there was an existing quorum of accepting and acting trustees, who alone were entitled to represent and bind the trust estate.

To establish the validity of such diligence it must [208] be directed against the proper debtor. In the present case part of the subjects against which the diligence was executed consisted of the trust estate of Mr. Stevens, vested in his trustees for the purposes of the trust; and the diligence could be legally used only by a person who had become a creditor of the trust estate; and no person could be such a creditor except in respect of a debt contracted by persons entitled to bind the trust estate, that is, by the trustees acting in terms of the trust settlement.

In order to make the debts said to have been contracted by Mr. Fyffe as a trustee good claims upon the trust property, it was necessary that Mr. Fyffe should have had power to burden and bind that estate. Whatever may be the effect of deeds done or debts contracted by a whole body of trustees, or by a majority or a quorum of that body, no single trustee is entitled to usurp these powers, unless the settlement which constitutes the trust were to contain a provision that every one of the trustees should have all the powers of the whole body. Unless all the powers of Mr. Stevens's trustees had either been given to Mr. Fyffe by the trust deed, or had come to be vested in him by the death or refusal to accept of all the other trustees, he could no more bind and dispose of the estate as a single trustee than as an individual not a trustee; and those who deal with a person professedly acting as a trustee, are bound to satisfy themselves as to his powers, and that he is acting within them.

As the summons which is the foundation of the diligence was exclusively directed against Mr. Fyffe as the sole accepting and acting trustee, it was only [209] as against him that inhibition and arrestment could be used.

The arrestments recalled by the interlocutors, having been used to attach the

rents of Baron Fyffe's property, were rightly and justly recalled, because the respondents, who were owners of that property, not only were not debtors to the appellants, but were not said to be debtors, and the action on the dependence of which the arrestments were used was neither directed against them nor contained any conclusion against them.

Arrestment of the rents of this property could be used only on debts due by the proprietors, and no arrestment at the instance of a creditor of one of the proprietors could be valid to attach any thing more than the share of the rents belonging to that one. But not one of the children, neither the respondents nor any of their brothers and sisters, were so much as named as defenders in the summons, which proceeded exclusively against Mr. and Mrs. Fyffe, for whose debts, if they had contracted such debts, the children were not responsible, and their property could not be attached; neither was there any conclusion for payment against any of the children, simply because the appellants could not aver that any one of them had contracted a debt; and even the summons was not executed against any of the children, nor were they called as defenders in the action. Accordingly, the final judgment in the cause has found that, "in so far as the rights and interests in the estate of the said Baron Fyffe are vested in the children of the said James Fyffe, there is no competent conclusion in the summons under which any judgment can be pro-[210]-nounced to affect the said children, or their rights and interests in the said estate."

As Mr. and Mrs. Fyffe and six of the children had conveyed their shares of Baron Fyffe's property to the respondent Mr. Gibb as a heritable security for money advanced by him to them, and that security was granted and completed by a recorded infestment before the arrestments at the instance of the appellants were used, these arrestments were of no effect as in a question with him, and therefore were rightly and justly recalled at his instance by the interlocutor under appeal.

Under these circumstances the respondents submit that the judgments appealed from ought to be affirmed, because, as the inhibition and arrestments thereby recalled had been used on the dependence of an action to constitute certain alleged claims as debts against the trust estate of Mr. Stevens, and the shares of Baron Fyffe's property belonging to Mr. Fyffe's children, and it was found and decided that these claims did not form good debts against the one property or the other, the diligences themselves necessarily fell to be discharged (Bell, ii. 151).

Lord Chancellor.—My Lords, this case, which is very much connected with that upon which your Lordships gave judgment last week, was heard before that case, but I thought it expedient to postpone the consideration of the judgment in this case until that had been disposed of. My Lords, I think the result has [211] proved that to be a good arrangement, inasmuch as the decision to which your Lordships came in that case will no doubt weigh very much upon your minds in the present.

This was an appeal against an order "recalling the inhibition as far as regarded Captain James Fyffe as a trustee, discharging the arrestment mentioned, and all other arrestments used at the instance of the trustees by virtue of the said letters of arrestment in the hands of the person therein named." But then it reserved to Mrs. Barbara Stuart or Herriot all claims of relief against James John Fraser, writer to the signet, and so on. The result of this was, that after an interlocutor declaring the rights of the parties in this suit of intromission, the attachments which had been obtained pending the suit on the application of the parties against whom they were obtained were discharged in the manner stated in the interlocutor. The nature of the suit was a claim on behalf of those who claimed originally through Mr. Fraser as the party actually pursuing, but claiming through him in respect of a trust estate which had been given by Mr. Stevens in trust for the separate use of the wife, and after her death to the children, excluding the husband. By that trust deed the husband was made a trustee with several other persons; it also affected certain estates which had descended from Baron Fyffe, which he gave to his brother James Fyffe and his wife and their children in equal portions. My Lords, it has been argued that that gave an estate to James Fyffe which he had power to dispose of. I apprehend it is quite immaterial for the present purpose that your Lordships should consider that question, inasmuch as it is a point not made [212] by the pursuers here; and it is a question not only not made by the pursuers, but the inter-

locutor as it stands assumes that the children had an immediate interest in that property. The summons states the title of the parties in these words:—"That Baron Fyffe died, and the said James Fyffe, Mrs. Jean Stevens or Fyffe, and their children on that event by virtue of the said last-mentioned will or deed of settlement succeeded to the two third parts or shares of the different properties." And in the interlocutor which is appealed from, and which declares the rights of the parties to the suit which is the subject of the present appeal, the interlocutor of the Lord Ordinary, which is affirmed on reclaiming to the Inner House, states, "that so far as the rights and interests in the estate of Baron Fyffe are vested in the children of James Fyffe, there is no competent conclusion in the summons under which any judgment can be pronounced to affect the said children, or their rights or interests in the said estate." The children were in fact not made parties to that suit.

My Lords, the law of Scotland as relating to this subject is, I believe, very accurately stated in the case of the appellants. I have referred to the authorities there cited, and I see no reason to doubt the accuracy of it; and taking the law as there laid down, I think your Lordships will have very little difficulty in applying it to the present case. It is stated in the eighth page of their case:—"But arrestments or inhibitions in security, or in other words used for securing debts, either future or contingent, according to their own nature, or, like the debt in the present instance, actually claimed to be due but not yet constituted [213] by decree, the diligences are liable to be abused, and creditors are occasionally found employing them for the purposes of vexation or oppression. In these cases the Court of Session, in the exercise of their equitable powers, are authorized to grant a remedy by either recalling the diligence *in toto* or on caution to a limited extent. But in all applications of that nature by the debtor, it lies upon him to make out a case of vexation or oppression, and to show sufficient cause for the interference of the Court, as the recall or modification of diligence is an extraordinary exercise of power, to be applied only in cases of excess or abuse of legal remedies (Bell's Principles of the Law of Scotland, p. 680). Thus it is also observed by Professor Bell that arrestment in security may be recalled without caution or loosed on caution in the following cases: first, where arrestment in security is used oppressively, and even where used nimiously (i.e. where it is a superfluous and vexatious precaution), the Lord Ordinary on the bills seems entitled to recall it, or restrict it, or grant warrant for loosing without caution, as in a future or contingent debt, where there is no change in the debtor's credit, or where the creditor is already secured by diligence, caution, etc., and there is no ground to suspect the security: second, loosing on caution when the time of payment has not arrived or the debt is not yet constituted, or when it is under suspension; the arrestment may be loosed on caution, and the arrestee authorized to deliver up the subject or pay the debt. This is done on a bill for loosing the arrestment in the Court of Session, on an application to the Judge [214] by whose warrant the arrestment has been used. The proceeding is either, first, for a special loosing of some particular arrestment, or second, for a general loosing of all arrestments used or to be used by the creditor (Bell's Principles of the Law of Scotland, pp. 671, 672). In like manner as to inhibition the same author observes, that inhibition may be recalled, if injurious or oppressive, where the debt is future, contingent, or not yet constituted; not where the debt is due" (Ibid. p. 680).

Now, my Lords, assuming that to be a correct representation of the law of Scotland, it is only necessary to call your Lordships' attention to the facts of the case, and to see whether this is not a case in which the Court was bound to recall these attachments. My Lords, the claim, as I have stated, was made by the party pursuing, claiming in the right of Fraser, upon the inhibition and arrestment having issued. No application was made to get rid of them until the interlocutor to a certain extent had adjudicated upon the rights of the parties. When that interlocutor had been pronounced application was made to get rid of these proceedings. The only party in the cause, (Fraser having parted with his interest) was Mrs. Stuart, claiming in the right of Fraser, and therefore of course affected by all the equities which might affect Fraser.

The first objection to this order was, that there was not a proper service; that Fraser himself, being no party to the record, was at the time in England, and there

was no regular service of the order; that, though regular in point of form, in substance it was no notice to Fraser. Now, what was the proceeding which was [215] adopted by the parties pursuing, against whom the application was made? They certainly applied in the first instance for time to communicate with Fraser; then this representation was made to the Court:—"The respondent begs farther to state, that, although in consequence of the arrangement which her son made with Mr. Fraser, she is not yet perhaps in a situation to prevent the latter from using her name, if he thinks proper, in answering this petition, notwithstanding steps which she is adopting in order to get rid of the predicament of allowing her name to continue to be used in this manner. She herself has no intention to trouble the Court with opposition to the petition upon its merits if Mr. Fraser shall not so oppose it in her name; she presumes that in that event petitioners would not demand expenses from her." Though the parties were to go on in the name of Fraser, she forbids their going on in her name; but he was the only party with whom the other parties could deal, and the only party with whom they were contending upon the record. In point of fact, she does not make any resistance to the order so obtained.

My Lords, with respect to the merits of the case; first of all, as to Stevens's estate. Here is a trust under which, by some strange arrangement, the husband, against whom a provision was made, was constituted a trustee for the wife, the property being settled on the wife and children to the exclusion of the husband. The husband, in his character of trustee, to a certain degree deals with this property. That is decided by the interlocutor which is appealed from to be improper,—that there was no right of dealing with the rents of [216] this estate, which were to be applied yearly to the aliment of the wife and family. There was a power in the trustees, in an event which never took place, of raising money; but that power not only never was exercised, but never could be exercised so as to interfere with the property. There, therefore, in regard to that estate was nothing which could be constituted a debt except the year's rent. In the summons there is no other claim; but the interlocutor of the Lord Ordinary opens a door to the possibility of a further claim, namely, that by possibility there may have been expenses incident to the trust, that is, in executing the trust to which Captain Fyfe as trustee may have a claim against the estate. There is no such statement in the summons. It is a possibility, according to the interlocutor of the Lord Ordinary, which might affect the rights of the parties; and if such a claim did arise, it might affect the *corpus* of the estate. Now, first of all, there is an extreme improbability of the parties making out a claim which they never thought of suggesting upon the record, but still the interlocutor leaves it open to them, if they care to make it out.

With regard to the estate of Baron Fyfe, the interlocutor, without referring at all to the will under which the question must arise, states that *quoad* the interests of the children, they, not being parties to the proceeding, could not possibly be affected by the proceedings which took place between the parties. The claim of Fraser is through James Fyfe acting as trustee for Baron Fyfe's estate; there was no trust, so far as James Fyfe might be a debtor to Fraser. No doubt, any interest he might have in the estate might be subject to the proceedings; but as far as the wife and children [217] are concerned, which is affirmed in the interlocutor, and is assumed indeed by the language of the summons itself, they cannot be affected by any proceedings which have taken place in this cause.

My Lords, under these circumstances the interlocutor which has been adhered to in the Inner House has declared, that *quoad* the trust estate there was no right in Fraser beyond a possibility, which does not touch the present question; for there is no question as to the current year's rent; the proceeding is in respect of future years' rent; and as to the interest of the wife and children in Baron Fyfe's estate, there is no question which can arise as to any right existing in Fraser claiming through James Fyfe to so much as may belong to James Fyfe himself. Under these circumstances, there being nothing against the trust estate but this possibility of a claim—so little likely to succeed as not to be included in the summons, the whole of the trust property and the whole of Baron Fyfe's property are subjected to this process of attachment upon the application of the parties who were appellants. According to the authorities referred to by the appellants themselves the court thought proper to

recall this attachment, and, if there were nothing else, it would be quite clear that the Court made a proper adjudication of the rights as far as the interlocutor goes. Under the adjudication of those rights there is very little which by possibility can remain to the pursuer to recover in that case. If no more were shewn, I should have thought the Court had exercised a sound discretion in recalling the attachment in respect of this property. But, my Lords, there are other circumstances in the case to which I have not alluded, [218] but which are perfectly conclusive. This all proceeds upon the ground that Fraser is a creditor upon the trust estate; your Lordships have had before you an interlocutor of the Court of Session which makes him a debtor of £2500 upon the same estate. In the case which stood immediately after the one now under consideration, there is the judgment of the Court of Session in favour of that demand against Fraser, and your Lordships have affirmed that interlocutor. The demand therefore is finally established, and instead of being a creditor he is proved to be a debtor to the estate. That fact is quite conclusive in this case; the parties who appear here as respondents come here not only to protect their interest against the demand of Fraser but to establish a claim against Fraser. It is unnecessary to go further into the case, because when you find, independently of the merits of the case as established upon this record, the party claiming the benefit of these proceedings by his appeal is by the judgment of your Lordships' House proved to be a debtor instead of a creditor, there must be an end of any debt which would entitle him to be paid out of this supposed security which is the subject of the proceedings now under discussion. There are now, therefore, additional reasons beyond those which appeared to the Court of Session for this interlocutor, and I cannot help saying that in my opinion there never was a case which has come before your Lordships in which it was more clearly shewn that the interlocutor of the Court of Session ought to be affirmed, and affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this [219] House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant, the said James John Fraser, do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal since he so sisted himself as appellant as aforesaid, the amount of such costs to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

THOMAS C. KERR—ROBERT SCOTT, Solicitors.

## [220] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

THE PRESBYTERY OF AUCHTERARDER, *Appellants*.—Sir F. Pollock—Pemberton—R. Bell; The EARL OF KINNOULL and the Rev. ROBERT YOUNG, *Respondents*.—Attorney General (Campbell)—Knight Bruce—Whigham\* [3d May 1839].

[See 3 St. Tr. N.S. 1298. S.C. 6 Cl. and F. 646, 7 Scots R.R. 154, and, in Court below, 16 Dunlop, 661, and Robertson's Report of the Auchterarder Case (1838). See also *Ferguson v. Kinnoull (Earl of)*, 9 Cl. and F. 251. See also the Church Patronage (Scotland) Act, 1874.]

*Patronage—Church—Jurisdiction—Acquiescence*.—A patron granted a presentation to a vacant church and parish in favour of a presentee, who accepted of it; the presbytery of the bounds found that they must proceed to fill up the vacancy, in terms of an act of the general assembly 31st May 1834, entitled "Overture and Interim Act on Calls," and the relative act of assembly, 2d

\* Rep. 16 D.B.M. 661, and see "Report of Auchterarder Cause," by Charles Robertson, Esq., Advocate, 2 vols. Edinburgh, 1838.

June 1834, entitled "Overture with Regulations for carrying the above Act into effect," in which sentence the patron acquiesced; the presbytery further "did, in pursuance of the first regulation of the act of assembly anent calls, in so far sustain the presentation as to find themselves prepared to appoint a day for moderating in a call to the presentee;" the call was signed by three individuals; no special objections were stated against the presentee, but a veto or dissent was lodged by a large majority of the male heads of families, members of the congregation, and in full communion with the church. The patron and presentee took appeals to the superior church courts against the admission of those dissents; but, on the ground exclusively that the provisions of the acts of assembly had not been adhered to, these appeals [221] were dismissed. The presbytery thereafter, without taking the presentee on trials as to his life, doctrine, or literature, etc., did, in respect of that dissent or disapproval, and in conformity with the above acts of assembly, "reject the presentee, so far as regarded the particular presentation on their table, and the occasion of that vacancy in the parish." The patron and presentee then raised a declarator against the presbytery, concluding, *inter alia*, that the presentee had been validly and effectually presented to the church and parish; that the presbytery were and are bound to make trial of his qualifications, and, if they found him qualified, were bound to receive and admit him as minister of the church and parish; and that their rejection of the presentee was illegal, and contrary to the laws and statutes libelled. The presbytery admitted the validity of the presentation, but, as to the other conclusions above recited, they declined the jurisdiction of the Civil Court as incompetent to determine as against them, their duty as a Church Court being in a matter ecclesiastical; but, under reservation of that objection, they pleaded in defence that their whole proceedings were, on the merits, unchallengeable:—Held (affirming the decision of the Court of Session) that the objection to the jurisdiction of the Court ought to be repelled; that the pursuer, the presentee, was validly and effectually presented to the church and parish; that the presbytery did and do refuse to take trial of his qualifications, and had rejected him as presentee, on the sole ground that a majority of the male heads of families, communicants in the said parish, had dissented, without any reason assigned, from his admission as minister; that the presbytery in so doing acted to the hurt and prejudice of the pursuers, illegally and in violation of their duty, and contrary to the provisions of the statutes libelled, particularly 10 Anne, c. 12, intituled "An Act to restore patrons to their ancient rights of presenting ministers to the churches vacant in that part of Great Britain called Scotland;" and that the defences of the presbytery should be in so far repelled.

[222] At a meeting of the general assembly of the kirk of Scotland, held on 31st May 1834, it was declared and enacted, among other things, "that it shall be an instruction to presbyteries, that if, at the moderating in a call to a vacant pastoral charge, the major part of the male heads of families, members of the vacant congregation and in full communion with the church, shall disapprove of the person in whose favour the call is proposed to be moderated in, such disapproval shall be deemed sufficient ground for the presbytery rejecting such person, and that he shall be rejected accordingly, and due notice thereof forthwith given to all concerned." Regulations were framed at a meeting of assembly on 2d June 1834, and transmitted as an interim act to presbyteries for their approval.

The church and parish of Auchterarder became vacant by the death of the Rev. Charles Stewart, on 31st August 1834.

Upon the 16th September 1834 the Earl of Kinnoull, the undoubted patron of the said church and parish, granted a presentation in favour of the Rev. Robert Young, a duly qualified licentiate of the church of Scotland.

At a meeting of the presbytery of Auchterarder, held at Trinity Gask on the 14th of October 1834, Mr. Robert Hope Moncrieff, writer in Perth, on the part of the Earl of Kinnoull, laid on the table of the presbytery the said presentation, duly executed, his lordship in the usual form thereby nominating and appointing Mr.

Young to be minister of the said church and parish, and requiring the reverend the moderator and presbytery of Auchterarder to take trial of the qualification, literature, good life, and conversation of the said [223] Robert Young; and after having found him fit and qualified for the functions of the ministry in the church and parish of Auchterarder, to admit and receive him thereto, by ordaining and admitting him in due and competent form accordingly, all conform to the deed of presentation itself.

There were produced to the presbytery by the said Robert Hope Moncrieff a certificate that the Earl of Kinnoull had, as patron, qualified himself to exercise his right of patronage by taking the requisite oaths to government; a letter of acceptance, by the Rev. Robert Young, of the presentation; a certificate of his having qualified himself to accept of and hold the said presentation, by taking the usual oaths to government; also the usual parochial certificate; and a certificate signed by five ministers of the presbytery of Dundee, that the pursuer, the Rev. Robert Young, was a duly qualified licentiate of the church of Scotland, having received his licence from the said presbytery. There was likewise produced an engagement to exhibit an extract of the pursuer's licence as soon as a meeting of the presbytery of Dundee should be held. The deed of presentation and relative papers having been read, they were appointed to lie on the table till next meeting of presbytery.

At a meeting of the presbytery, which was held at Auchterarder on the 27th of October 1834, Mr. Robert Hope Moncrieff, on the part of the Earl of Kinnoull, produced an extract of the licence of the pursuer, the Rev. Robert Young, as a preacher of the gospel, and testimonial in his favour by the presbytery of Dundee; which having been read, and the presbytery "considering that all the documents usually given in [224] cases of this kind have already been laid on the table, along with the presentation by the Earl of Kinnoull to Mr. Robert Young, preacher of the gospel, to be minister of the church and parish of Auchterarder," did so far sustain the presentation as to find themselves prepared to appoint a day for moderating in a call to the pursuer; and accordingly they appointed one of their number to preach in the church of Auchterarder on Sunday then next, being the 2d of November, and to intimate that the presentee would preach in the church of Auchterarder on Sunday the 16th, and again on Sunday the 23d of the same month. Intimation was likewise directed to be made that the presbytery would meet in the church of Auchterarder on Tuesday the 2d of December, to moderate in a call, in the usual way, to the pursuer, the Rev. Robert Young, to be minister of that parish. In the foresaid deliverance of the presbytery of Auchterarder Mr. Hope Moncrieff, on the part of the Earl of Kinnoull, acquiesced, and took instruments in the clerk's hands; but in so far as the deliverance at all sustained the presentation, two of the members of the presbytery dissented, on the ground that by so doing the presbytery did seem to homologate and approve of patronage.

At a meeting of the presbytery which was held at Auchterarder on the 2d of December 1834, for the purpose of moderating in a call to the pursuer, there was produced and read a call, subscribed in his favour by three of the parishioners, to be minister of the said church and parish; whereupon the presbytery, in terms of the said interim act of assembly, afforded an opportunity to the heads of families, members of the congregation and in communion with the church, by [225] themselves, or by an agent duly authorized, to state any special objections or dissents to the settlement of the pursuer, of whatever nature such objections might be; but no special objections were given in. In terms of the said interim act the presbytery then proceeded to afford an opportunity to the male heads of families, whose names were alleged to stand on a roll, "to give in dissents on the call and settlement of Mr. Robert Young as minister of the parish. The following heads of families (287 in number), whose names stand on the roll, did then appear before the presbytery, and did personally deliver their dissent or disapproval of the presentee:" and the presbytery thereupon found that "dissents have been lodged by an apparent majority of the persons on the roll inspected by the presbytery," and they adjourned consideration of the case until their next meeting, to be held at Auchterarder on the 16th of December 1834; against which sentence a protest was taken for Mr. Young.

At another meeting of the presbytery, which was held at Auchterarder on the



16th of December 1834, in respect that none of the persons who had dissented from the settlement of Mr. Young appeared to withdraw their dissents, the presbytery again found "that there is a majority of the persons on the roll still dissenting."

These proceedings having been submitted to the review of the superior church courts, viz., the synod of Perth and Stirling and the general assembly, and a remit having been made to the presbytery to proceed in terms of "the interim act of the then last general assembly," at a meeting of the presbytery held at Auchterarder on the 7th of July 1835, the presbytery, [226] by their deliverance and sentence, did "reject the pursuer, Mr. Robert Young, the presentee to Auchterarder, so far as regards the particular presentation now on their table and the occasion of this vacancy in the parish of Auchterarder, and do forthwith direct their clerk to give notice of this their determination to the patron, the presentee, and the elders of Auchterarder."

No special objections were stated against the presentee's qualification or settlement; the presbytery nevertheless did not take him upon trials, and pronounce judgment on his qualifications as presentee foresaid; but refused to do so, and to admit and receive him as minister of the said church and parish.

Thereafter a summons of declarator was brought in the Court of Session by the Earl of Kinnoull, as patron, and Mr. Young, as the presentee of the parish of Auchterarder, which summons (as amended) libelled on the statutes 1567, c. 7; 1592, c. 116 and 117; 1690, c. 23; 10 Anne, c. 12 (1712); and set forth the above proceedings, and refusal of the presbytery to induct the presentee. It then proceeded:—"That the foresaid judgments or deliverances of the said presbytery, of date 2d December 1834 and 7th July 1835, were *ultra vires* illegal and unwarrantable, in so far as that though by the laws and statutes before libelled the presbytery were bound and astricted to make trial of the qualifications of the pursuer, Robert Young, as presentee to the church and parish of Auchterarder, and were not entitled to delegate to or devolve that duty on third parties, or to denude and abandon their right and duty as a church court, to judge of [227] and decide upon the qualifications and fitness of the presentee for the pastoral office and charge; and after examination by said presbytery, if the pursuer, the said Robert Young, as presentee foresaid, was found to be duly qualified, the said presbytery were bound and astricted as aforesaid to have admitted and inducted him into the office of minister of the church and parish of Auchterarder; nevertheless, though the pursuer, the said Robert Young, is duly qualified as a licentiate of the church of Scotland and presentee foresaid, as well as in all other respects, to be received and admitted minister of the church and parish of Auchterarder, and though no objections have been stated against his qualifications, the presbytery not only refused, and continued to refuse, to take the pursuer upon trials, and to pronounce judgment on his qualifications as presentee, or to admit and receive him as minister of the church and parish of Auchterarder, but have by their sentence rejected him as presentee to the said church and parish without trial, without taking cognizance of his qualifications as presentee, and expressly on the ground that they cannot and ought not to do so in respect of a veto of the parishioners. In all which respects the said presbytery, and the individual members thereof, have exceeded the powers conferred on them by law, and acted illegally, in violation of their duty and of the laws and statutes libelled, and that to the serious prejudice of the patrimonial rights of the pursuers: and although the pursuers, as patron and presentee foresaid, have often desired and required the said presbytery and the present individual members [228] thereof to discharge their duty in terms of law and the statutes libelled, by proceeding with the trials, admission, and final settlement of the pursuer, the said Robert Young, as minister of the church and parish of Auchterarder, yet they illegally, contumaciously, and in violation of their duty, and to the serious injury and prejudice of the patrimonial rights of the pursuers, refused and continue to refuse so to do."

The principal conclusion was, "Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that the pursuer, the said Robert Young, has been legally, validly, and effectually presented to the church and parish of Auchterarder: That the presbytery of Auchterarder, and the individual members thereof, as the only legal and competent court to that effect by law constituted, were bound and astricted to make trial of the qualifications of the pursuer, and are still bound so to do; and if in their judgment, after due trial and examina-

tion, the pursuer is found qualified, the said presbytery are bound and astricted to receive and admit the pursuer as minister of the church and parish of Auchterarder according to law: That the rejection of the pursuer by the said presbytery as presentee foresaid, without making trial of his qualifications in competent and legal form, and without any objections having been stated to his qualifications, or against his admission as minister of the church and parish of Auchterarder, and expressly on the ground that the said presbytery cannot and ought not to do so in respect of a veto of the parishioners, was illegal, and injurious to the patrimonial rights of [229] the pursuer, and contrary to the provisions of the statutes and laws libelled."

The summons also contained other conclusions, the first of which was directed against the presbytery and the collector of the ministers widows fund, for decree ordaining them not to molest the said Robert Young in the possession and enjoyment of the stipend, manse, and glebe, and whole other emoluments belonging and pertaining to the said church and parish.

The next conclusion was directed against the heritors, for decree against them to pay their respective shares of the stipend to the said Robert Young during his life, and to perform and fulfil all the other obligations incumbent upon them, as heritors, to him, as legally, validly, and effectually presented to the said church and parish, or otherwise to declare that the Earl of Kinnoull had legally and validly and effectually exercised his right as patron; and that the said presbytery of Auchterarder, and the individual members thereof, had illegally and in violation of their duty and of the several laws and statutes before libelled, refused to make trial of the qualifications of the said presentee, but had illegally and in violation of their duty and of the laws and statutes libelled as aforesaid, rejected the said Robert Young as presentee; and therefore that the pursuer, the Earl of Kinnoull, had right to and was entitled to receive and retain the whole stipend and emoluments of and pertaining to the said church and parish of Auchterarder from the date of citation hereto, and in all time coming during the life of the said Robert Young; and it being so found and declared, the presbytery and collector of the widows fund, and all others, should be ordained to desist from molesting the pursuer, the said Thomas Ro-[230]bert Earl of Kinnoull, in the possession and use in time coming, during the life of the said Robert Young, of the stipend, manse, glebe, and other emoluments belonging and pertaining to the said church and parish, and that the heritors of the parish should be accordingly ordained to pay their respective shares of stipend to Lord Kinnoull during the life of Mr. Young.

The presbytery in their defences admitted Lord Kinnoull's right of patronage and the validity of the presentation, but objected to the jurisdiction of the civil court to take cognizance of and decide on proceedings of a church court, which, according to the enactments of the superior church judicatory as established by law, and by virtue of which the presbytery had acted, were warrantable and regular.

It was agreed that the discussion should be confined to the first or principal declaratory conclusion. A record was made up and closed.

The question at issue was raised by the following statement in the condescence for the pursuers:—Art XI.—"That the foresaid sentence" (that is to say, the sentence of the presbytery of 7th July 1835,) "whereby the presbytery rejected the Rev. Robert Young, pursuer, as presentee to the church and parish of Auchterarder, proceeded exclusively on the ground of the veto or dissents exercised by the alleged majority of heads of families or parishioners of Auchterarder."

The answer made to that statement by the presbytery was, Ans. XI.—"Admitted."

The Lord Ordinary reported the cause on Cases, and by order of the Lords of the First Division a hearing in presence took place before the whole [231] Court, and their Lordships, having taken time to consider, delivered their opinions *seriatim* at great length.

Thereafter, upon hearing counsel for the parties and before pronouncing judgment, the Court, 8th March 1838, allowed the following minutes to be lodged:—

"MINUTE for the Reverend the Presbytery of Auchterarder.

"Mr. Solicitor General for the presbytery of Auchterarder, of consent of the Dean of the Faculty, for the pursuers, craved the Court to allow the following plea in defence to be added to the record:—

"The pursuers are barred by acquiescence from objecting to the proceedings of the presbytery of Auchterarder and pleading that the same were illegal.

(Signed) *And. Rutherford.*

"Edinburgh, 8th March 1838.—The Lords, having heard the above minute of consent of parties, allow the above plea in defence to be added to the record. (Signed 10th March.) (Signed) *C. Hope, I.P.D.*"

"MINUTE in answer for the pursuers.

"Before the Court proceeded to give judgment and pronounce their interlocutor the Dean of Faculty, on the part of the pursuers, stated that he did not and never had objected to the Court entertaining and considering any plea raised by the defenders in argument, either as to the alleged personal objection to the action founded on acquiescence stated in the proceedings of the presbytery under the veto act, or as to the alleged objection to the sufficiency of the summons.

(Signed) *John Hope."*

The following interlocutor was thereupon pronounced: [232]—"Edinburgh, 8th March 1838.—The Lords of the First Division having considered the Cases for the Earl of Kinnoull and the Reverend Robert Young, and for the presbytery of Auchterarder, with the record and productions and additional plea in defence admitted to the record, and heard counsel for the said parties at great length in presence of the Judges of the Second Division and Lords Ordinary, and having heard the opinions of the said judges, they, in terms of the opinions of the majority of the judges, repel the objections to the jurisdiction of the Court and to the competency of the action, as directed against the presbytery: Further, repel the plea in defence of acquiescence: Find, that the Earl of Kinnoull has legally, validly, and effectually exercised his right as patron of the church and parish of Auchterarder, by presenting the pursuer, the said Robert Young, to the said church and parish: Find, that the defenders, the presbytery of Auchterarder, did refuse, and continue to refuse, to take trial of the qualifications of the said Robert Young, and have rejected him as presentee to the said church and parish on the sole ground (as they admit on the record) that a majority of the male heads of families, communicants in the said parish, have dissented, without any reason assigned, from his admission as minister: Find, that the said presbytery in so doing have acted to the hurt and prejudice of the said pursuers, illegally and in violation of their duty, and contrary to the provisions of certain statutes libelled on, and in particular contrary to the provisions of the statute of 10 Anne, c. 12, intituled, An act to restore patrons to their ancient rights of presenting [233] ministers to the churches vacant in that part of Great Britain called Scotland: In so far repel the defences stated on the part of the presbytery, and decern and declare accordingly, and allow the above decree to go out and be extracted as an interim decree; and, with these findings and declarations, remit the process to the Lord Ordinary, to proceed further therein as he shall see just. (Signed 10th March.) (Signed) *C. Hope, I.P.D.*"

The presbytery appealed.

*Appellants.*—Two questions had to be considered: (1) whether the general assembly were competent to pass, *cum effectu*, the interim act of 2d June 1834? and (2) whether, supposing that such interim act was alleged to be *ultra vires* of the general assembly, the Court of Session had power to entertain the question of its legality? Now, all that related to the call, trial, induction, or collation of ministers was matter purely of ecclesiastical regulation, and cognizable only by the ecclesiastical courts. The acts of the different assemblies from 1560 downwards proved that all such matters as now sanctioned by the laws and daily practice of Scotland were so determined on by the assembly in exercise of its strictly ecclesiastical powers. The propriety or wisdom of the different acts of assembly did not come into question; the proper inquiry being, whether the assembly had the right. Now, the usage or actual exercise of power afforded the strongest confirmation of its legality. The constitution of the kirk of Scotland, as sanctioned and approved by acts of parliament, afforded no trace of any authority in the civil court to overrule [234] and control their proceedings in matters ecclesiastical, excepting during three short periods, which confirm the general rule.

With regard to the respective powers of the ecclesiastical Court and the Court of Session, it seemed to have been assumed that the Court of Session had an immemorial right to interfere in all matters affecting the rights of individuals; but this could not be, as that Court was established and its powers defined by act of parliament, which confined its proceedings to civil actions, and gave no jurisdiction in matters ecclesiastical. It could not be shown that ecclesiastical jurisdiction had been given by any subsequent statute. Besides the Court of Session or Supreme Civil Court, Scotland had also its Court of Justiciary or Supreme Criminal Judicatory, as well as its Church Courts, consisting of the General Assembly of the Kirk, and its subordinate tribunals, so that there were three separate coexistent though independent jurisdictions. The kirk, as reformed, succeeded to the whole jurisdiction exercised by the pope and bishops; and that was now vested in the proper Church Courts. The Commissary Court, now merged in the Court of Session, took cognizance of certain cases which might be considered partly civil and partly ecclesiastical; but no argument could be raised from that fact.

The recognition of the ecclesiastical jurisdiction, exercised by its proper courts, was proved by abundant statutory authority; also by the text writers, excepting Bankton,\* (the value of whose authority had been [235] commented on by Lord Moncreiff in his opinion below). The opinions of Forbes and Erskine were confirmed by decisions, and had been fortified by the actual exercise of legislative powers by the general assembly,—the inferior church judicatories being bound to give obedience to laws and usages sanctioned by the general assembly. The decisions of the Court of Session, corrective of excess in the exercise of statutory powers by inferior courts, were not applicable, particularly where a party had not followed out his regular course of appeal through such inferior judicatories.

And even although the act of assembly complained of might be *ultra vires*, still, as was shown by the authorities, well explained by Lord Cockburn below, the Court of Session had no power to direct an inquiry by civil process into the legality or illegality of the act, for it is a civil court merely, possessing only civil jurisdiction, as given by statute; and where it possessed jurisdiction in certain ecclesiastical matters it was only where such jurisdiction was given by statute.

Did the question here involve matter of civil or ecclesiastical jurisdiction? The call and ordination of a minister to discharge the duties of the cure of a parish could not be considered otherwise than as ecclesiastical matter. There was no such thing in Scotland as *ministerium vacuum*; for there a minister is licensed, and when ordained is set apart to a particular cure. Then the call is no mere matter of form. No minister could be admitted unless there had been a moderation of the call, which was, therefore, a necessary as well as a substantial part of the ecclesiastical procedure in the settlement of a minister. Upon the record as between these parties there was no question [236] upon which the Court of Session could pronounce a valid decision. Viewing it as a question of the fitness of the minister presented, that Court had no power; it was not enough to say that it related to the acceptableness of a minister, and not to his fitness, as if it were not true that although acceptableness might not be fitness, still his unacceptableness was clearly unfitness, and therefore raised an inquiry as to his being qualified or fit, or not, for the cure of this particular parish. There was no instance of interference by the Court of Session, unless the right of the patron or stipend was affected. To synods there had been numerous and repeated appeals in ecclesiastical matters, and touching settlements, and also to the general assembly both by reference and appeal. In this case the appellant, Mr Young, had taken that course, although he afterwards thought proper to depart from that which was the legitimate mode, of having the authority of the general assembly, and the regularity of the proceedings of the presbytery enquired into and determined.

*Respondents.*—They now complained of a civil injury sustained through the refusal to admit a presentee duly licensed, and not on the score of qualification, as hitherto understood, but on the sole pretext of a veto or dissent, which went to a complete denial of the right of the patron. The important question then was, whether

\* Lord Brougham, when moving judgment, stated that the next time an opinion was brought forward questioning the authority of Bankton, his lordship would inquire into the grounds of that opinion.

the patron and presentee had any remedy for the latter having been so illegally prevented from being admitted to the benefice. The appellants do not say there is any remedy; they allow that the present mode adopted was the proper remedy, or there was none; but said, the Court of Session had no jurisdiction, [237] and therefore the presentee had no redress. Suppose there had been a wrong, there must be a remedy; and to ascertain whether there was jurisdiction in the Court where the remedy was sought, the wrong—the illegality of the veto act—must be assumed. *Injuria et damnum* must be shown, and then the right of action arises; but there must be both.

Generally, the sound and obvious view was that up to the year 1834 it was not pretended that there was any law entitling presbyteries to refuse to take on trial presentees who, if qualified, were entitled to be ordained and inducted into the cure of the parish. Had the law before 1834 sanctioned exclusion on the score of dissent, there would have been no necessity for, and there would in fact have been no ecclesiastical legislation attempted on the subject. And the necessity of such legislation through the want of any such pre-existing right of dissent without reason, was evident from the notorious fact that the framers of the scheme did not at first agree as to the class of persons in whom such right of dissent, without reason assigned, should be placed; so that it must have been not in its administrative capacity as an ecclesiastical court, but as a legislative body, that the assembly acted in 1834; and it now sought as a court to interpret and enforce the law, not as sanctioned by the legislature and explained by the judicatories of the land, whether civil or ecclesiastical, but the law as confessedly made or altered by the assembly itself. Thus there was no conflict, and could be none betwixt the two courts, considered strictly as courts; and no conflict of decisions, so long as both courts confined their proceedings within proper judicial bounds.

The stat. 1592, c. 16, establishing presbytery, gives [238] collation on presentations to the presbytery, "providing the said presbyteries be bound and astricted to receive and admit quhatsoever qualified minister presented be his Majesty or laick patrons:" And by the 10th Queen Anne, c. 12, (1711,) it was again enacted and declared, on restoring patronage (which the stat. 1690, c. 23, had suspended,) "That the presbytery of the respective bounds shall and is hereby obliged to receive and admit in the same manner such qualified person or persons, minister or ministers, as shall be presented by the respective patrons:" And the duty thus imposed upon presbyteries by the legislature has never been discharged by any act of the legislature, and cannot be repudiated, destroyed, or abandoned by the kirk of Scotland, or any right of peremptory rejection of the presentee given by the church to a third party, to the effect both of excluding the duty imposed on the church courts and of defeating the patron's rights.

The interim act of the general assembly 1834 in the principle of it necessarily raises and disposes of questions of civil right, the determination of which belonged to and was within the jurisdiction and competence of the civil court; for the veto or right of peremptory rejection thereby conferred on the male heads of families in a parish was altogether distinct and separate from a call by the congregation, and unauthorized either by the nature of a call, or by any of the enactments of the church in regard to calls; and accordingly in this case the moderation of the call was over before the dissents or veto were given or asked for.

A call was never, during any period in the history of the kirk of Scotland prior to 1690, in which the right of patronage was recognized by law, admitted or acted upon as a means of controlling the right of patronage, [239] or as any part of or necessary to the title or appointment of the presentee, and to his right to be taken on trials, and (if found on trial to be qualified) to be inducted. The call, in its origin, object, and principle, was a mode of appointment or nomination when patronage was not in force or secured by law. After the restoration of patronage by the statute of Queen Anne the call continued to be acted upon as a mode of election in some cases in which the patrons did not choose to exercise their right of presentation at all; sometimes also as a mode of appearing to elect the presentee of the patron, in the hope of preserving a kind of protest against the act of parliament; but it was known and acknowledged that a call was not a form applicable to the case of presentation by a patron, or which could in that case have any effect against the title

of the presentee, and his right to be taken on trials. And it came also to be resorted to for a considerable time by parties in the church, in order to thwart the right of presentation by an admitted perversion of the true object of a call.

A call by the congregation, in the sense of warranting peremptory rejection by the male heads of families without reasons assigned, is inconsistent with the rights of lay patronage, as part and parcel of the law of the established kirk of Scotland; and it had, by a series of adjudged cases in the Supreme Ecclesiastical Court, been determined that a call is of the nature of an invitation, which it is desirable the congregation should give for the encouragement of their pastor, and which in practice they are asked to give, but which is not part of ordinary vocation, (that is, of election or of title,) as defined in the book of discipline, nor anywise [240] essential to a presentee's induction and settlement as minister of a parish.

Whether the right of veto or of peremptory rejection, which is given to the male heads of families by the interim act of the general assembly of 1834 and relative regulations, be civil or ecclesiastical, it is wholly beyond the power of the church to confer on the members of congregation, or on any section of them, such power of rejection. The right of nomination to the office of minister of a church and parish is by law vested in the patron, subject to no approval or rejection by the people or congregation, but solely to the power of collation in the church courts, to try and adjudge the qualifications of the presentee.

Assuming that the general assembly had power as a legislative body to make regulations as to the qualifications of presentees, they were not entitled, consistently with the statutes founded on by the respondents, to enact and require that the presentee should be acceptable to the people, as the condition of his being taken upon trials and inducted to the office of minister of a particular church and parish, acceptableness not being a quality in the presentee at all, either absolutely and with reference to the duties of a minister in general, or relatively as regards the discharge of those duties in the particular parish to which he is presented. Acceptableness *per se* is not a matter within the province of collation, though the collators may inquire whether the want of it has arisen from a good and sufficient cause. If they give to it any other effect, they delegate to the male heads of families the office which was delegated to themselves, they substitute the choice of the male heads of families for the choice of the patron, and [241] to the exclusion of others just as capable to judge as the male heads of families thus arbitrarily selected.

The exercise of the right of nomination to the office of minister of a church and parish in Scotland, as well as to the benefice, is reserved and secured by statutes to lay patrons as a condition on the establishment of the national church of Scotland. And when the church courts *jure devoluto* nominate or call an individual to the office, it is by the exercise of the right of presentation which was in the patron, but which he had failed to exercise, and which in consequence is transferred to the church by a statutory devolution; and the right is then exercised by a deed of presentation flowing from the right of patronage as much as when it is exercised by a lay patron.

The power to give collation upon presentations, that is to say, of examining and admitting ministers to parishes, which is vested in the kirk of Scotland as a national establishment, is statutory in its origin, and defined and limited by statute; and but for the enactments of civil statutes the presentation would have filled the office, the act of ordination alone remaining to the church, but without any power of rejection of an unqualified person. The state conferred the power and imposed the duty of collation on the church, as a check upon the exercise of the right to present to the office, and as the only check consistent with the fair and free exercise of the right of patronage.

The power conferred and the duty imposed on the judicatories of the church by the statutes to judge of the qualifications of presentees, and to decide on objections stated to their qualifications, was one of the leading principles of presbytery; and the power and duty could [242] not, consistently with the statute law, either be wholly abandoned by the church courts, or devolved by them in whole or in part, on the congregation, or on any section of them, or on any other body or class of persons; and any claim of right to legislate on any matters, civil or ecclesiastical,

which had been the subject of statutory enactment or provision, or to interfere with and affect the provisions of statutes, is inadmissible in point of law.

The church of Scotland established at the reformation was an entirely new ecclesiastical establishment. The state abolished the former established church, and all its powers, authority, and jurisdiction, and then by degrees, and by enacting special statutes to that effect, it formed and adopted another establishment. These statutes are, in Scotland, the sole origin and foundation of the national church as an establishment. The national church received from these statutes certain powers within which it must be confined, while at the same time certain duties were imposed in regard to the right of presentation. Those duties were again confirmed and imposed by the act of Queen Anne, and the established church cannot refuse to discharge them without its presbyteries committing a civil wrong, which is cognizable by the Supreme Civil Court. The church was limited, restrained, and confined as to its own powers and functions in regard to all the matters which formed the subject of statutory enactment: Hence the position recently broached on the part of some of the presbyteries of the church of Scotland,—that it is in truth the old church of Scotland, (that is, the popish church,) only reformed from its errors,—is as inconsistent with statute as it is absurd and extravagant, when the juris[243]-diction of the pope and the nature of presbytery are considered and compared.

A claim for an inherent power of legislation by an established church so as to destroy, restrain, or impair any civil rights, is inconsistent with any sound constitutional principle applicable to the connexion between the state and established church, and most dangerous to the rights and true liberties of the people of Scotland. And when any such claim is brought forward, it is the duty and province of the Supreme Civil Court to decide on the validity of such pretensions, and to enforce civil rights, and at the same time to restrain all bodies in the country within the limits assigned by law, so as to preserve the civil rights of others: this is clear upon the authorities. There was none to show that the church had the supreme legislative power; but on the contrary, there was authority that if the church courts exceeded their powers they were amenable to the law of the land. Where secular rights are concerned the Court of Session would interfere.

If the analogy of the law of England be resorted to, it would be found that that law was entirely adverse to the pleas of the appellants.

The arguments of counsel having been concluded (23d March 1839),—

Lord Chancellor.—My Lords, the great importance of the question which you have now to determine, and the extent of matter which is necessary to be considered before you can safely come to an adjudication in this case, will, I am sure, induce your Lordships to postpone the consideration of it for such a length of time as may be necessary for that purpose; but at the [244] same time this is a case which for obvious reasons ought not to remain undecided beyond the period which may be absolutely necessary for the purpose of a due consideration of it. I would therefore suggest to your Lordships to postpone the consideration of the case for the present; but to resume the consideration of it at as early a day after the recess as may be consistent with your duly considering it.

Lord Brougham.—My Lords, I entirely agree with my noble and learned and much esteemed friend in recommending your Lordships to postpone your decision in this case, for the purpose of the necessary consideration of it in all its bearings, regard being had to its extreme importance; and, my Lords, at the same time I agree, as well for the peace of the church as of the people, we ought not to adjourn so indefinitely the consideration of it as to run the least risk of the decision of this cause not being finally given before the meeting of the General Assembly of the Church of Scotland.

My Lords, that being the opinion of my noble and learned friend and myself, I shall not at all enter into the merits of the question at present, farther than to say that I regard the question as one of very great importance, and that I do not see, in any view I can take of the case, any conflict whatever between the rights of patrons on the one hand, and of the church on the other, or between the church as an ecclesiastical or spiritual body on the one hand, and the flocks on the other,—hardly any conflict between the temporal and the spiritual courts on either side; but that I regard the interests, the views, and the peace of the whole community, the church

and the laity, the courts spiritual and temporal, as all bound up together, and that in the [245] decision to which your Lordships may come you will not be giving the balance to one or the other of the conflicting parties, but adjusting it for the common interests and behoof of the whole.

My Lords, it greatly increases the difficulty of this case that not only is there some conflict of authority,—that not only is there very great discrepancy of opinion among some of the most learned and most able judges, who have dealt with the question on either side in the Court below; but that we are in this position; I say it particularly with reference to what last fell from the very able and learned counsel who has just addressed your Lordships in his most able, singularly able reply, where he alluded to a legislative measure; and something was said upon that also in the Court below, as well as on the other side of the bar by the counsel for the respondent. Now, my Lords, as the peace of the church and of the community is first of all to be considered, I am of this clear opinion, as at present advised, that it will be much better consulted by a judicial determination of the case than by a legislative measure,—that it will be much better and safer dealt with by having a declaration from the high authority of this highest court of law, of what the law is and what it always has been, and what the rights of all parties are under the law as it is and always has been established in Scotland, than by interposing with the strong hand of the supreme legislative power, and by an act of that supreme power making a new law to regulate the conflicting or supposed conflicting rights of the parties. If there is any disposition on any part to fall out with the ultimate decision I am quite sure [246] of one thing, that that disposition will be far more likely to be shown to fall out with an act of parliament, with an interposition, as it were, of a legislative nature, than with a judicial declaration of your Lordships, calmly considered, on the case, as if it were a question of science; without regard to conflicting interests, where indeed there is no conflict; without regard to conflicting passions and feelings, of which I am afraid there is considerable, than if it were left to an act of parliament, armed as parliament unquestionably is with supreme authority. My Lords, for this reason, then, I concur with my noble and learned friend and the rest of your Lordships, whose assistance I crave in considering the case. I shall be most happy to hear from them, as I know my noble and learned friend also will, what impression the arguments (to which they have given most exemplary attention, as good Scotchmen as well as judges of this High Court,) have made upon their minds, when we apply our minds to the case in a judicial point of view for the sake of coming to this, as I think, only satisfactory determination of it.

My Lords, it is quite unnecessary to state,—what it will be satisfactory to the people of Scotland to know, and it is for that reason I state it,—that never was a case of importance argued with greater resources and learning and ability than the case we have heard argued at your Lordships bar.

I suppose that the General Assembly meet on the 13th of May.

Mr. Whigham.—The 15th, my Lord

Lord Brougham.—Then we must give judgment before the 15th; and if I cannot be here I shall write [247] mine and send it to my noble and learned friend. Whether I am present or not I shall consider it my duty to write my judgment.

Judgment deferred.

Lord Brougham.—My Lords, in rising to state the opinion which I have formed upon this case, I own that I approach the question with very considerable anxiety,—an anxiety occasioned by its vast importance, increased by my knowledge of the deep and universal interest which it excites all over the kingdom of Scotland, and consummated by the very considerable difference of opinion which has prevailed among the learned judges who have decided it in the Court below,—a decision pronounced by very little more than a bare majority of the Court, preceded by very elaborate argument at the bar, accompanied also with very elaborate argument from the bench, and dissented from by no less than five of those learned persons who are among the most distinguished of the Scottish judges.

A circumstance occurs which might at first sight seem rather to relieve me from some part of this anxiety, but which, nevertheless, is in itself a source of considerable uneasiness—a circumstance common to myself and to my noble and learned friend, who is about to give his opinion upon this case. After an unremitting



attention for five days to the able and learned arguments on both sides of the bar, I deemed it my duty equally to examine the reasons adduced in the ample discussion which the case received from the Scottish bench, having access to their opinions and their arguments in a shape which it were to be wished we had in all cases of any importance, and the want of [248] which it has often been my lot here to complain of, namely, the statement of their own reasoning, I may venture to say so far corrected by themselves as to be given in their own words. These reasons from those thirteen learned judges occupy a volume of nearly five hundred pages closely printed. It may therefore be safely assumed, that there is no one part of this question which has not been visited by all the light which their learning and capacity were fitted to throw upon it; and that we have every thing before us that passed below, as well as all that could be urged before your Lordships here, to enable us to steer our way through the various difficulties, or supposed difficulties of this subject.

Now it does so happen that in a case which has undergone so much discussion below, which has given rise to so great divisions among the judges below, which has been argued on either side at such length both at the bar and on the bench, both in Scotland and here, it does so happen that I have been with the utmost diligence seeking for difficulties, and found them not; that I have been, with all the power which I could bring to bear upon the investigation, wholly unable, and am to this hour unable to discover wherein the very great difficulty consists; and that I have come to my conclusion without any sort of doubt whatsoever resting upon that conclusion, or upon the grounds whereupon it is formed.

Now although this at first sight, as I have already said, may seem to relieve me from the anxiety natural to the position of one who is to decide upon an appeal such as this; yet in another view it rather increases that uneasiness, by making me dread lest matters which have [249] occurred to others, have been the source of their doubts, and the cause of their divisions, should have escaped me, and lest I may fall into error in exercising the function I am now called upon to perform. But it is a great satisfaction for me to know, and it bears me up completely in the position I am to occupy, that my noble and learned friend and myself have arrived at the same conclusion without any communication whatever upon this subject. From the time when the argument began, during the course of the argument, at the close of the argument, and during the interval that has since the argument elapsed, we have never had the least communication on the subject in any way, direct or indirect, till the last time of your Lordships sitting here, when we agreed to give judgment this morning; and upon that communication we both were found to have arrived at precisely the same conclusion; and I rather think (but my noble and learned friend will be better able to tell you than I am) that we entertain as little hesitation in our judgment the one as the other, being both of us unable to account for the question of law now at issue having been made the subject of such long and pertinacious contest.

My Lords, I say all this without the slightest disrespect to that most learned and venerable tribunal which has judged upon it below; because I know full well that it is of the nature of men, and the more so the more learned, and subtle, and able they are, that in proportion as a case coming before them is of great importance, and occupies the minds of the people by whom they are surrounded,—it is of the nature of men, and even of judges in such circumstances sometimes, rather to overdo the matter; and perhaps it is the safest [250] side upon which to err, because at all events it betokens their attention bestowed upon the subject, and it precludes the possibility of a hasty or unwary decision.

And now, before proceeding to state the grounds upon which, in my opinion, there can be no doubt whatever that the Court below have come to a right conclusion, and that their judgment should be affirmed here by your Lordships, I will take notice of a topic which we have heard more than once, and in more shapes than one urged at the bar. It was adverted to below; it was adverted to even in the judgments that have been pronounced; and I cannot withdraw from taking notice of it here. In reference to the great anxiety which this case excites in Scotland, and to the possible consequences of an affirmance of the judgment, much has been said of the public feeling in two forms, the feeling of the flock and the feeling of the pastor. With respect to the flock, I have no reason whatever to doubt, I am not

permitted to doubt, that they will render a respectful obedience to the law of the land: but if I have no reason to doubt of this respecting the laity, how much less dare I question it with respect to the ministers of the gospel! To menace a tribunal with any disrespectful reception of its lawful decrees from the laity of the land is hardly conceivable; but to menace it with any disrespectful reception of a sentence pronounced by the judges of the land, to menace such lawless conduct on the part of the clergy, of the christian clergy of a christian church, the church of Scotland, whose head is Christ Himself, is not only indecorous, but it is preposterous, it is monstrous: I will not believe it till I see the fact,—a fact which I hope I shall not live to see, and which I hope no one [251] else will live to see, of the church of Scotland refusing to yield a willing as well as a respectful obedience to the lawful decision of the highest court of judicature in the realm, the court whose office it is to pronounce the law of that realm. It is for me to add, that if it were as certain the other way, still the law must take its course. If it were just as clear that the judgment we are about to give would be resisted, as I know it to be demonstrably certain that it will be cheerfully obeyed, still it is the office of your Lordships to pronounce your opinion upon the question of law brought before you; and you would betray your duty most grossly if you were to suffer yourselves to be diverted from pursuing the course of your duty by any fear of other persons still more scandalously betraying their duty both as ministers and as subjects, and still more flagrantly violating the law.

I will now proceed to state the reasons upon which I have come to a conclusion in favour of the judgment under appeal. They are short and satisfactory to my mind. They consist in reference to the statute law of the country, and they leave upon my mind no doubt whatever, unless we are to allow niceties drawn from antiquarian lore, subtleties gathered from disputed points of church history, refinements borrowed from the controversies among theologians of past ages and metaphysical distinctions and arguments *ab inconvenienti*, and misconceived notions with respect to the bounds and limits of jurisdictions to pervert the plain intendment of statute law, that intendment which is to be gathered from the words of the legislature, which is confirmed by the reason of the thing, which is established above all by the manifest purpose of the enact-[252]-ment, as declared by the law-givers themselves, and which is ultimately clenched, as it were, and made fixed and sure by comparison with other branches, other principles, and other provisions of the law itself.

Now, my Lords, when I go at all, after what I have said, into the historical matter belonging to, or rather, perhaps, brought into and made to encumber this case, and much of which is more curious than useful in the argument, your Lordships will presently perceive it is with a view of helping out the construction to which I am coming, and for no other purpose. I shall, therefore, for a moment look to what was the original interposition of the people in question of presentment and induction into benefices, and then I find that at no time, even when the rights of patronage were the least known, and therefore the worst secured, at no time did the people's share in the operation bear the least resemblance to what is contended for in the present case.

But, first of all, it is certainly convenient and satisfactory to find that we have no dispute whatever here relating to the facts: Lord Kinnoull's undoubted right to the advowson, or the patronage of the living, is clear; his having presented Mr. Robert Young to that living is clear. The presentment having by the presbytery been received within due time is admitted; it having been sustained, as they are pleased to call it, is admitted also. What effect that sustentation has had, or what use or purpose it has served, is another question. The refusal afterwards of the presbytery to ordain and induct Mr. Young to the living is admitted; and, in the sixth place, the ground of that refusal (and this is most important) is distinctly admitted; it forms the whole subject matter of the controversy, and I shall now call [253] your attention to the statement of it upon the record in the eleventh article of the condescendence, and the answer of the presbytery. The allegation in the condescendence is this:—"The aforesaid sentence, whereby the presbytery rejected Mr. Robert Young as presentee to the church of the parish of Auchterarder, proceeded exclusively on the ground of the veto,"—a new word introduced, I apprehend, into

the Scottish law; but a translation of it is given in the same sentence,—“on the ground of the veto, or dissent,”—a most important word,—“or dissent exercised by the alleged majority of heads of families or parishioners of Auchterarder.” Such is the allegation. The answer is, “admitted.” Thus, therefore, it is clear that there is raised before your Lordships the question, Have the majority, or the alleged majority (an allegation not traversed) of the heads of families, of any families, the right to exercise a veto or dissent (I prefer the English translation to the Latin original, a dissent)? and is the presbytery bound by that dissent, unaccompanied with any reasons, and not followed by any inquiry on their part into the validity of the causes of dissent, to reject the patron’s presentee? In other words, Is the patron’s right of presenting subject to the acceptance or refusal, that is, the choice of the congregation? That is the question, and the most important question raised before your Lordships; that is to say, is or is not, by the law of Scotland, the right of patronage in the patron, or is it in the patron conjointly and currently with and shared by the parish as well as the patron? That is the question raised by force of the word “dissent;” for it is a mere refusal of assent; it is a choice negative exercised by one party after a choice affirmative exer-[254]-cised by the other, neither party being bound to assign any reason other than his mere will.

My Lords, I come, therefore, to observe upon what has at different times been the right of the parish or the congregation, even in times when the right of the patron was most feeble and worst ascertained. Let us see what right have they in point of fact, and by practice or usage enjoyed.

Now it is to be observed that before endowments were numerous, when there were very few patrons to present, when all that the church consisted of was a number of congregations, and when the provision for the parson or the priest was feeble as the church itself, when he was paid accidentally, by casual offerings, by various fees from time to time increased by clerical encroachments, but when there was no provision regularly made by formal and substantial endowment, it is clear that the right of patronage could hardly be known; and as the priest must be chosen by somebody, it appears that he was then chosen, not by the congregation who were to be his scholars, not his patrons, but he was chosen by the clergy, by the clerical portion of the church. For your Lordships will find that there was a canon in the year 428 referred to by one of the learned judges, which shows that the election was in the clergy, though with the assent of the congregation. “*Plebis*” (Van Espen. II. t. 3, c. 9), says the canon, “*non est eligere, sed est electioni consentire.*” That is, all the function of the people. The clergy chose, the people assented; and this in 493 was extended to bishops; for it is then laid down by another canon, “*in electione episcopi populus debet adesse,*” just as in the enthronement of the king, which has been [255] originally the actual choice of soldiers of their imperator or emperor in ruder ages, beyond the period of authentic history. Long after that election had been disused, there continued the remnant of it, which we have at coronations up to this hour, by asking the people’s assent as a form. The people may here be said to be *adesse*, for they are called upon to give their assent, though the coronation, the enthronement, the allegiance, and the prerogative would have been just the same if they refused as if they gave their assent, and would have been just the same if their assent had never been asked.

Then, in a work which is deemed a great authority among the fathers, I mean Cyprian’s letter to the Spanish people, we find it written that no one should “be ordained but in the presence of the people.” Now, why? The reason is given, and it throws light upon the call; for I take the call to be a sort of remnant of this popular presence. The nature of the call is exceedingly ill defined, and its history is admitted on all hands to be very obscure, as far as it ever existed in any thing like a substantive shape, (except at one period, when patronage was avowedly abolished by law;) it is now put down by law, as I shall show in a further part of my argument. But its nature seems to be illustrated by the reason which Cyprian assigns for the presence of the people at ordinations:—“No one should be ordained,” (it is rather an advice or a recommendation than a law, or a construction put upon a law,) “no one should be ordained but in the presence of the people, to the end that the demerits of the bad may be disclosed and the merits of the good proclaimed.” An opportunity was to be given for showing whether the life and conversation were

good [256] or bad ; because that tended to inform the conscience of the bishop, who was to ordain the clerk, and that tends, in presbyterian government, to inform the conscience of the presbytery, who are to judge, as I shall presently show, and only to judge of the candidate's qualifications, the life and conversation being one of those clerical qualifications. It was for the purpose of informing the party who was to decide, that he might inquire, and upon inquiry might determine.

Then there is in 493 a rescript of Gelasius, which states that the right of rejection does not exist at all in people ; for it expressly says, " if their objections are groundless," which implies giving a reason, and implies no veto, no dissent ; dissent is a mere refusal. But this must have been grounded upon reasons ; because he says that those reasons are to be submitted to the clergy, and if groundless the clergy are to remove them by admonition, and thereby to compel an assent. Does not that clearly show, that if the reasons, in the opinion of the clergy, were groundless, the clergy were to proceed as if there had been no dissent ; and to deem a dissent founded upon bad reasons, or upon no reasons at all, as of no force at all ?

Then in the year 886 Pope Stephen says, referring distinctly to the same subject, "*docendus est populus, non sequendus*" (1 Dec. Dist. 63) ; a very pontifical doctrine, no doubt, and one which by most pontiffs was very amply and very accurately practised, together with another principle as religiously acted upon, namely, that the flock were to be fleeced as well as taught ; that, however, belongs to the papal and, God knows, not at all to the presbyterian church.

[257] Now, what says Boehmer, in a book which is of great authority,—authority in foreign countries as well as among the canonists of our own ; I mean his *Jus Parochiale* ? It is cited by one of the learned judges (Lord Corehouse). He says (*Jus Paroch. iii. 1. 18 ; Jus Eccles. prot. iii. sec. 77 and 78*), "*patrono votum decisivum in electione tribuatur.*" Now see the difference between the *patronus* and the *populus* :—"*Populo negativum, ut possint dissentire.*" But how ? Not as the Auchterarder people have done, and as the presbytery have allowed them to do, merely to dissent without reason, and with nobody to judge of the reason :—" *Non tamen aliter quam si justas dissensus causas allegare queant.*" They must not only dissent and give their reasons ; but their dissent must be grounded upon such just reasons as they "*allegare queant*," that is, as they are able truly to allege. Then the question is, who is to decide upon the justice of those reasons ? and that question is best answered by coming to the point now in contest between the parties. How has the Scotch law determined that those reasons shall be examined and decided upon ? We are thus led to what is certainly the very pinch of this case, and which, in the view I take of it, makes decisively against the appellants ; for I now come to the statute law of Scotland, upon which the whole controversy must ultimately depend. Let us first go to the original act, regulating the presbyterian scheme, the act 1592, chapter 116. After providing for the exercise of the judicial and administrative functions of the various church judicatories in Scotland, it concludes in these words :—" Ordains all presentations to benefices to be direct to the particular presbyteries in all time coming, [258] with full power to give collation thereupon, and to put order to all matters and causes ecclesiastical within their bounds according to the discipline of the kirk, providing the aforesaid presbyteries be bound and astricted to receive and admit whatsoever qualified minister presented by his Majesty or laick patrons." So that they were bound and astricted by the force of this statute to admit, and if they did not admit they broke the law ; they acted illegally, and were liable to the consequences, civil and other, of disobeying the clear and positive order of a statute to receive and admit whoever was presented by a lay patron, if duly qualified ; they were only to judge of his qualification, and if qualified they were bound and astricted, that is, they were ordered by the law, to admit him. It was at their peril, *quoad civilem effectum*, and also *quoad alios effectus*, that they refused to obey the positive mandate of the King and the estates of parliament.

At different times doubts were entertained whether the law ought to be continued, and some fluctuations existed even in the practice under it in one or other of the troublous periods of Scotch church history. Nevertheless it was not till the year 1690 that the legislature itself made any even apparent alteration of the statute, there having been an act passed immediately upon the revolution, the act of 1690, chapter 5, which revives, renews, and confirms the act of 1592, with the one exception of that

part of it that I have just read relating to patronages, and states that this matter is hereafter to be taken into consideration; and in performance of that promise, and in compliance, as it were, with that legislative notice, came in the same year the 23d chapter, which it is most material, therefore, that I should now bring under the view of your Lordships. [259] It is entitled "An act concerning patronages," and it undoubtedly introduced, for the first time, a total change in the law of patronage. It abolished the right of patrons, and indeed radically extirpated patronage; it professed to do no less. It did not proceed, as some would have done, by a side wind, professing to do one thing and doing another, but it honestly, openly, and manfully avowed, in a spirit worthy of men the legitimate successors of the covenanters, and who had just brought about the revolution of 1688 in Scotland,—it avowed that nothing less was intended than to root out patronage from the land. This famous statute, therefore, begins by pronouncing the doom of patronage; and it gives the cause of the doom, namely, the crimes of the offenders:—"Our sovereign Lord and Lady, etc., considering that the power of presenting ministers to vacant churches of late exercised by patrons hath been greatly abused, and is inconvenient to be continued in this realm." The sentence has thus gone forth against patrons, and whatever is done after this preamble must be taken to be in execution of this judgment for the offence, namely, the abuse and inconvenience ascribed to the right of patronage; the sentence is neither more nor less than utterly abolishing that right for that cause. Now this is most effectually done; but it is material to consider how it is done, and what is substituted in place of it; because one part of the argument, and the greater part of it, is a falling back from the act of 1711 (the 10th of Anne) upon the act of 1690, in a way and by a process of reasoning which I marvel at,—the more I read the more I wonder at, and upon which I shall presently have to say somewhat to your Lordships. The act proceeds, "that in [260] case of the vacancy of any particular church, and for supplying the same with a minister, the heritors of the said parish, (being protestants,) and the elders of the said parish are to name and propose the person to the whole congregation, to be either approved or disapproved by them." The process therefore is clear; it is not the people, it is not the congregation, who are to call; but it is a very select portion; it may be five people, it may be four people, there may be but one heritor and three elders, and these are constituted a kind of corporate body; for what purpose? for the purpose of presenting to the people.

Then the presentation is hereby taken from the patrons, because they have abused it, and because it was found inconvenient; and it is transferred to this new body, the heritors and elders, who are to present to the congregation. If the congregation disapprove, the disapprovers are to do what? to exercise a veto? to give their dissent, as the second article of the condensation states and the answer to it admits, and as the presbyteries state to be their sole reason for not admitting Mr. Robert Young? No such thing; the "disapprovers" are "to give in their reasons;" just as the canon of 428, just as the canon of 493, just as the rescript of 493, and as Pope Stephen's rescript of 886, and as Boehmer's authority with respect to these old times states to have been the church law even then. Now what is to be done upon the reasons, and why are they to give them? "To the effect the affair may be cognosed upon by the presbytery of the bounds, at whose judgment and by whose determination the calling and entry of a particular minister is to be ordered and concluded."

Now I pray your Lordships to stop here, and to form [261] a clear idea, (for it is most important to the subsequent part of my argument,)—to form a clear idea of what the scheme is of presentment and admission which is laid down by this important statute. Patronage was to be abolished. It had sinned in two ways: first, by its abuse, and secondly, by its inconvenience; therefore it was to be extinguished, and another process of election to be substituted in its room. Then what is this process? The heritor or heritors and elders are to present to the congregation, and the congregation are either to say that they approve, or that they disapprove. If they disapprove, they are to give their reasons; those reasons are to be decided upon, not, certainly, by the heritors and elders, but by the presbytery of the bounds, and by the presbytery of the bounds cognoscing, that is to say, judicially examining, the truth and sufficiency of those reasons. Here, as in all cases of judicial examination, two things may happen: the presbytery may either demur, as it were, and deny the relevancy of the grounds stated by the congregation; they may say, if all these

things are true they are no objection to the admission ; or the presbytery may go to issue upon the fact. They may say it is true ; that if the statement of facts be well grounded, it forms a sufficient cause for our rejection ; but the fact is denied or is doubted. Inquire as to the fact. If upon both of those inquiries they find that the congregation is right, then, the reasons being well founded in fact and law, the presbytery are to reject the party presented. If either inquiry proves against the congregation, if either the facts amount, in the judgment of the presbytery, to no disqualification, or if the statement of fact be found untrue, then the presbytery are to reject, not the can-[262]-didate, but the reasons of the congregation, and to admit and induct the presentee. So that here is a completely new form of proceeding instituted for the first time in Scotland ; an abolition of the right of patronage, and a transfer of that right to the heritors and elders, who are to name and propose a person to the whole congregation, who, if they disapprove, shall submit their reasons to the judgment and determination of the presbytery ; and all those parties combining, the operation is completed one way or another : either the presentee of the heritors and Kirk Session is rejected, or their presentee is admitted, and obtains possession of the cure.

My Lords, keeping the provision of the act of 1690 steadily in view, let us see what next took place. If this had continued the law of the land, if this statute had been left unrepealed, no man could have said that Lord Kinnoull, or any other patron, had the right of presentation. It was abolished ; it was avowed to be abolished. The reason of the abolition was given ; a transfer was made, and the party was indicated to whom the transfer, as the substitute of the patron, was effected by the act. But if this is true, another thing is equally true, that nothing like the present arrangement, laid down by the general assembly and followed by the presbytery, would have arisen under that law. This argument is something wholly different : it is no presentment to the congregation by the heritors and Kirk Session ; it is no refusal upon reasons given in by the congregation ; it is no cognoscing and adjudication by the presbytery ; but it is a totally different proceeding, invented for the first time in the year of grace 1834, and which at the revolution of 1690 was no more [263] dreamt of than it was in the reign of James the Sixth, in the year 1592. It is a totally different process, not in the slightest degree resembling the other, so that if we are driven back in the argument from the statute of Anne, to which I am now coming, and are to fall back upon the statute of William and Mary, we are then no doubt driven away from the right of patronage, and the act of Anne is repealed, (though only by our misconstruction of it, and not by the legislature). But we do not fall back upon the present proceeding of the Auchterarder presbytery, or anything like it ; we fall back upon a totally different state of things, namely, patronages transferred from the patron to the heritors and Kirk Session, and reasons to be given for dissent by the congregation, and those reasons to be adjudicated upon after being cognosced by the presbytery ; which is a thing as different from what has been done upon the present occasion as can well be imagined. Therefore let us see now what was done, and why it was done, by the act of Anne in the year 1711 : I must here say, that, with all the respect and reverence which I habitually feel for the authors of the revolution both in England and Scotland, if they had never done anything wiser, or anything more just or more considerate, than they did in passing the act of 1690, chapter 23, I should not have thought them entitled to all the veneration with which we are wont almost instinctively to mention their names. I cannot conceive anything more strikingly different from the conduct of the Somerses, the Godolphins, and the other great men who brought about the revolution in this country, whose conduct in all particulars, civil and ecclesiastical, was marked by the most careful, and delicate, and cautious dealing with all [264] existing constitutional positive rights, all vested interests. I can conceive nothing more widely different from the spirit that presided over all the proceedings of those great men than this act of the Scotch estates in parliament assembled ; for upon a vague and general allegation of abuse and inconvenience, it takes away the rights of the lay patrons ; it gives them no opportunity of defending themselves against the one charge or arguing against the other ; and it then admits, in express terms, that they have a valuable right of property, because it professes to give them a compensation : 600 merks Scots were given, equal to about £33 sterling. And be it observed, that this very hasty, rude, and ill-worded provision gave the same

compensation for all advowsons, whatever might be the difference in their value. It was, therefore, a very great encroachment, very hastily and violently made, upon the rights of private property, the existence of which it admitted, while it gave nothing that could be called equivalent in return for what it confiscated. But after twenty-one years of this new scheme, then comes the statute of Anne in 1711, and its reasons are given in the preamble:—"Whereas by the ancient laws and constitutions of that part of Great Britain called Scotland the presenting of ministers to vacant churches did of right belong to the patrons, until by the act of 1690 the presentations were taken from the patrons and given to the heritors and elders of the respective parishes; and in place of the right of presentation the heritors and life-renters of every parish were to pay to the respective patrons a small and inconsiderable sum of money: and whereas by the fifteenth act of the fifth session, and by the thirteenth act of the sixth session, the one [265] entitled 'An act for encouraging of preachers at vacant churches be-Northforth,' and the other entitled 'An act in favour of preachers be-Northforth,' there are several burthens imposed upon vacant stipends, to the prejudice of the patron's right of disposing thereof: and whereas that way of calling ministers has proved inconvenient." Here they adopt a very opposite mode of reasoning *ab inconvenienti*, which, although no argument in construing a statute or expounding a law, is an admirable reason for making a law, or for repealing one already made, and for altering a practice tried by experience, especially as that practice was only twenty-one years old, "and has not only occasioned great heats and divisions amongst those who by the aforesaid act were entitled and authorized to call ministers, but likewise has been a great hardship upon the patrons whose predecessors had founded and endowed those churches, and who have not received payment or satisfaction for their right of patronage from the heritors or life-renters, nor have granted renunciation of their rights on that account." For these reasons (and stronger can hardly be conceived), first, because an uncompensated violation of private property had been committed,—an interference with a valuable estate without compensation; secondly, because great inconvenience had been occasioned by causing heats and animosities in the exercise of the new right in the new hands, to which it had been transferred from the lawful owners: for these very sufficient reasons the act proceeds immediately to "repeal and make void" the said act of 1690, c. 23, concerning patronage.

That act is therefore, by the statute of Anne, completely repealed and abrogated, and it from thenceforward ceased to exist, just as much as if it had never [266] been enacted at all. Then, in order that there might be no doubt when that act was repealed, or what the law existing before 1690 was, a declaratory clause follows:—"that in all time coming the right of all and every patron or patrons to the presentation of ministers to churches and benefices, and the disposing of the vacant stipends for pious uses within the parish be restored, settled, and confirmed to them, the aforesaid acts or any custom to the contrary in anywise notwithstanding; and that from and after the first day of May 1712 it shall be lawful for her Majesty, her heirs and successors, and for every other person or persons who have right to any patronage, to present a qualified minister or ministers to any church or churches whereof they are patrons which shall at any time after the said first day of May happen to be vacant; and the presbytery of the respective bounds shall and is hereby obliged to receive and admit in the same manner such qualified person or persons, minister or ministers as shall be presented by the respective patrons, as the persons or ministers presented before the making of this act ought to have been admitted."

Now, if the act had stood without this last proviso as to the manner of inducting, no doubt whatever could have existed in any man's mind upon the state of the law which is to regulate this question; for you would then have had the act of 1690 abrogated altogether; you would have had the right of the heritors and elders to present to the people, and the people to dissent upon reason, and the presbytery to cognosce those reasons, and adjudicate thereupon, entirely repealed, as much as if it had never been bestowed upon the parties. It only existed for twenty-one years, and this act would have [267] repealed it at the end of the twenty-one years. You would then have had a declaration, or a statutory enactment, in 1711, that all patrons had a right to present, and that all qualified persons by them so presented, that is to say, all persons who had the due qualification, without any other condition whatever, should at once be invested with the living. That would have been the clear, undeniable, unquestion-

able law of the land, had not these words which I have last read been adjoined in the form of a proviso or a regulation. This argument, then, will turn upon the force and effect of those words; and therefore two points are raised upon this act, and upon those two I am now about to give my opinion, with the reasons of that opinion. The first question is, what was meant by "qualified person?" and the other question is, how far this repeal of the former act and the revival of patronage is qualified or restricted, or in any manner of way modified, by the reference therein made to the manner of inducting persons observed before the making of the act. These are the two points material to be considered, which are raised upon the construction of this statute; and I address myself to them in their order.

First, with respect to qualification. I am somewhat surprised to find, in the very able and learned arguments from the bench below, an attempt to show that "qualification" is of such extensive meaning, that within its scope may be brought the whole of the matter at present in dispute, namely, the acceptableness and reception of the party presented by the congregation, as finding favour in their sight. Much ingenuity is displayed by several of those learned judges, for some of whom I have the greatest respect, whose subtlety I know to be unbounded, and the fertility of whose imagination in dealing with questions I know to have no limits. That subtlety, and ingenuity, and fancy I think are shown in endeavouring to give this widely comprehensive sense to the term "qualification." It was said Dr. Parr might have been a very able divine in England, and a most learned man in the church, and yet very unfit to teach the parish of Auchterarder. Such eminent men will do in one place,—in Glasgow or Edinburgh; but they will be thrown away entirely when they are sent to waste their gifts in the desert air of some Scotch mountainous or insular parish. It is justly said, indeed, that a man is not fit to teach them who does not speak their language. But such a man cannot be called a qualified person. Language is one essential part of qualification; it belongs to literature, though it is the simple portion of letters. If a man knew Greek and Hebrew, and did not know the mother tongue he was to preach in, I should say he was *minus sufficiens in literatura*, and so not a qualified person. But we have here no question of literary qualification; the question alleged to come under the larger sense of the word is that of acceptable or not acceptable to the flock; and to bring this within the meaning of "qualified" is the attempt of these expounders of the act. A man, say they, may be of such rude and stern manners, he may be so disagreeable in his habits of life, or he may be so much above his flock in his manners, and so entirely disqualified for associating with them, that they will receive no edification from his ministration. My Lords, if it amount to anything affecting his morals, his life, and conversation, that comes, no doubt, within the meaning of "qualified;" but if it is merely that they do not like him as well as they might, that they prefer another to him, that they [269] do not fancy him so much as it is to be wished they did, the law has affixed to the word "qualified" no such meaning as that. It is quite clear that it is a violent strain upon the law to impute to it such a meaning.

But I do not rest my position upon argument alone; I am going to show your Lordships that no such meaning can possibly be the law of Scotland be given to the word "qualified." It is a technical word in this question; it is not the word "qualified" used in its general sense, as you talk of a man's qualities, of his capacity, of his abilities, of his merits, which are all general phrases, and none of them technical and defined. The word "qualified" is as much a known word of the law, and has as much a technical sense imposed upon it by the statutes, by the law authorities, by the opinions of commentators, by the *dicta* of judges, as the word "qualification" has when used to express the right to kill game, or when used to express a right to vote in the election of a member of parliament. It is perfectly technical, and it is an understood technical expression.

I now go to the most venerable of all authorities in the law of Scotland because the most ancient, the *Regiam Majestatem*; and I am the more induced to resort thereto, that it is brought from a period when the right of patronage was weaker than it has been since, when the rights of advowsons were not understood as thoroughly as they have subsequently been, and before the legislature had ever exercised its discretion upon the subject, or made any enactment touching those rights. I the more go to the *Regiam Majestatem* for this further reason, that it is of high authority in the English



law. At one time it was doubted among legal [270] antiquaries whether it was a Scotch or an English book, and it was said, with the usual national feeling of our Scotch fellow subjects, that it was a Scotch work originally, and had been transferred and adopted by an English lawyer; but I believe all men now admit that it was originally an English book,—that the original work is our Bracton, whose book was adopted in Scotland. This circumstance shows that the law of the two countries was nearly if not precisely the same in those remote ages, how widely soever they may differ now.

The Regiam Majestatem, buke 1, c. 2, s. 3, has these important words:—"Ane laick patron sould be ware that quhen ane kirk or vicarage sall happen to vaik," (that is, to be vacant,) "that he present thereto ane worthie man qualified." How? by being acceptable to the people from his eloquence, or from his manner of demeaning himself in society? No such thing,—“qualified in literature, life, and manners” (that is, morals), “within foure months after that he knows the kirk to be vacant, that be the longer delay of the presentation he prejudice nocht himselfe.” The law is assumed as clear, and the only object of this passage is to prescribe the time beyond which the patron’s right may lapse. To prevent this it says, let him take care to present within four months. Now what does he do? He is to present a qualified person. How is he to be qualified? In literature, life, and manners. All the qualification, then, imposed upon him which there is the necessity of looking to is this, that the party presented has sufficient literature, a pure life, and godly manners.

The same is the doctrine laid down in all the most venerable commentators; and I do not now quote Bankton, for two reasons; first, because he is much [271] more modern; and secondly, because a most learned judge, for whom I have the most constant and inviolable respect, even when I most differ from him, I mean Lord Moncreiff, throws a doubt upon the authority of Bankton, as if his opinion were of no great weight generally, which I own surprised me. It was new to me; I always understood that his authority had risen of late years very much in our courts; such was the language at the bar during the time of Lord Eldon, during the time of my noble and learned friend who succeeded him, and during my own time. But, however, Lord Moncreiff is a very high authority; and what he has said will lead me, as often as Bankton is quoted, to reconsider this matter. But his Lordship also says he is peculiarly of less authority upon a question of this nature, because it is well known that he had taken a strong part upon the church patronage question. Therefore I do not quote Bankton at all. But Balfour (Balfour’s Practicks, p. 501; “Anent advocatioun and patronage of kirkes”) I cite; and in his Practicks he lays it down thus: “Ane laique patron of ony kirk or benefice vaikand sould present thairto ane qualifyit and habil persoune of sufficient literature, honest in life, of gude maneris.” That exactly corresponds with the words in the Regiam Majestatem, which says, “qualified in literature, life, and manners.”

Therefore I take it to be clearly established by these authorities, and I know of nothing which does not confirm it, in any of the dicta of judges, or the decision either of the ecclesiastical or the municipal courts, that “qualification” is a technical word, meaning suffi-[272]-ciency in literature and honest life, as Balfour has it, and of good manners, meaning thereby good morals; and no one is more ready to admit at once than I am, that upon cognoscing this matter, as the statute of 1690 expresses it, if objection to the literature, to the life, to the morals, be made, the presbytery, the Kirk Court, with an appeal to the synod and an ultimate appeal to the assembly, are the judges of his qualifications in those respects. But I also venture to assert it as a thing equally clear, that his being acceptable or not upon other grounds not even stated by the parish,—their saying they do not like him, they have an aversion to him, they prefer any other to him, he is the man in all the world they do not wish to have among them,—may be stating a thing very much to be lamented, may be a thing very fit to be submitted for the consideration of the patron, may prove it to be exceedingly unfortunate that a man the object of such prejudice, however groundless, should be forced upon the people as their pastor; but is nothing like a defect in the person’s qualifications, and is nothing of which the law will take any kind of cognizance. I would, however, add in passing, that I cannot admit at all even the strongest prejudice universally entertained against a presentee to be decisive that the patron was wrong and the people right. I cannot assume that because he is even unanimously rejected by the people at the time of his presentation, he might not afterwards turn out a very fit

pastor for them; because we know of instances in which if that had been held a sufficient objection, some of the greatest ornaments of the church of Scotland never would have filled the pulpit for one single hour after their nomination; and if I mention the truly venerable [273] name of Dr. Reid, one of the most eminent philosophers that any country in any age ever produced, I at once recall to the recollection of such of your Lordships as are connected with Scotland, a remarkable instance of what I am now stating. He never would have been minister of the parish of New Machar in the county of Aberdeen, if the strongest and unanimous objection of the people had been reckoned decisive. He was settled there by main force,—I believe by the military, and against the strongly-expressed united will of the people; and yet he became, before many months had passed by, one of the best beloved ministers that ever officiated at the altars of his country. But be that as it may, and suppose we admit it to be undeniable that a harmonious settlement should always take place, this is a totally different consideration from the question of right. The law is not so; the word “qualified” does not mean that,—it does not comprise the qualification of popular favour. The word “qualified” means something else; it means a qualification in literature, life, and morals, to be judged of by the presbytery; and no one talks of interfering with that right of so judging by them.

Now we will just refer for a moment to some stress that has been put by the learned judges, as well as by others, upon the word “qualification,” from a desire to extend its scope over other things as well as learning and life. The two books of discipline are well known to your Lordships,—Knox’s book, first in 1560, and the second book in 1578. Now these authorities, as they have been strangely called, undoubtedly assert an election by the people in so many words; they do not merely touch a right of rejection; they do not confine themselves to veto; they do not mention assent or dissent [274]—sent with or without reason; but they go a great deal further. What does Knox say in his book? Election is here asserted in plain terms:—“It pertaineth to the people to every such congregation to elect their minister.” That is not contended for now; that is claiming for the people a right not merely to reject or to accept, but to choose originally,—to present as patrons to the presbytery. That is the doctrine of this book, but that never was received for law in Scotland; and the first book of discipline is of no legal authority at all. The second book of discipline in like manner says: “The liberty of election of persons called to ecclesiastical functions, and observed without interruption so long as the kirk was not corrupted by antichrist, we desire to be restored, so that men be not intruded upon any congregation, either by the prince or any other inferior person, without lawful election and the assent of the people over whom the parson is placed, as the practice of the apostolic and primitive kirk and good order craves.” Now, if I were called to a conflict with the book of discipline upon any point of church discipline, or upon any article of theology, I should, no doubt, feel great anxiety and much distrust of my own opinion; but I do not feel the same anxiety and the same distrust if I conflict with it upon a matter of historical fact,—if I go to issue with it upon a gross violation of historical truth, which I think I am justified in asserting after what I have already read to your Lordships from the history of the church and from the statutory records themselves. Can any man breathing say that an election by the people of their pastor was the practice in all times until antichrist corrupted the church,—until the [275] time when antichrist entered to despoil the vineyard of the Lord, as this book states? No date is given, no period assigned for this trespass, this breaking and entering the vineyard, so that the statement is much less easily refuted by the generality: *Dolus versatur in generalibus*. Hence I know not that it is an honest statement of facts; it is probably more zealous than honest, but at all events it is more zealous than true. But can any man point out the time when it ever was the practice to have a free election of the pastor? because this is not merely an assent about which something might be said; it is not a call, whatever that may mean; but it is an assertion that the people had at all times the right of choosing their own minister (and it says nothing whatever of the patron, any more than if there had never been such a thing as a patron in existence) until antichrist entered the vineyard. Now, I aver that this is not true; it is not correct in point of fact; it is the very reverse of the known admitted fact.

I will next advert to the act of 1567 (cap. 7), which throws some light upon the subject. Considerably before the time when the second book of discipline denies that

patronage ever existed,—before popery came in, the presentation of lay patrons is expressly reserved to the just and ancient patrons in so many words. Now it must be admitted that this enactment was after the first book of discipline in 1560. But the book of discipline in 1578, twelve years after the act of parliament which I am about to read, mis-states the fact in the face of that act of parliament, as grossly as a fact was ever mis-[276]—represented for any purpose. The act of 1567 says, “the presentation of laic patronages always reserved to the just and auncient patrones.” But the book of discipline in 1578 says that in point of fact the just and ancient patrons had no existence, for that until antichrist took the field it was the people who elected, and not the just and ancient patrons at all. The act proceeds to say:—“And that the patron present ane qualified person, within six months (after it may come to his knowledge of the decease of him who bruiked the benefice of before,) to the superintendent of thay parts where the benefice lies, or others having commission of the kirk to that effect, otherwise the kirk to have power to dispoise the same to ane qualified person for that time; providing that in case the patron present ane person qualified to his understanding, and failing of ane, ane other within the said six months, and the said superintendent or commissioner of the kirk refuses to receive and admit the person presented by the patron as said is, it shall be lesum to the patron to appeal to the superintendent and ministers of that province where the benefice lies, and desire the person presented to be admitted; which if they refuse, to appeal to the general assembly of this haill realm, by whom the cause being decided shall take end as they decern and declare.”

Now it is inferred from this that the matter becomes a question of exclusive ecclesiastical cognizance, and that the decision of the general assembly, the highest church court, is to be final and conclusive upon it by force of the words “take end as they decern.” To be sure the matter is to take end as they decern; but upon what are they to decern, and what is to take end? [277] The question of qualified or not qualified; if the presbytery and assembly refuse to admit a qualified person, not denying his qualification; if there is a competition of two qualified persons; if A., claiming the right of advowson, presents one, and B., claiming also the right of advowson, presents another, and the church courts take the wrong one, nobody can contend that this is a question for the final adjudication of the general assembly, it is for the final adjudication of the civil courts of the realm, according to the uniform and uninterrupted current of all the decisions; for I may observe in passing, that though those decisions are not fruitful of instruction for the present question, though no one of them is to be found which disposes of the arguments, though in no one case to which they relate has the present question ever been raised, yet they are very fruitful with reference to other questions, and are very important as showing the bounds of the civil and ecclesiastical jurisdictions of Scotland. They are numerous and they are clear touching the decision of questions as to who has the right of advowson where there is a competition of presenters; and in that case it is not the church court that decides the right, any more than it is the convocation in England that decides the right; it is the civil or municipal court, not the court christian,—the temporal court here, the court of the King by *quare impedit* or *quare non admisit*, or an assize of darrein presentment; not the spiritual court of the Bishop. The statute of 1567 undoubtedly gives an exclusive jurisdiction upon the question of qualification to the presbytery coming in place of the superintendent or bishop, or assembly's commissioner; and it may go by appeal from the presbytery or the [278] superintendent to the general assembly of the whole kirk, whose jurisdiction is exclusive upon the point. That their sentence has this virtue and force on such questions no doubt whatever exists; for I have explicitly stated that no one denies the cognizance of the courts ecclesiastical upon qualification.

Having disposed, therefore, of the first of the two points which arise upon the statute of Anne, the foundation of the whole question before us, and having shown that the term “qualified” used in that statute does not mean general acceptableness to the congregation (which would be vesting the choice in the congregation, and not in the patron), contrary to the express words of the act, I now come to the second point raised, and by which it is attempted to show that the statute leaves the mode of presentment and induction precisely where it stood before, that is to say, in the interval between the year 1690 and the year 1711. If the argument does not confine itself to those twenty-one years it is nought, it proves absolutely nothing; for if it goes back

to the period before 1690 it goes to the state of things under the act in 1592, which says that the presbytery are bound and astricted to receive whatever qualified person the patron shall present. Then those of the learned judges who so construe the statute of Anne hold its meaning to be this: that, desiring to repeal the act of 1690 altogether, because it had been found unjust and inconvenient, and intending to set up in its stead the old established patrimonial rights of the lay patrons, the legislature in its wisdom left things precisely as they were, while the act repealed was in existence; for that is the argument. I confess my astonishment at it; I confess my utter inability to [279] comprehend what it can mean, or how to their acute minds it ever could have occurred.

What, I ask, does the statute of Anne effect, according to this argument? It reasons in the preamble against the act of 1690, and it leaves the act in force. It professes to repeal the act of 1690, and the whole tenor of the contents of that statute of Anne does repeal that act; and not satisfied with repealing the act of 1690, it sets up patronage by express declaratory words; and yet by a clause at the end it abrogates its own repeal, and sets up the act which it professes to abrogate: that is the argument. It says there shall be no longer any rights enjoyed such as are given by the act of 1690, and then it sets up those rights in full force. It says that the patron's rights shall be restored, and then it destroys that altogether. It says, revive patronage; and the better to revive patronage, it utterly extinguishes it. It says, we are not satisfied with abrogating the rights of the heritors and kirk session and with restoring the right of the patron, but we tell you in affirmative words as well that he has the full right,—that he has not lost that right by the statute we have repealed; and then, to the astonishment of the reader, and of the patron, I should apprehend, who finds himself so dealt with,—to the astonishment of all, it proceeds to tell the patron, you were just where you were before we began our work; for with one hand we set up your right, and with another we pull it down; with the right hand we made the show of giving you back your right, and with the left we take it away for ever. Now, that is the argument upon which this extraordinary construction of the act of 1711 is based. That your Lordships may see that I am not giving an [280] incorrect description of it, I remind you of these words: "Whereas the presenting of ministers did of right belong to the patrons: and whereas the act of 1690 took it from them and gave it to the heritors and elders: and whereas this act has proved inconvenient: and whereas it is necessary that it should be repealed; it is hereby repealed, and the right of all and every patron is restored, settled, and confirmed; provided nevertheless, that such qualified persons as shall be presented shall be admitted, as the persons or ministers presented before the making of this act ought to have been admitted."

No doubt this proviso has some meaning; every word in every statute must have a meaning given to it; and who can doubt what the meaning is here? All the ordinary forms and modes of proceeding shall be followed, which are understood to be a presentment by the patron to the presbytery moderating in the call of the presentee; the presbytery receiving objections, and considering them as to qualifications, and admitting, *modo solito*, the person so by them found qualified, who has by the patron been so presented.

That is what the concluding proviso means. Whether it was necessary or not is another question; for though a legislature is never supposed to use words without a meaning, it is always allowed the privilege of using words not absolutely necessary. But to say that it means that the candidate shall be inducted exactly as if this act of 1690 never had been repealed, is to attribute to the legislature not only great infirmity of purpose, but the grossest blundering that can possibly be imagined; for it would leave the law precisely where it stood before the repeal of the act, the abrogation of [281] which is the sole object of the legislature; it would leave in the last section, by way of proviso, that which is repealed in the first section by way of positive enactment. Moreover, to prove that this construction set up for the appellant is wrong, let me observe that unless it has the very effect which I ascribe to it, nothing whatever is gained by it for the argument it is used to aid. The force and effect of those words at the end, "in the same manner," etc., is to revive the former practice under the act of 1690, and undo all the former had done. They had no force or effect at all; they do not help the argument at all; those words either revive or enlarge the act of 1690, or they do not. Therefore I say in the next place, which is decisive of the first question.

suppose you make the appellants a present of their argument; suppose you say that this is the force and effect of these final words; suppose you say that the proviso does not revive the act of 1690, which the enactment had first repealed; suppose you say that it brings back things to the state in which they were during the twenty-one years which elapsed from the year 1690, just see how little way you get in your present contention. This is the reason why I have been entreating your Lordships to attend minutely to what that act of 1690 really did; for, as it was a repealed act, it was not worth commenting upon, or worth noticing at all for its own sake; but it was because the consideration of its substance clenches the argument against the construction put upon the statute of 1711 that I began my argument by fixing that in your Lordships' minds. The argument is, that the last words of the act of 1711 revived the state of things in respect of presentment and induction, and placed the presentment and induction upon precisely the footing upon which [282] they were immediately before the passing of the act, and ever must be so.

Now what is meant by "before the making of this act?" It cannot, according to this argument, be before the year 1690, because every body admits that then the old rights of patronage were in force, and that the former statute expressly orders the presbytery to admit every qualified person presented by the patron. Then the argument I am grappling with must needs refer to the state of things during the twenty-one years that elapsed between 1690 and 1711; it must mean this or nothing; it must mean to set up the presentment of the patron to the presbytery, the sustentation by the presbytery of that presentment, the dissent of the congregation without reasons against the presentee signified to the presbytery, holding themselves bound by that dissent, and therefore, and for no other reason, rejecting the patron's presentee. That is the argument. But is that the state of things during the last twenty-one years by the act of 1690? It is as utterly different as any one thing can be different from any other, for the act of 1690 does not prescribe any presentment by the patron to the presbytery; it prescribes a presentment by the heritors and kirk session to the congregation. The act of 1690 does not prescribe a dissent or an assent by the congregation without reasons; it prescribes a statement by the congregation of reasons for or against the presentee. The act of 1690 does not prescribe an absolute binding of the presbytery by the assent or dissent of the people; it prescribes a cognoscing by the presbytery, and an adjudicating by the presbytery upon cognoscing, that is to say, upon examining, those reasons. Consequently two things more completely different than the state of matters as [283] it existed between 1690 and 1711 and that which is now contended for by the presbytery against Mr. Young as the relative position of the parties under the proviso cannot possibly be imagined. My Lords, I hold this to be quite conclusive, I hold this to be demonstrative, that there is no foundation whatever for the construction sought to be put upon the act of 1711. It is equally clear that this argument might be admitted, without benefit to the appellants or damage to the respondents, to its full force. I think it is very absurd, I think it is grossly indecorous towards the legislature, I think it is mocking the legislature to suppose that they did so great an absurdity as to say that they meant to repeal an act, and yet to keep that act in force. But still I will admit, for argument sake, that the construction is both decorous and well grounded, that the act of 1711 left the matter of presentment and induction precisely upon the footing upon which it stood immediately before 1711. The appellants cannot require a larger concession than this. Then what follows? Not the advancement of their argument by one hair's breadth; for what men did before 1711 and after 1690 is not what the appellants have done, is not what they pretend to do, is not what they contend for the right of doing. Therefore it appears to me perfectly evident that this construction of the act of Anne is wholly groundless; that the act of Queen Anne repealed the act of 1690, restored the right of patronage, and left that right of patronage precisely as it stood before the act of 1690; but that if this construction were ever so well grounded, it is wholly beside the present question.

But it is said to be a very strained and fanciful construction to import into the act of Queen Anne those words, "as matters stood before 1690." My Lords, [284] I am not importing those words or any others; but the meaning of the statute of Anne, so plain that he who runs may read, is to abrogate the act of 1690, and therefore to leave things as they stood before 1690. The act of Anne says, "let the statute of 1690 be entirely out of the field; let it be abolished altogether." Then it equally

says (for this is implied), "let matters be as they were before that repealed act passed." When you repeal an act in one year which was passed twenty-one years before, of necessity and by the abrogation you restore things to the state in which they were twenty-one years before. If there comes at the end of an act of parliament a clause about which some doubt is sought to be raised, are not you to adopt one or other construction of that clause, according as it makes out or does not make out,—according as it helps or frustrates, the plain and obvious meaning of the whole statute itself? That is an ordinary and simple principle of construction, not only of all acts of parliament, but of all instruments, all wills, all deeds, and all writings whatever; far from being fanciful, it is the plain rule of common sense; far from being strained, it is the only natural course.

These, therefore, are the grounds upon which I have come to the conclusion that the judgment must be affirmed. I wish I could have stated them more shortly. If I had had time to digest my judgment, and, as I usually do, reduce it into writing, I should have spared your time; but it was a choice of evils; because I must either give my judgment at greater length and with less compression than I could have wished, or I must delay giving it; a thing on all accounts to be avoided if possible.

Now, my Lords, although these views satisfy my own [285] mind, yet, in consideration of the importance of the question, and by way of confirming the view I have taken of the construction of the statute, I think it may be advantageous that we should just look at the subject in different lights, that we see it from various points of view, for the purpose of observing whether this consideration of it in those various lights and seen from different quarters may not aid the decision to which by other means we have arrived. First, it is admitted on all hands that neither the general assembly nor any consistorial court has any vocation to adjudicate on merely civil rights; that is granted on all hands. It is allowed by every reasoner on these subjects that if a question arises, whether a party has the patronage of a certain pariah or church, this is for the courts civil, and not for the courts spiritual. It is admitted fully, without any hesitation whatever, that the ecclesiastical courts are confined to spiritual matters, and that the temporal courts have exclusive jurisdiction over civil matters. Consequently it is certain that if this were a proceeding, or if the grounds whereupon it is sought to be rested were arguments, that affected the rights of the patron, the claim of the presbytery could not be sustained; nor could the general assembly, which passed the act of 1834, deal with those civil rights. Now, let us see whether they have dealt with those rights; let us see whether that is not the effect of the act of 1834 passed by the general assembly, acted upon by the presbytery, maintained in argument as the title of the appellants; for though I have not mentioned that act of assembly, yet I have argued all along with reference to it in considering the argument of the presbytery; and if I have defeated that argument I have defeated the right of the [286] general assembly, subject to an observation as to the question of jurisdiction hereafter to be made. Now it being admitted that the assembly has no jurisdiction to judge of civil rights, I apprehend that we shall have the same admission, that if the church court has no power as a judicature to interfere with the civil rights of patrons in any one case, still less can it have any power as a legislature by one sweeping provision to abrogate all those rights in all cases. But let us see whether the assembly does not interfere directly, and almost avowedly, with the rights of patrons by the act of 1834.

What they say is this: the patron has a right to present; we sustain that right; but the people have a right to dissent, and to reject the presentee. Now, what is the people's dissent? It is saying, without a reason assigned, that they do not like this man; it is saying that they prefer another; it is saying that they prefer any other; it is saying that they will not have him. What does that mean? Under what general expression would you convey the different meanings which all these particular and detailed forms of expression comprehend? I should think choice, election. Refusal to choose—refusal to elect is at least one half of choice and one half of election; because election consists in selection and in choice affirmatively; it consists negatively in rejection of all others, in refusing to choose all others but its elect. If I select A. I reject B., C., D., etc.; if I reject A. I exercise a negative power of choice; I exercise the right of choosing some other person than A., or of saying to the patron, Z., he shall not choose A.: that is quite certain. I may cover it over by what-

ever circumlocution I please; I may say [287] that he is not acceptable to me. A person being acceptable to me is the reason why I choose him; a person not being acceptable to me is the reason why I reject him. But because I say he is not acceptable I do not deny that I exercise choice; I exercise the negative choice of saying either, I prefer another to him, and that is one reason; or, I prefer every other to him, and that is another reason. Does not this interfere with a man's right of choice? It is taking half of it away from him; it is saying, you, the patron, have the right of choice, but upon one condition, namely, that you choose the person that I, the congregation, wish; it is saying, I admit I have no right whatever of choice, the whole choice is vested in you, the patron, but upon this one condition, that you choose the person that I would have chosen if I had been to begin: that is the meaning of it. You shall choose whomever you please: that is the meaning of choice. Whoever you please to choose is the man: that is the meaning of choosing. Well, say the congregation—the presbytery—the general assembly, whoever you choose shall be the man, upon this only trifling condition, that you must choose no other person except the man we choose. Who is the chooser there? I think the second person is the chooser rather than the first. If I were to choose, if I may so speak, between the position of the patron and the position of the congregation, I would much rather be the congregation than the patron as regards the choice of A. or the choice of B., because the patron may choose A., B., C., and go on to the end of time, and the congregation will always reject him, till he happens to hit upon X., the particular person they choose.

Now, this illustrates the nonsense of saying that the [288] kirk courts seek not to interfere with the rights of the patron. My Lords, I cannot help casting my eye back to the former times of the Scottish church, and endeavouring to figure to myself the contempt, the scorn, the indignation with which such a man as my most venerable relative who once led that general assembly, one of the greatest men that Scotland ever produced, one of the greatest historians, one of the greatest statesmen, one of the most accomplished orators, which any age of this or any other country has ever seen,—what would Dr. Robertson have said to such pretences so couched and so covered, when he led for so many years the general assembly, when he took that well known part on the question of patronage which was supposed to have settled it for ever; that very part which the presbytery and the general assembly of our day have not taken, and in the face of which they have done all these things. It is not difficult to conceive what reception his manly practical understanding would have given to the doctrine of 1834: "We do not interfere with the right of patrons; they may choose whom they please; but we tell both parties, both patrons and people, that if any body is chosen by the former whom the latter dislikes the choice shall go for nothing." His manly and practical understanding, aye, and the honest nature of his venerable colleague Dr. Erskine, who differed from him *toto coelo* upon the question of church patronage, (though their difference never threw any shade across the intercourse of the two friends in private life,) how would his honest mind have received the subterfuge upon which the distinction of the present change is sought to be raised—the paltry subterfuge, that the rights of the patron are preserved, but the veto of the [289] parish let in? Aye, or another light of the church, a man of as honest a nature, as sound and sagacious an understanding, as ever flourished in any sphere, a great leader of the general assembly, though not of Dr. Robertson's party, I mean my venerable friend the late Sir Harry Moncrieff; what would he have said? I doubt whether any man could have dared to use such arguments as have been invented at the present time if he had been living. I doubt whether such subtleties would ever have been vented in his presence; but I know, if they had, how swiftly they would have been blown away out of the general assembly, and out of whatever kirk court, be it presbytery, or synod, or consistory, or council, that had ever suffered them to flutter about within the dark aisles of its sanctuaries for the fraction of a second of time; for if there was ever a man who despised such subtleties and sophistries it was that man; if ever there was a man who knew and practised the true rule of honest morals as well as sound judgment and good policy, it was that man,—I mean the rule of never trying to do indirectly what you dare not do openly and manfully and avowedly, and never to seek to escape from or to shelter yourself from the natural and just consequences of your own proceedings by mysterious

generalities, and vague phrases, and shadowy distinctions, which, as they never for a moment do deceive yourself who practise them, never can much longer deceive any one else.

Then, my Lords, it is said (to make it still more absurd) that the congregation have a right to say, we do not choose this man; we prefer any other to him; we like him less than any other man that can be mentioned, and therefore we will not have him: and this [290] decision of the congregation is to bind the presbytery. But observe all the while, the congregation themselves are not bound by it; for, a few moments after they have said that they prefer any other man to A., you present B. to them, who is another man than A., and they may refuse him as they did A. You may present twenty people after A., but they are not bound to take any one of them. That is exactly the state of the argument. The patron says, I choose A.; he has a right to say so; the presbytery sustains his right; the general assembly sustains his right; he is not called upon to say why he prefers A., if he chooses A. and A. is a qualified person; the choice is in him to select a qualified person. Oh! but, say they, the people shall be called in; and the people say, we do not choose A., and without giving any reason. Now, I say no two things are so impossible to exist together in the same world as the absolute right to choose, on the part of one person, without a reason, and the absolute right to refuse, on the part of another person, without a reason, unless you mean to say that they have a joint choice, and that has been said for the first time in the history of the Scottish church, and in the history of the Scottish courts and the history of Scottish jurisprudence, ecclesiastical and civil, by the act of the assembly of 1834, and by the presbytery acting upon that act of the assembly in this instance.

But then it is said that they would not exercise this veto, as it is called (or right of dissent, as it is translated by way of making it more fatal to the argument which rests upon it,) capriciously; they would do it conscientiously, and they would not refuse a man without reasons. My Lords, I do not much understand, and do not at all ap-[291]-prove of a confidence sought to be reposed in persons whom you vest with the power of acting without a reason, and do not call to give any reason at all, and yet are to confide in their always acting correctly, always exercising it conscientiously; the patron is also to exercise his choice conscientiously; the law does not assume, it does not protect him in the capricious or wanton exercise of what is a kind of public trust. It is a right of private property, but it is to a certain degree a trust for the benefit of the church; and I am sure that if a patron either in England or Scotland were to present a party to the bishop here, or to the presbytery there, whatever his motive might be, if it were a bad one, he would be slow to avow it. He would not say, I presented this man because he is a pot companion, or because he is the nephew or the brother of a mistress or a complying husband. These are all bad motives; he would not avow them if he acted on them; they might influence him, but he would not say so. Now, will the people avow that they refuse a man because he is too strict in his doctrine, which makes him the better pastor; because he is a man of a high moral sense of duty, and will not overlook scandalous crimes in his parishioners; because he is one who will preach the word faithfully and be instant for righteousness in season, and out of season, as his duty to his master prescribes, and as his master and his apostles have enjoined? No congregation will say, because that is a man likely to preach against notorious enormities practised by us the parishioners, and refuse us access to the sacraments of the church if we are of impure life, because he catechises us and insists upon our attention to our spiritual concerns in the performance of his ministry, we do not like [292] him. No congregation will openly avow such motives, but they may be motives which influence them all the while; and the act of the general assembly allows the fullest scope to such motives, because it does not require any reason whatever to be given, and the reason, if it were given, is not required to be cognosed and judged upon by the presbytery; consequently they place things upon a very different footing from the act of 1690. The act of 1690 had some sense, it had some consistency, it made some provision for the right government and right filling of the church; for it said, if any man has any reason to propound against the presentee let him state that reason to the presbytery, and let the presbytery judge of the sufficiency thereof, or of the truth of the facts upon which it is grounded. But not so the act of 1834; it says, whoever is presented shall



undergo the ordeal, not of examination by the presbytery, but of gossip among the people; and if the people choose to say they will not have him, though the reasons as the bottom of their refusal may be the very things in all the world which make him the fittest minister for the parish, he shall be rejected simply and finally, and rejected only because the people say, we will not have him. That is the act of 1834, and therein lies its material difference even from the repealed act of 1690, which our ancestors one hundred and twenty years ago thought so urgent, so inconvenient, and so mischievous, that they utterly and absolutely repealed it.

*Dolus versatur in generalibus* is a maxim of the civil law adopted by all our courts, frequently referred to by the judges, no where more frequently than in the Scotch courts, and one which I have oftentimes heard cited both in the general assembly and in the civil courts. [293] When a *quare impedit* was once brought in England, where the right of the patron is precisely the same as in Scotland, for he must present a qualified person, and the bishop is to judge of his qualification for the sacred office, that is to say, his literature, his life, and conversation, and his orthodoxy, which comes within literature; nay, according to the calvinistic creed, may come both within literature and life in Scotland,—I am alluding to Specot's case (5 Rep. 57, b, 58, a) in 5 Coke's Reports, a leading authority here as to the limits of the bishop's power. When Specot was presented by the patron and refused by the ordinary, it was held not to be sufficient for the bishop to return generally that he was *non idoneus*; but if he had answered *minus sufficiens in literatura*, that, it was held, would be sufficient; and as the court have no organs to say whether he is or not, the bishop shall decide it, because literature is matter of clerical qualification and clerical competence. It is remarkable that the judges assign for a reason why the general return *non idoneus* wanted validity, "*quod dolosus versatur in universalibus*." If they will not allow the bishop or the presbytery merely to say *non idoneus*, without specifying in what, much less will they allow it to be said, "We will not have you;" they must say why; and then the judges add, "for if it were otherwise the patron's rights might be prejudiced." So that holding the patron's rights might be prejudiced by a general answer, they require a specification.

This I throw out in answer to what may seem an objection, though it was not much relied upon at the bar, to the course of my present argument. It may be said, if the presbytery had only said "We refuse him," without saying why, nobody could have touched their [294] decision. In the first place, my Lords, I do not deny that if such had been the return of the presbytery, just as the bishop's return was to the *quare impedit* in Specot's case, it would have made our proceeding a good deal more difficult. The case of the respondent would then have rested upon different ground; it would not have been the same case, and would not have been tangible by the same arguments by which this case is touched. But I say, in the next place, that a general refusal without assigning any reason would not be legal and valid on the part of the presbytery, any more than the bishop's refusal was valid who in Specot's case merely said "*non idoneus*." He must point out some *non idoneitas*, of the relevancy of which we, and not he, are entitled to judge; some qualification or want of qualification of which he has exclusive cognizance. But I am not called upon to dispose of that point, because it is not before us. The presbytery have not sheltered themselves under a general refusal; they have come so far to particulars that they have said, we refuse him though a regularly presented person—though a perfectly qualified person; and we reject him because the majority of heads of families in the parish dissent without giving any reason, and we are bound by their dissent. That is their return, and that is a totally different case from the one now put. I understand the act of the general assembly to specify a majority of male heads of families; is it not so, Mr. Attorney?

Mr. Attorney General.—Yes, my Lord, these are the terms.

Lord Brougham.—I think the Lord President refers to that in his plain, distinct, and highly judicial view of the case. "The male heads of families;"—what is the meaning of that? The men are to decide, it [295] seems. Shall nothing be said of women in the matter of salvation and in the administration of the church to which they belong? We are living under the christian and not under the mahomedan law. But it is "the male heads of families." Now, suppose there are three or four single women—pious women—in communion with the church, and three or four

widows, these may even constitute a majority of the whole communicants; are they to have no interference,—never to be consulted at all? Oh! no; the general assembly says they must take whatever the males of the parish choose to impose upon them for their edification. But “heads of families.” Why not lodgers? Why not a respectable and well-informed journeyman? Why not a respectable scholar, more learned than all the parish together? Is he to have no voice *quoad sacra*, though perhaps a communicant more regular at the altar than any one? No; “the male heads of families,” says the general assembly,—“heads of families.” Now all this exclusion of females and of lodgers may be right or it may be wrong, but it is not self-evident why; it is not of necessity right, it does not follow from the nature of church discipline; it does not follow as a necessary consequence from the nature of the case at all; it is an arbitrary, it is a gratuitous, it may be a capricious selection of a judicature by the general assembly. And that leads me to my next observation.

If the general assembly have a power to impose the will of this kind of majority upon the whole parish, have they not equally the power to make a totally different arrangement altogether? Can any one earthly reason be propounded which justifies the present criterion adopted by the assembly, the majority of heads of families [296]—lies in communion with the church, which would not just as well, and for the exactly same reasons, and precisely on the same grounds, have justified a totally different scheme of induction altogether. Suppose it had been enacted thus:—provided that he shall be acceptable to the majority of the synod?—that is a very important body; or, provided he shall be acceptable to and chosen by, or not rejected by, a commissioner whom the assembly shall appoint for that purpose to superintend, as they have done in former times; because I read to your Lordships out of the Book of Discipline, and I read to you out of an act, that at one time the superintendence and control was given to commissioners appointed by the kirk to regulate the presentment and induction of ministers. They might have done that; or I will tell you what they might have done, and for aught I know it is the next thing they will do, if you allow them to do what is now attempted. They might have said, provided he be agreeable to the presbytery of the bounds; who could object to that? Is it impossible they should do that? My Lords, it is so far from being impossible that they have done it already. There was an act in 1576 made by the general assembly, by which it was provided that none seek preferment without the advice of the presbytery: that was for a season the law of the kirk, and the assembly may now revive it. The legislature may make that law now which out of the kirk courts was the law before; but has the general assembly any right to do so? Has the church judicature and the general assembly, which by the common law of the land and by statutory enactment is limited to ecclesiastical concerns, a right to do that? for the statutory enactment of the year 1592 is revived in all particulars by the act of [297] 1690, c. 5., except as to patronage, and that is disposed of by the subsequent act of 1690, c. 23., which is repealed by the 10th of Queen Anne; but the other is not repealed; the act of 1592 is to all intents and purposes revived, and among other intents and purposes to that of defining, chalking out, and limiting the bounds and the formations of the ecclesiastical jurisdiction. By all these rules, by the common law, by the parliamentary constitution of the country, by statute enactment, by the act of 1592, by the act of 1711, it is the province of the general assembly and the inferior church courts to take cognizance of church matters and to make regulations touching ecclesiastical concerns, and ecclesiastical concerns alone; and they are excluded, they are barred and shut out, from any cognizance of civil patrimonial rights, and not only of civil patrimonial rights directly, but of those things which indirectly affect civil patrimonial rights. They cannot do *per nefas* what they cannot do *per fas*; they cannot do indirectly what they cannot directly; they have a right to make rules as to qualification, and they have a right to make rules as to who shall judge and how they shall judge upon qualification, because qualification is admitted upon all hands to be a matter of ecclesiastical cognizance. But they have no right to make a rule as to who shall be chosen and how he shall be chosen when the patron presents him; they have no right to transfer from the patron either the whole or the half, and in this case they have transferred by far the larger half of the choice and selection of the presentee. But one thing is perfectly clear, that no grounds in reason which the general assembly can advance for its right to make the

act of 1834 giving a veto to the congregation can be conceived [298] to exist which would not give them precisely as complete a power and as undeniable a right to give a veto to the presbytery of the bounds, that is to say, to repeal the act of Anne, and to revive the act, long since repealed, of 1576, which alone and for the first time assumed the choice of the presbytery.

It is now fit that I should advert to one topic which certainly at first did seem to impose some difficulty upon those who maintained the judgment of the Court below. There is a great difference, it was said, between the location or admission of a minister in Scotland and the admission of a clerk by the ordinary in England, inasmuch as in England the person having the advowson presents his clerk, a person already ordained, to the bishop; whereas in Scotland the presentee is ordained and inducted *unico contextu* by the presbytery, that presbytery being beyond all doubt the only judge of ordination, with which the municipal court has no right whatever to interfere. Ordination, it was said, is thus mixed up with the induction, and cannot be severed from it. But in the first place we must look to the case before us; the severance here at least is complete. The presbytery do not refuse to ordain; nothing of the kind; they do not say he is not qualified; there is no objection whatever to ordaining him; but they say, though we have no objection to ordain him we do not choose to induct him into the parish of Auchterarder, because the people dissent from receiving him; and this is our only reason. I think that is a sufficient answer to this objection, and I believe I threw it out in the course of the argument.

But there is another answer:—If a person being a probationer is brought before the presbytery for induction into a benefice, he is then ordained as well as inducted, that being the first benefice to which he is appointed. But whatever argument and whatever law applies to the case of the first benefice in respect of the present controversy, must be equally applicable to the second benefice, that is, to the case of transportation, as it is called, from one benefice to another. Now, in this case of transportation to a second benefice the argument is sifted entirely from the difficulty with which it is sought to be mixed up as to the first benefice, because the first benefice is accompanied with ordination, and the second benefice is accompanied with no ordination at all. The presentee is already *e clero Domini*—already ordained, and therefore the only question, in the second instance, that can arise is with respect to inducting him into the parish of A., whereas formerly he was settled in the parish of B. Consequently in this instance the presbytery can never say, we refuse to ordain him (which is matter of ecclesiastical, not of civil, cognizance) because he has already been ordained; and the only question is, shall he be inducted into the parish of B., having been already settled in the parish of A.; and that question is only of civil cognizance. No man is absurd enough to contend that the congregation should be consulted only in cases of transportation, and not of original settlement; nothing so wild has ever been urged as the proposition that the assembly has the power to make this act as to second settlements, though not as to first inductions. The two cases stand upon the selfsame grounds, and the same arguments apply to both. I think those two answers,—either of them, but citing both together, are sufficient to repel the objection which I have now been considering.

[300] Another argument was used, which I cannot altogether pass over, as many of the learned judges go very mainly upon it. It was said, is a call of no avail? does it mean nothing? Have all the people of Scotland,—all the lawyers and all the divines of the church courts, been hallucinating for so many years, when they have held a call to be necessary as part of the induction, and that the moderating in a call is the proper function of the presbytery? I by no means say that a call is nothing; but I only say it is not every thing; I deny that it is decisive; I refuse it the virtue which others ascribe to it. In the first place, it is admitted on all hands that nothing can well be conceived more obscure and involved in more doubt than the whole history of calls in Scotland. At one time there was a call most effectually, namely, during the interval between 1690 and the year 1711, because during that period the kirk session and the heritors presented to the congregation, and if the congregation did not call the presentee no further step could take place; only it is to be observed that was a call of a very peculiar nature, and wholly different from the one now contended for. The power to refuse or give a call was of a very limited kind, for the people could not refuse giving the call unless they assigned reasons, and the presbytery were to judge of

those reasons. But was there ever any period in the history of Scotland in which it was held, either practically or by law, that the congregation was by a majority of voices to call a person, and that if they did not by such majority call him, nothing could be done in his favour? I know very well that there are two authorities in favour of it. The first Book of Discipline in 1560, and the second Book of Discipline in 1578; for [301] the first says the people have the power of electing: it says in so many words, "it pertaineth to people to elect their pastors;" and the second says that that "has always been the practice of the kirk till antichrist intruded into it." But that is not the law now; it was not the fact at any time; I have shown your Lordships that it is a very gross mis-statement of the historical fact; and that it never was the law of the church is clearly admitted by the very fact of the general assembly having had to invent this new mode of proceeding, namely, to call upon the majority of the male heads of families in communion with the church to accept or reject him. The majority being substituted for the former practice of any two or three persons is most material, and shows a complete change from a mere formality to a substantial choice.

But whatever was at any one time the force or validity of the call, the statute of Anne does away with it altogether, unless in a modified way and to the very limited extent, that of somewhat more and not much more than a mere ceremony, to which extent only it has been limited ever since that time. The best proof of this is, first of all, this act of 1834, making, for the first time, a majority necessary, and pointing out of whom that majority shall consist; and in the second place, the avowed fact on all hands that the call might have been made by any two or three people in a parish of two thousand, and that if the presbytery chose to moderate in that call, it was just as valid a proceeding as if it had been made by the majority or by the whole parish. Now, does not that give one a very great misgiving as to the substantial meaning of the call,—as to whether it really means anything or nothing? It can be got rid of by almost any form. [302] I suppose that the mere presentment may be a call; there is no law which points out who shall give the call. Why may not the patron, in respect of his advowson, be held to belong to the parish, even if he be not a heritor or an inhabitant? Why may not the patron's connection with the parish in respect of that advowson be held to be sufficient for the purpose of giving a call? I know there is no authority against me; I know there is no answer to these questions by any dicta of judges or any authority of text writers.

But what authority is there in favour of a call? No doubt there is the act of assembly of 1782, to which reference is made by Lord Moncreiff; and there is the decision of that venerable body in 1790, highly disapproving of the settlement of a presentee who had no call. For aught I know it may be a great informality; but observe, they did not rescind the settlement on that account. But if he had got in without a presentation, or if he had got in without the presbytery inducting him, or if he had never been ordained, would they have allowed him to continue? No such thing; they would have ousted him from the church, and they would have had another man appointed, according to the laws and formalities of the church. When it is said that the call is a very substantial ceremony, and that it is proved to exist in right and in law, and to be necessary, by the Stirlingshire case in 1790, I think you only prove the reverse by the quotation of that case, inasmuch as it was one where there had been no call of a presentee in any manner of way, where the presentee never had a call from any single person in the parish, and there was no moderation in the call by the presbytery; nevertheless he was held to be validly inducted, and to have a [303] good right to a settlement, even by those who were censuring the illegality, saying all the while *fieri non debuit; factum valet*. In other words a form had been omitted which ought to have been observed, but the omission was immaterial. Thus a call is shown to be as immaterial a part of a valid settlement, as it is immaterial to a valid marriage by banns, that the parties shall have resided in the parish before proclamation. That is a directory, not an imperative part, under Lord Hardwicke's marriage act. It is a very material direction; it goes to the main purpose of the statute; here it is not a necessary condition precedent; the marriage is valid without it.

My Lords, this throws great light on the subject, and mainly strengthens instead of negating my argument, for it shows that a call is held by the church court itself to be rather a matter of convenience and a useful form,—if you will an important form, than of the very essence or substance. What then is the call? It is a remnant of the

old, obsolete, and repealed right of election. Whether it comes from the period which elapsed from the Revolution to the 10th of Anne, while the act of 1690 was in force, or whether it comes from some mistake of the authority of the two Books of Discipline in the 16th century I need not stop to inquire. The nature of the thing clearly enough appears from the way it has been dealt with. This serves to demonstrate that it has not been held a condition precedent of a valid induction, but that the induction may be valid without that condition being fulfilled; nothing can more clearly indicate its being a mere ceremony or form. I suppose it is convenient and useful that there should be a presentation in form of the person to the congregation as well as to the presbytery. The pres-[304]-bytery are to judge of his qualifications without appeal, except to the church court, but the congregation is to be brought acquainted with their future pastor; and as the presbytery are to judge of his life and conversation, as well as his literature, it is convenient and useful that the people should have an opportunity of coming forward with any objections which they may have to him in these important particulars. But that is wholly different from the right of veto or dissent or refusal without any cause shown.

Now I will take an analogous instance: Mr. Attorney General very properly alluded to the coronation. It is a decent and convenient solemnity to present the sovereign to the people, and the people are supposed to take part in the choice; a part, however, so immaterial that if they were all with one voice to reject, the coronation would be just as good, would go on exactly in the same way, and the rejection or recalcitration of the assembled people would have no more weight than the recalcitration of the champion's horse in Westminster Hall during the festival attending the great solemnity. It is an obsolete right, which has not within the time of known history ever been exercised by any people.

But I will state another instance which is very analogous, the publication of banns. Now both in Scotland and in England a regular marriage requires the publication of banns; in Scotland a marriage may take place by mere words of consent, without any church ceremony whatever, and it is supposed that in England the law was so before the marriage act. But a regular marriage can only be made by publication of banns, and whoever in Scotland does it without is liable to church censure. Now, when the banns are published in England, the object is to ascertain by this publicity that there is no lawful impediment, such as consanguinity within the limited degrees, or prior marriage, or refusal of consent by parents or guardians. I have taken pains to inquire, both from bishops and priests, what would be the consequence in their practice if upon publication a person were to interpose and forbid the banns, or afterwards to forbid the marriage, which may be done at the altar when the marriage is about to be solemnized. The answer they have all given is, I should suspend the solemnity till I made inquiry. But suppose the person forbidding should say, I give no reason, but I only forbid the banns; or suppose he gave another reason, that he was the rival of the husband, or that she was a rival of the lady; a very good reason for the party not wishing the marriage to take place, but no legal objection to the marriage. The answer is, that he would not be attended to at all. The marriage would go on just as well as if the dead silence prevailed through the church which generally attends those interesting solemnities. Thus, then, it is a very convenient thing that banns should be published, because it gives publicity to the intended contract; it gives parties an opportunity of coming forward. If there has been a prior marriage, it gives the public an opportunity of saying, Do not commit bigamy. If there is consanguinity, it gives the party an opportunity of saying, Do not allow incest. If there is an infant about to be married, it gives the parent or guardian an opportunity of saying that his consent has not been given; but though the law requires that the parent's or guardian's consent shall be necessary where the marriage is by licence, there is no such accompanying necessity where it is by banns; and it is [306] a very great inconsistency in the law, for, though the legislature meant, no doubt, to prevent marriage without consent, yet if the banns are published, and the priest chooses to marry in spite of the parents and the guardians, their refusal or opposition signifies nothing, and the marriage is just as valid as if they had consented. Then I am for the publication of banns. It would not be a regular marriage without it. It would not be a valid marriage in England without it, unless by licence, which is accepted by law. It would not in Scotland

be a marriage free from the church censure without it; and therefore I am for it, and therefore we are all for it, and therefore we think it is a useful and a convenient part of the ceremony, because it gives opportunities for objections being made by giving publicity to the intended contract. But then the consent or silence is not a necessary part of the marriage; nay, the banns call on persons to object, and if they do object the marriage proceeds just as if they had held their peace. Furthermore the last publication tells all the world that if they do not then object they must for ever after hold their peace, and yet a person present, and saying not a word, may come forward the day after and set aside the marriage by proving a lawful impediment. Precisely so it is with respect to the call. I have attended to its history as well as I could, but I cannot find,—and I see that some of the learned judges who have given great attention to the subject have come to the same conclusion,—I cannot find that either before or after the statute of Anne, unless between 1690 and 1711, the call has been held to be a necessary part of the induction, or a condition precedent to a valid settlement. At all events I am perfectly certain that if such force and [307] effect is given to the call as to make it an essential part of the proceeding, and much more, if the general assembly, acting upon this supposition, can carry into effect any assumed intention of the law so as to make a specific provision against an induction ever taking place without the consent of the majority of the male heads of families, then the statute of Anne is abrogated, and the rights of patrons are utterly extinguished.

It only now remains that I should say something respecting the question of jurisdiction; but I have no doubt whatever upon that. It is asked, “How can the Court of Session interfere in a matter of ecclesiastical cognizance?” Prove to me your position, that this is a matter of ecclesiastical cognizance, by which I mean of exclusive consistorial cognizance; prove to me that this is a question of qualification like the question of *sufficiens* or *minus sufficiens in literatura*, and then I say that the Court of Session will be excluded, just as the Court of King’s Bench was in Specot’s case upon a *quare impedit*, but which Court did not deem itself to be excluded (and the Common Bench agreed with them) where the return to the *quare impedit* by the bishop was *non idoneus*. They would not have been excluded even if the bishop had said *schismaticus inveteratus*, much less if he had said merely *nolo inducere*, as the presbytery has here done; but we have here no such question as one of qualification. We have a question of election and nothing else, a veto or dissent set up by the ecclesiastical court; and which, if they had done so in England, would have been ground of prohibition, as an interference with the jurisdiction of the municipal courts in matters temporal; and therefore this argument fails altogether.

[308] But it is said, the Court of Session may give the civil rights,—the right of stipend, and can do nothing more; yet, it is admitted all the while that the court has no power to give those civil rights, to bestow the temporalities of the church on the pastor, unless he is inducted, so that the non induction was as complete a bar to the civil court giving him the temporalities as if the civil court had been told, you shall not adjudicate upon the matter at all.

Then it is said, you have no means of carrying into effect the decree of the Court of Session, albeit supported by the authority of the House of Lords, which is a decision of parliament in its judicial character, upon the subject. In other words, although you say the presbytery have acted wrong, although you say that their reason for rejecting is of no avail whatever, although you say that the law is contrary to what they have supposed it to be, and although you say, deciding upon the petitory part as well as the declaratory part of the summons (which, however, you are not called upon to do), let the presbytery induct immediately, for it has no grounds for refusing, still it is affirmed that the presbytery may persist in refusing and must prevail.

My Lords, it is indecent to suppose any such case; you might as well suppose that Doctors Commons would refuse to attend to a prohibition from the Court of King’s Bench; you might as well suppose that the Court of Session when you remit a cause with orders to alter the judgment would refuse to alter it. Conflict of laws and of courts is by no means unknown here. We have, unfortunately, upon the question of marriage had a conflict dividing the courts of the two countries for upwards of twenty-five years, in which the Court of [309] Session have held one law, and in which

your Lordships and all our English judges have unanimously held another law. The Court of Session in Scotland has held and still hold two persons to be married whom your Lordships hold not to be married. But has the Court of Session ever yet, when a case, which had been adjudicated by them according to their view of the law, has come up to you, and you reversed according to your opposite view of the law,—has the Court of Session ever then continued the conflict, which would then have become not a conflict of law, but a conflict of persons, a conflict of courts, a conflict in which the weaker would assuredly have gone to the wall? The Court of Session never for one instant thought of refusing to obey your orders upon this matter, whereupon they entertained an opinion conflicting with your own. For this reason alone, and it is enough, I have no doubt whatever, that the presbytery, when your judgment is given declaring their law to be wrong, declaring the patron's right to have been valid, will even upon the declaratory part of the judgment do that which is right.

And then may come this question: what is the Court of Session to do upon the petitory part of the summons, supposing that shall be insisted upon? Enough for me to-day to observe that this is not now before us; but suppose it were I should have no fear whatever in dealing with it. I should at once make an order upon the presbytery to admit A. if duly qualified, and to disregard the dissent of the congregation. And, my Lords, why do I say so, and with such confidence? Because I look to the cases; and as these are all to the same effect, there is only one with which I shall trouble your Lordships. None of them bear upon the main question now before [310] us, but they effectually raise the inquiry, collaterally instituted, How are the court's orders to be enforced? They are all cases of conflicting rights of advowson, they are all cases where there was no question whatever between the presbytery and the courts, and the only question was as to the right of A. to be presented. They are all cases, therefore, which fall without the scope of the main argument here before us, and throw no light upon that. But upon this collateral question they do throw light; and I refer to the case which a most learned judge, Lord Gillies, has justly called a too well known case, for it was attended with unpleasant circumstances,—the case of *Lord Dundas v. The Zetland Presbytery*, in the year 1795. Now, what was the conclusion of the libel there?—"That it should be found and declared that the pursuer had a right to the patronage, that he exercised his right as patron within the time prescribed by law, and that the presentation to Mr. Nicolson is valid and effectual, and was offered to the moderator of the presbytery in due time." The conflict was this, that the presbytery had chosen one, and they ought to have chosen the other. The Court were called upon to declare "that the presbytery should be decerned and ordained by decree foresaid to give due obedience to the said presentation, and to proceed in the settlement of the said Nicolson," who was the conflicting, or, as they call him, the competing, presentee, "until the final end and conclusion; or, until the said Nicolson shall be settled in the said church and parish of Unst, it ought and should be found and declared by decree foresaid that the pursuer and the other heritors, life renters, and others liable in stipend to the minister [311] serving the cure of the said parish, are entitled to withhold and retain the said stipend," and so forth. They then settled Nicolson, whose name, Lord Gillies says, appears as the minister next year instead of Gray, the competing one, whom they had before erroneously admitted and settled.

Now observe that the cause of this dispute was totally different from the present; it was because Nicolson was the proper man in competition with Gray; but that is perfectly immaterial to the present argument, touching the jurisdiction of the Court of Session. Whatever was the cause of dispute, the presbytery had acted wrong. The presbytery had refused to admit Nicolson; they had admitted Gray. What does the Court of Session say? Admit our man Nicolson, and oust your man Gray. Why was it not said in that case, as has been said here, this is nonsense, this is incompetent; you have mistaken your way; the Court of Session has no power; because, when the Court of Session declares that Nicolson has the right, the presbytery will continue to keep in Gray, and then what can you do? And so would arise in that case of *Zetland* every one of the arguments with which an attempt has been made to scare your Lordships from putting a proper construction upon the act of parliament, and from doing your duty in this appeal; namely, can you have letters of horning against a whole presbytery? Can you proceed against a whole body of clergymen? Can you bring an action

of damages against a whole body of men? That is the argument with which we have been harassed and threatened at the bar if we here affirm the judgment of the court below. Why was not that argument used in the case I have just mentioned to [312] scare the court below? It is good for nothing; but it would have been not more worthless there than it is here. And if the Court of Session had the power of saying there "Take Nicolson and oust Gray," have we not just the same power here of telling the presbytery "You have mistaken the law" (a perfectly innocent mistake, to which all men are liable); retrace your steps, and take the person presented by the patron, if he is qualified according to the ecclesiastical rules? Therefore, I hold that this argument on the jurisdiction is utterly absurd and untenable, and proves no impediment in our course towards a right conclusion.

These are the grounds upon which I hold that it is expedient and just, and therefore necessary, for your Lordships to affirm the judgment of the Court below. I find that I have gone at much greater length in point of time into this case than was at all desirable; but when I consider the great interest which it has excited, and, moreover, when I observe that I look upon it as so much more clear than many have considered it, who have dealt with it below, I do not regret that I have pursued this course.

My Lords, no person would lament more deeply than myself if the judgment which I am now about to move should give offence to that most venerable body, the general assembly, as representing the church of Scotland. I have the most profound veneration for that establishment, and it is hereditary in me as well as personal. I am myself sprung from some of the most venerable and most learned members of that establishment; sprung directly from them, as well as knit to them by collateral connexion. I cannot be indifferent to its welfare or deaf to its claims, or in the slightest degree prepared to [313] treat it with any other than the most affectionate reverence.

My Lords, I am not the only person engaged in this discussion before your Lordships' house who is connected with the church of Scotland, and who is imbued, I know, with those joint feelings towards it. The learned Attorney General is himself descended from a most venerable pastor of that establishment; and I know, because nothing could more clearly indicate it than the whole course of his argument, and all the observations which fell from him, that he is most scrupulously and delicately averse to any thing which could betoken the slightest want of respect for it, as much so as I am myself. I say this the rather because I have been not a little astonished, in my correspondence with Scotland, to find that something which fell from him had been so grossly misrepresented or misunderstood as to make it fit that I should authoritatively, and as a witness present during the whole argument, contradict it, as utterly unfounded in point of fact. Nothing could be more perfectly respectful and affectionate towards that body than the whole of the argument on the Attorney General's part throughout.

My Lords, I join with him in the deepest sorrow, that anything in this House should pass, to which he has contributed by his argument, and to which I am contributing more effectually by my judgment, with the tendency of perpetuating the discord now prevailing in Scotland. That it should ever have begun all must sincerely deplore, but that it should continue is a matter of still greater affliction to every friend of his country. I have declared my inviolable respect for the kirk and general assembly, but any want of respect that I could [314] show towards them, any irreverence—any mockery of them, any slander that I could bring against them, any attempt to revile them, or to hold them up to hatred and to scorn, would be a mere jest compared to the attempts that are made by some who take an opposite view of the case, and who, without meaning, God knows, any more than I do, any the least disrespect, think they are taking the best means for establishing their privileges by holding out indications that the assembly will pursue its own course; that the assembly will disregard the authority of the law; that an assembly of christian ministers will be parties to the fomenting of discords; that the last thing the ministers of peace are minded to promote is the peace of the church of Christ committed to their care; and that the only thing they now think of is the victory of them, the churchmen, the pastors of Christ's flock, over the judges, over the supreme judges of the land, and over the law of the land itself; a victory to be won by setting up acts of their own, which they have no title to pass, against queen, lords, and commons,—the statute law of the realm.

My Lords, I defend the assembly against the arguments and the threats of their



advocates. I protest on the part of the assembly as a body of christian men, of whom the bulk are christian ministers, against the imputation thus thrown out against them by this course of defending them, and I say that my hopes of them, my confident expectations of what will be their conduct, are wholly the reverse of those prospects thus held out; that it was an injudicious line of argument on their behalf, an argument which I am morally certain would be repudiated and spurned by the assembly itself. My Lords, that assembly will do its duty, will show its [315] veneration for the established authority of the law, will rest satisfied with having entered its protest and indicated upon its records its own opinions; but will, with its inferior judicature the presbytery, render a willing and respectful obedience to the law of the land as pronounced by the Court of Session and as affirmed by your Lordships. With these views, my Lords, and upon these grounds I am humbly to move your Lordships, that the interlocutor appealed from be affirmed.

Lord Chancellor.—My Lords, it is impossible for me to conclude to-day the observations which I think it my duty to present to your Lordships in this case, and therefore, with your Lordships' concurrence, I shall adjourn the further consideration of this case till half-past two to-morrow.

Lord Brougham.—My Lords, I entirely agree with my noble and learned friend. I know that my noble and learned friend means to enter into this case at large, and therefore I entirely agree with him that it will be most satisfactory to postpone it until to-morrow.

Lord Chancellor.—My Lords, it was stated to your Lordships yesterday by my noble and learned friend, that the opinion we had formed upon this case had been arrived at by us without any communication with each other. My Lords, that statement required no confirmation from me; I only refer to it for the purpose of explaining the grounds upon which I propose to follow a course in this case which I should be induced [316] to abstain from in any other. When I asked my noble and learned friend within a few days what opinion he had formed upon this case, I certainly was not without a very confident expectation of the answer I should receive, not from any thing which had passed between us, but because in examining the case myself it appeared to me difficult, if not impossible, to suppose that my noble and learned friend could have come to any conclusion other than that at which I had arrived myself.

My Lords, in this case, as in all others of importance, I have thought it the better course to reduce to writing the opinion I have formed, and the reasons upon which it was founded; a course which I am well aware that my noble and learned friend approves, inasmuch as I believe no judge before his time delivered so many written judgments; a course which is productive of the greatest benefit, which the profession have particularly experienced from the judgments of my noble and learned friend; and a practice which I am happy to say has been pretty generally adopted in all the courts of Westminster Hall. My Lords, following this course, I have, after considering all the documents upon the subject, and all the authorities referred to, committed to writing the opinion I have formed, with the reasons upon which it is founded. My Lords, that was accomplished long before I had any communication with my noble and learned friend upon the subject.

Now, in listening to what fell from my noble and learned friend yesterday, I found that very many of the grounds upon which the opinion which I have formed would rest have been anticipated by what was stated yesterday. Under ordinary circumstances I should have [317] thought that a very sufficient reason for abstaining from a repetition of that which had been so much more ably expressed by my noble and learned friend. But in this case I consider it to be rather a ground for exactly the opposite course of proceeding, because it cannot but be satisfactory to those who take an interest in this matter, and who of course will anxiously consider all that falls from your Lordships upon this question, to see what have been the workings of the minds which have been applied to it without any communication with each other; and if there should be found to be a similarity of reasoning and a community of view of particular parts of this case operating upon the mind of my noble and learned friend and of myself, no doubt it will have some effect in leading those who may consider the judgment of your Lordships, to be satisfied at least, that there probably is some

foundation for those conclusions to which we have both arrived separately, and apart from each other.

It has seldom happened that your Lordships have been called upon to adjudicate upon a case of more importance than that now under your consideration. It affects the manner in which ministers are to be appointed to a very large proportion of all the parochial benefices in Scotland, and believing, as I do, that the interests and well being of the people now and hereafter depend much upon the due execution of the most important duties of pariah priests, I feel deeply the responsibility which attaches to all those who are called upon to decide upon the manner of their appointment; for although no opinion as to policy ought to influence our judgment, which ought to be founded upon grounds of law only, yet the importance of the judgment to be [318] pronounced, and the evil consequences of any error, impose upon us all the sacred duties of exercising every means within our reach of coming to a safe and satisfactory conclusion.

With these feelings I have addressed myself to the consideration of this case. It naturally divides itself into two questions.

First, whether the proceeding of the presbytery of Auchterarder, founded upon the act of the general assembly of the 31st of May 1834, was legal, or an invasion of the rights of the pursuer. And, secondly, whether the interlocutor of the Court of Session appealed from was within its jurisdiction, and such as, under the circumstances of the case, ought to have been pronounced.

In considering the first of these questions, much of the difficulty which has been felt would, I think, be removed if any precise meaning could be affixed to certain terms which have been necessarily introduced into the argument on either side. Both parties agree that the right of presenting the minister belongs to the lay patron, and that the right of judging and of deciding upon his qualification for his office belongs to the church; for such indeed is the substance of the legislative enactments upon the subject. Both these rights must be exercised in the settlement of the minister, but the boundary between these rights,—what belongs to the one and what to the other, is the real question in dispute.

The pursuers allege that the right of presentation entitles the presentee to be admitted into the benefice, unless the church shall, upon examination and trial of the presentee, find him not qualified.

[319] The defenders, on the other side, contend, that to the church belongs the right of deciding upon the whole matter of admission, including every consideration which may affect the propriety or impropriety of the presentees becoming ministers of the parish.

What is the extent of the patron's right to present, and what the jurisdiction of the church in judging the qualifications of the presentee? That is the real question: if the acts, upon the true construction of which the whole contest ought to rest, reserve the right to the one and the jurisdiction to the other? Which being so, it necessarily follows that that only can be a true construction of the acts and a proper definition of those terms which preserves this right and this jurisdiction. The boundary between the two must be so fixed that the one must not be permitted to encroach upon, still less to destroy, the other.

If it were safe to refer to the law and practice of England in ascertaining the meaning of those terms, whatever doubt may exist would be speedily solved. It is the undoubted right of the patron here to present, and to insist upon the admission to the benefice of any qualified person, and the jurisdiction of the bishop is confined to deciding upon the qualification, or rather disqualification, of the presentee. But I have felt desirous of avoiding as far as possible any reference to the law and practice of this country, and choose to discuss and decide upon the law and practice and authorities of Scotland alone, even as to the meaning of the terms used; and I think there is not only in the statutes themselves, but in authorities of an earlier date, conclusive proof of the sense in which these terms were understood from the earliest periods, and of the meaning [320] which ought to be attributed to them in putting a construction upon the statutes.

That the right of patronage, as it existed before the reformation, though no doubt subject to the jurisdiction of the church as to the qualification of the presentee, was not

subject to any limit or restriction from the people or congregation, has not been disputed.

In 1555 the general assembly, in a message to the queen, expressed their opinion as to the meaning of those terms—patronage of the patron, and trial and examination by the church. They say, “Our mind is not that Her Majesty or any other patron should be deprived of their just patronages, but we mean whensoever Her Majesty or any other patron do present any person to a benefice, that the person presented should be tried and examined by the judgment of learned men of the church, such as are the present superintendents; and as the presentation unto the benefice appertains unto the patron, so the collation by law and reason belongs unto the church, and the church should not be defrauded from the collation, no more than the patrons of their presentation; for otherwise, if it be lawful to the patrons to present whom they please without trial or examination, what can abide in the church of God but mere ignorance!”

Balfour (p. 501), who writes in 1566, says, “Ane laique patron of ony kirk or benefice vaikand sould present thairto ane qualifyit and habil persoun of sufficient literature, honest in life, and of gude maneris.” At this time, then, all the church asked as against the patron was a right to judge of the qualification of the presentee; that is, of his literature, good life, and manners.

[321] When, therefore, the act of 1567, c. 7, ordained that the examination and admission of ministers should be in the power of the kirk then publicly professed within the realm, the presentation of lay patrons always reserved to the just and ancient patrons, and directed that the patron should present one qualified person within six months, otherwise that the kirk should have power to dispoise the same to one qualified person for the time, it is clear that the presentation so secured to the lay patron was to be subject only to the trial and examination of the church as to the qualification of the presentee, that is, as to his literature, life, and manners; and that the appeal given by that act to the patron against the refusal of the superintendent to receive and admit the presentee applied only to what had been before the subject of trial and examination, that is, his qualification as to literature, life, and manners.

If such was the extent of the right of patronage, and such the limit of the jurisdiction of the church in the trial and examination of the presentee under the statute of 1567, cap. 7., there will not be much difficulty in tracing those rights and duties through the subsequent statutes.

By the statute 1592, cap. 116., it is ordained “that all presentation to benefices be directed to the particular presbyteries, with full power to give collation thereupon, and to put order to all matters and causes ecclesiastical within their bounds according to the discipline of the kirk; provided the foresaid presbyteries be bound and astricted to receive and admit quhat-somever qualified minister presented be His Majesty or laick patrones.”

By another statute of the same year 1592, cap. 117., it is ordained, that upon deprivation of a minister the [322] patron shall present another qualified to the kirk within six months, and that if he fail so to do, the right of presentation shall devolve to the presbytery, to the effect that they may dispose of the same, and give collation to such qualified person as they shall think expedient. Provided that in case the presbytery refuse to admit any qualified minister presented to them by the patron, it shall be lawful for the patron to retain the whole fruits of the benefice in his own hands.

There is no allusion in any of these statutes to any authority intervening in the settlement of a minister between the presentation by the patron and the admission by the presbytery of a qualified person, which qualifications were clearly personal; and of which, indeed, the church was to judge, but was bound and astricted to receive and admit any person presented who should be qualified.

There is no allusion in any of these statutes to any election by the parishioners, or to any reference to them for approval or disapproval. The early reformers had struggled for some such power, and in the first Book of Discipline, composed in 1560, and therefore before the act of 1567, and the second Book of Discipline, composed in 1578, and therefore before the two last acts, it is expressly claimed; but the legislature decides against it, and secures to the patron the right of presenting the minister, and to the church the power of rejecting him, but only upon the ground of his not being qualified. Such were the

terms and conditions upon which the presbyterian church government was established, and received the sanction of the legislature; but it appears that these terms and conditions were unwillingly submitted to, for, so early after these acts as the year 1596, [323] the assembly enacted and attempted to establish that none should seek presentation to benefices without advice of the presbytery, and that if any should do the contrary they should be repelled; and this was approved and re-enacted by the assembly in 1638.

When, therefore, the legislature, notwithstanding this feeling and these attempts on the part of the church, declared that the presbyteries were bound and astricted to receive and admit whatsoever qualified person was presented by the lay patrons, there can be no doubt of the object of the enactment, or of the construction to be put upon the terms used.

The act 1690, cap. 23., which for a time destroyed patronage, recognizes the efficacy with which it had been exercised, and recites that the power of presenting ministers to vacant churches of late exercised by patrons had been greatly abused, and annuls and makes void the said power theretofore exercised by any patron of presenting ministers to any vacant kirk. And to the effect the calling and entering ministers in all time coming may be orderly and regularly performed, it enacts, that the heritors and elders shall propose a person to the congregation, to be approved or disapproved by them. If they disapprove, they are to give their reasons, to the effect the affair may be cognosed by the presbytery, at whose judgment and by whose determination the calling and entry of the minister are to be ordered and concluded. And it enacts, that if application be not made by the elders and heritors to the presbytery, for the call and choice of a minister within six months, the presbytery may proceed to provide the said parish, and plant a minister *tanquam jure devoluto*; and it provides a certain compensation to [324] the patron for the right of presentation thereby taken away.

The act of Anne, c. 12, 1711, is entitled "An act to restore the patrons to their ancient rights of presenting ministers to the churches vacant." It recites, that by the ancient laws and constitution of Scotland the presenting of ministers to vacant churches did of right belong to the patrons, until by the act of 1690 the presentation was taken from the patrons and given to the heritors and elders; and that that way of calling ministers had proved inconvenient, and had occasioned great heats amongst those who by that act were authorized to call ministers, and had been a great hardship upon the patrons. It then repeals the act of 1690, so far as it relates to the presentation of ministers by heritors and others therein mentioned, and enacts, that in all time coming the right of all and every patron and patrons to the presentation of ministers to churches and benefices be restored and confirmed to them, any act or statute to the contrary notwithstanding; and that it should be lawful for any person who had right of patronage for any church to present a qualified minister, and that the presbytery shall and is hereby obliged to receive and admit such qualified person as the person or minister presented before the making of that act ought to have been admitted.

Such are the legislative provisions upon the subject in contest in this cause,—the right claimed by the pursuers, and the power or duty claimed by the defenders, to belong to them, and to be regulated by the enactments now in force, so far as such enactments support such rights or regulate such powers and duties. Other authorities and other regulations may be resorted to, as [325] operative in matters not included in these enactments, but can be of no effect as to any matter within them. What then is the true construction of such of these enactments as are now in force, resorting to the history of the time only for the purpose of explaining the expressions used in those statutes? In my opinion clearly this: that the patron's right to present was absolute, but to be exercised only in favour of a qualified person, of which the presbytery were to judge. If such was the right of the patrons under their statutable title, and such the power and duty of the presbytery, it is only necessary to inquire whether the act of 1834 has or has not interfered with their right; and whether the presbytery, in the course they have pursued, have or have not assumed a power beyond that which is given to them by the statutes.

In making this inquiry, it must be assumed that the presbytery were armed with all the authority which the general assembly could give to them. But if the general

assembly had no power to pass the act of 1834, or to authorize the presbytery to follow its directions, the presbytery can derive no protection from it. The question, therefore, is as to the validity and efficacy of the act of 1834, but which properly arises between the patron and the presbytery. There appears, therefore, to be no ground for the objection raised, that the contest is with the general assembly, who are not represented in this cause.

What, then, was the act of the presbytery of which the patron complains? It appears from their proceedings as printed, that the presentation was duly made, and the form being, as I understand, the usual and old accustomed form, is not immaterial. The patron nominates [326] and presents the minister to be minister of the parish, grants to him the glebe and stipend, requires the presbytery to take trial of his qualification, literature, life, and conversation, and having found him fit and qualified for the functions of the ministry of the said church, to admit and receive him thereto, and give him his act of ordination and admission.

This form of presentation appears to me correctly to describe the rights of the patron and the duties of the presbytery as prescribed by the statutes.

This presentation with all the usual papers being laid before the presbytery, they in so far sustained the presentation as to find themselves prepared to appoint a day for moderating in a call to the presentee, and accordingly they appoint a day for that purpose. On the day appointed a call was produced, and signed in the usual manner. The presbytery then gave opportunity for the male heads of families, whose names stood on the roll, to give special objections, or dissents to the admission of the presentee. No special objections were given in, but it appears that a majority of the heads of families whose names appear on the roll dissented.

It was then moved that the presentee's call, being signed only by three persons, was insufficient; upon which a counter-motion was made, that the presbytery refuse to act in terms of the motion, it being incompetent in that stage of the business. Which last motion was carried; not an unimportant circumstance with reference to the argument, that in rejecting the presentee the presbytery were only adjudicating upon the sufficiency of the call.

At a subsequent meeting of the presbytery it was moved and seconded, that in conformity with the sen-[327]-tence of the general assembly 1835, and the interim act of the general assembly of 1834, the presbytery do now reject the presentee, which the presbytery agreed to be determined in terms thereof.

It appears, therefore, that there never was any adjudication upon the call, but that the presbytery rejected the presentee, because a majority of heads of families whose names appeared upon the roll dissented. It is also clear that such rejection was not in consequence of any adjudication of the presbytery upon the qualification of the presentee; such adjudication can only be made upon the trial; but according to the form adopted the call must be sustained before the trials are proceeded with; and by the article 8 of the act of 1834 the presbytery was to proceed to the trials only in the case of the dissents not being those of a majority of persons on the roll.

Now, if it was the right of the patron under the statutes to present a qualified person, and if the presbytery were obliged to receive and admit such qualified person, which are the words of the statute of Anne, what possible right could the presbytery have to reject a person duly presented without any trial of his qualification, because a majority of the heads of families dissented? There is no such restriction upon the right of patronage and presentation in the statute, but, on the contrary, the right is unfettered and unlimited, except as to the person presented being qualified. Looking, therefore, to the statutes, as giving, or rather as securing and defining, the rights of the patron, it does not appear to me to be a matter of doubt that the presbytery in rejecting the presentee have acted in opposition to the provisions of those statutes, and in violation of the [328] rights of the patron, which those statutes intended to secure. If the question had been as to the construction of those statutes simply, it does not appear to me to be possible that any serious doubt could have been entertained; and it may, therefore, be thought that I have unnecessarily occupied so much time in considering this part of the subject. I have been induced to do so from a conviction that a due understanding of the construction of these statutes must lead to an easy solution of the several collateral questions which have been fully discussed in the several stages of this cause, and which have given rise to the difficulties which have been thought to belong to the question between the parties.

In considering these collateral questions I have therefore assumed that, according to the true construction of the statutes, there is thereby reserved to the patron the right of presenting a qualified person, and to the presbytery the right of trying his qualifications and the power of rejecting him if found not to be qualified.

If such be the construction of the statutes, of what purpose can it be to consider the supposed legislative power of the general assembly? For it cannot be contended that there can exist in the general assembly any legislative power to repeal, control, or interfere with enactments of the legislature. So that, even if the subject matter were found to be within the general legislative power of the general assembly, it would be powerless as to such subject matter so far as it is regulated by statute. It would therefore be beyond the powers of the general assembly to interfere with the right of the patron, as secured by statute, by adding to the powers of the presbytery.

[329] But this legislative power claimed for the general assembly is confined to ecclesiastical matters, and it is insisted that the matter to which the act of 1834 applies is ecclesiastical. Now, although it is clear that if it were so the legislative power of the general assembly would be controlled by the statute, it is worth considering whether the matter in question can be considered as ecclesiastical. It is clear that there is nothing ecclesiastical in the right of presentation; that is a purely civil right; the adjudication upon the qualification of the presentee may be a matter ecclesiastical. But it is the right of presentation, and not the power of adjudication, which is affected by the act of 1834; not the power of adjudication, because that is to be exercised upon the examination and trials which, according to the proceedings of the presbytery in this case, following the directions of the act of 1834, have never been entered upon; but certainly the right of presentation, because, if that right consists in selecting the minister and calling upon the presbytery to admit him if found qualified, and for that purpose to examine and try him, it is a direct interference with that right to say we will not examine the minister presented, and though qualified we will not admit him if any other person or persons, be they who they may, object to him. Is it no infringement of a right to give to others a veto upon the exercise of it? As an argument in favour of the proposition that what the presbytery have done is matter exclusively of ecclesiastical cognizance, it has been contended that the ordination of a minister is part of the proceedings for settling him in the parish, and that the civil courts can, therefore, have no jurisdiction over any part of such proceedings. It is true that the ordi-[330]-nation in general takes place upon the settlement of the minister, but it seems quite clear that the two are altogether distinct. The ordaining may, and often does, take place without any preferment, as when a minister is ordained for the purpose of becoming a missionary; so a minister may be and often is settled in a parish without ordination, as when, having been ordained, and settled in one parish, he is transferred to and settled in another. Indeed the offices of ordaining the minister and of settling him in the parish are performed by different authorities; the first by members of the church only, the latter by the presbytery at large. But how can the interlocutor complained of interfere with the office of ordination, that takes place after the presentee has been put upon his trials, and found qualified, and no valid objection made? The discretion and duty confided to those who are to confer orders remain unaffected by the taking the presentee upon trials; which is all that the interlocutor declares that the presbytery ought to have done.

But this consideration opens another objection to the act of 1834, as it enables the majority dissenting to interfere as well with the province of the church in ordaining the minister as with the right of the patron to present him. That the act of 1834 does in its operation interfere with the right of presentation is obvious; but it is contended that it does so indirectly only, and merely through the exercise of the ecclesiastical power of adjudication upon the qualifications; of which it is said that being acceptable to the parishioners is one, and that being objectionable to a majority of the heads of families is a disqualification.

I have already observed that the presbytery are de-[331]-prived of this argument by the proceedings adopted. They rejected the presentee before the time arrived for adjudication upon his qualifications. But if it be clear, as it certainly is, that the qualifications referred to in the statute are personal qualifications, "literature,

life, and manners," there can be no ground for contending that the dissent of the majority of the heads of families is a disqualification within the meaning of the statutes. It cannot be so in substance, and it has not been so treated in form. How can the dissent of any person be a disqualification of the presentee, more than the want of a previous consent of the presbytery as attempted in 1596? If the presbytery have the power of imposing this obstruction to the exercise of the right of presentation, it is clear that there can be no limit but their own will to the obstruction which may be afterwards added; it can exist only at their discretion; they will have the power of appropriating it to themselves, or of giving it to others in defiance of the statutable title of the patron.

Another ground upon which the act of 1834 has been justified, and which is recited in it as the foundation of it, is, that it is a fundamental law of the church of Scotland that no person shall be intruded in any congregation contrary to the will of the people; and that the act is only an arrangement to carry that principle into effect. Whether that is or ever was a law of the church of Scotland is perfectly immaterial, if the statutes contain enactments and confer rights inconsistent with any such principle, or with the execution of any such law. The absolute right of patronage, subject only to the rejection of the presentee by the adjudication of the presbytery for want of qualification, which is secured by [332] the statute, is inconsistent with the exercise of any volition by the inhabitants, however expressed. The second Book of Discipline, cap. 12., p. 9., says, "that the liberty of election, so that none be intruded upon any congregation by the prince or any inferior person without the assent of the people, cannot stand with patronage and presentation." Therefore the reformers of those days sought to destroy patronage, but the legislature rejected the proposition and confirmed the law of patronage; and now it is contended that the power of rejection does not interfere with the civil rights of patronage and presentation. But how stands the evidence as to this being a fundamental law of the church of Scotland? It certainly is unfortunate for the argument in support of this supposed law that the 17th article of the act of 1834 is directly at variance with it, as it gives to the presbytery acting *jure devoluto* the power of appointing a minister without any reference to the wishes of the congregation. I am now inquiring what evidence there is of the principle of non-intrusion having been the law of the church; that it never was the law of the land sufficiently appears from the statutes I have referred to.

In the message of the general assembly to the Queen, in 1565, there is no allusion to any such principle. The first Book of Discipline proposed that if upon open audience the minister be found unobjectionable in doctrine, life, and utterance, the congregation are unreasonable if they reject him, and that they should be compelled by the censure of the church to receive him; and this is not a violent intrusion.

In 1649, when the church enjoyed the patronage, they did not give the congregation the right of dis[333]-senting, but only of stating objections, of which the presbytery were to judge, which was the principle of the act of 1690, c. 23. No doubt many attempts have been made to destroy patronage and to introduce the principle of election in various forms; the attempts have failed. So far as the principle of non-intrusion is inconsistent with the rights of patronage secured by statute it could not be the law of the church; and in the instances referred to the principle has rather been to admit the congregation to state objections than to give them an arbitrary power of rejection.

Connected with this supposed law of non-intrusion is another of the arguments in favour of the act of 1834; that it is a regulation of the call, and that as the call is a matter ecclesiastical the church had the power to regulate it. To this the first and obvious answer is, that whether the provisions of the act of 1834 be or be not connected with the call, and whether the call be or be not part of the ecclesiastical function of admission, the general assembly had no right to make, and the presbytery, therefore, had no right to follow, any regulation inconsistent with the right of the patron as secured by the statutes. But it appears to me that there is no ground for connecting these regulations with the call; and that the call itself, whatever may be its origin or meaning, cannot be so used as to interfere with the right of patronage. The call is, in form, merely an invitation and request by the inhabitants sub-

scribing it to the presentee to take upon himself the spiritual charge of the parish, promising to him all due respect, encouragement, and obedience. It is a request not to decline the office to which he has been presented; it implies no power or authority on those [334] who subscribe it; it does not profess to be the act of the inhabitants at large, or even a majority. The act of 1834 does not treat the regulation prescribed for enforcing the veto as part of the call, although it directs such regulation to be put in force at the time of moderating in the call. If the majority disapprove, the presentee is to be rejected, but without reference to the call; and so the presbytery have acted, and their acts have been approved by the assembly: for it not only appears that the presentee was rejected without any adjudication upon the call, but after it had been finally ascertained that a majority dissented. Upon a motion being made that the call was not good and sufficient, they refused to act in the terms of the motion, as being incompetent in that stage of the business, and their next act was to reject the presentee upon the ground of the dissents, without any reference to the call. And this is not only admitted to be so by the defenders, but is one of the arguments urged against the jurisdiction of the Court of Session, the call being, as it is said, a matter ecclesiastical, and there having been no adjudication upon the call. Under these circumstances there seems to be no ground for justifying what has taken place under the act of 1834 as a proceeding in moderating in the call. But if this were otherwise, can it be maintained that it can be used in such a manner as to prejudice a right secured by act of parliament; and above all, that it can be altered from a form in that respect innocuous, so as to produce that effect? Whether the call be considered matter ecclesiastical or not, it must be subject to the control of parliament, and must be accommodated to the provisions of its enactments. If it existed before the act of 1711 in a form to interfere with patronage, it was so far restricted by that act. Considering, however, the arguments which have been urged in this case upon the subject of the call, it seems necessary to inquire in some degree as to its apparent origin and nature.

The term seems first to occur at periods when the early reformers were struggling for the election of ministers. The acts of 1567 and 1592 negatived this claim; but the struggle continued, and at different times subsequently it was attended with success; and in the act of 1690, by which patronage was for a time destroyed, the expression "calling and entering" ministers is used, the calling being apparently put in opposition to presenting; and in the act of 1711, by which patronage was restored, there is no longer any mention of "calling;" but the patron's right to present, and the presbytery's duty to receive and admit a qualified person so presented, are the only acts referred to as incident to filling the vacant churches. The act of 1649 uses the term "call" in the same sense as the act of 1690; it declares the title of a minister valid who upon the suit and calling of the congregation, after due examination of his literature and conversation, shall be admitted by the presbytery, though he have no presentation.

If, then, the call was what the reformers were desirous of substituting for patronage when the latter was finally established by the act of 1711, the call could only be continued as a form; and if before that time it was only to be substituted for the civil right of patronage, why was not the substituted right to be of the same character as the original? Why, if the patronage was a civil right, was the call to be a matter ecclesiastical? [336] Both were the exercise of the right of selecting the individual and bringing him to the church for examination and admission. Till the person selected was so presented or called, and brought to the church, the ecclesiastical jurisdiction does not appear to have commenced. It is true that many instances have been produced of questions as to the validity of the call having been brought before the assembly from the decisions of the presbytery; and if in any of those cases the result had been that the patron had been deprived of the benefit of his right of presentation by a final judgment of the assembly that the call was insufficient, it would no doubt operate as a case in which the individual patron had acquiesced in the jurisdiction of the assembly. But if no such case can be produced, and if, on the contrary, the result of the appeal to the assembly has been either a settlement by arrangement, or a decision in favour of the patron against the prior proceedings of the presbytery, of which the case of Dunfermline, in 1752, is a remark-



able instance, then the fact of no case upon this point having been brought before the civil tribunal is fully explained.

It appears, indeed, for many years after the act of 1711 the difficulties thrown in the way of the patrons were such that their rights were but sparingly enforced; but it is admitted that in all the latter times the decisions of the assembly have been in favour of the patrons; holding any call to be sufficient, and thereby treating it as a mere form. It is impossible too highly to praise the good sense of those distinguished members of the church, who, seeing that the law was against them, avoided giving offence to their less discreet brethren by preserving the form of the call, but at the [337] same time so dealt with it as not to let it interfere with the right of the patron, and thereby avoided a collision, in which it was certain that the church must have been defeated. I cannot, therefore, consider the proceedings which have been produced from the records of the assembly respecting calls as of any weight upon the present question. They cannot be of any weight except when they show acquiescence in the jurisdiction by the patron; for, as acts ascribing a jurisdiction to the assembly itself, they can only be classed with such proceedings as the assembly adopted in 1596, and 1638, and 1736; they attempted to establish rules as to patronage, in direct opposition to the provisions of existing statutes; and looking to the proceedings of the assembly itself down to the year 1834, they exhibit, indeed, in the earlier times a struggle against the right of the patrons as defined by statute, but afterwards a gradual acquiescence in those rights and submission to the law.

The second Book of Discipline had declared the obvious truth that patronage and election could not stand together. An effectual call is equally inconsistent with patronage; and the church therefore most properly treated any call as sufficient. I do not, however, think it necessary to express my opinion upon the origin or effect of the call, except so far as the use of it may interfere with the rights of the patron as secured by statute. With such rights the call in its original form could not have been permitted to interfere; no new regulations inconsistent with those rights can be legal; they can give no authority, from being clothed with the name of a call, from which in form and substance they entirely differ.

[338] It has been suggested by the highest authority that the act of 1711, in enacting that the presbyteries shall receive and admit the persons presented by the lay patrons, in the same manner as the persons or ministers presented before the making of this act ought to have been admitted, intended to have preserved the form prescribed by the act of 1690, c. 23, for the purpose of enabling the congregation to state objections to the presentee for the consideration of the presbytery, and subject to being overruled by them. If that should be the right construction of the words in the statute of Anne, it would not affect the present question. That part of the provision of the act of 1690 would be consistent with what has been often contended for as a proper course, and what, in form at least, prevails upon ordination in England and in Scotland. It would, in effect, only add to the facilities of the presbytery in judging of the qualifications upon the trials; but it has no resemblance to the provisions of the act of 1834, which, instead of giving an opportunity to the inhabitants to state objections which the presbytery may disregard, enables a majority, by dissenting without any reasons stated, to deprive the presbytery of the power of adjudicating upon the qualifications of the presentee.

It is therefore unnecessary to express any opinion upon this point; but to guard against misapprehension, I will only say that there appear to me to be difficulties to be overcome before this construction of the statute of 1711 can be adopted, of which I have not been able to find any solution. It is sufficient for the present purpose to observe, that if that be the true construction of the act of 1711, the act of 1834 would be equally an invasion of the right of the patron. I cannot, therefore, [339] hesitate to declare my decided opinion that the proceedings of the presbytery founded upon the act of the assembly of 1834 amount to an illegal interference with the right of the patron as secured by statute, and that a wrong has thereby been sustained by the pursuer.

The next subject for consideration is the remedy for this wrong, and before I apply myself to the consideration of the objections which have been made to the proceedings of the Court of Session for this purpose, I must make some observations upon an argument of a more general nature urged on the behalf of the defenders;

which, if well founded, would, in effect, give to the general assembly a legislative power uncontrollable even by parliament, and would exhibit a case, I will not say of wrong, as that would be a contradiction in terms, but of a serious deprivation of valuable civil private rights without the possibility of redress.

It is argued, that although the right of presentation belongs to the patron, yet that everything connected with the admission of the minister after the presentation is by law subject to the jurisdiction and direction of the church; that the general assembly has legislative power to make what regulation it thinks fit upon that subject; and that no complaint can be made of any thing done by the presbytery relative to the admission of ministers, but to the superior ecclesiastical courts, that is, ultimately, to the assembly. The result would necessarily be, that the assembly in its legislative capacity might make laws destructive of the right of patronage, and, having sole jurisdiction over the execution of its own laws by the inferior jurisdictions, no means would exist of questioning the legality of its enactments. This is but a mode [340] of describing pure despotism; if any such power had existed in the church, the struggle against patronage continued through so many years could not have been unsuccessful. Whatever parliament might have enacted, the general assembly had only to enact laws of its own inconsistent with the enactments of parliament, and itself to have enforced the execution of them. It could not have failed to have effectuated what it attempted in 1596 and 1638, by accepting the presentation, but enacting that the presbytery should not proceed to admit the presentee unless he had previously received the consent of the assembly. From a rejection by the presbytery upon this ground there would, according to the argument, be no appeal or means of redress but by application to the general assembly, who, supporting the act of the presbytery in the execution of their own enactment, would at once transfer the right of patronage from the lay patron to the presbytery.

However extravagant this proposition may appear to be, it is necessarily included in the argument for the defenders. If the presbytery may agree not to receive or to act upon a presentation, because a majority of heads of families dissent, why may they not do so because a majority do not assent at a meeting held for that purpose, which is election, or because a majority of the presbytery do not assent, which is in effect the usurpation attempted in 1596 and 1638? In all these cases the violation and destruction of private civil rights would be effectual, because the only remedy, according to the argument, would be by application to the authors of the wrong. Nothing can be farther from my wishes than to treat lightly the opinions which have been expressed by any of the very learned and able judges [341] who dissented from the judgment of the Court of Session, but it is impossible to do justice to the case without following out these opinions to what appear to me to be their inevitable results.

Those who contend that there is no remedy for the wrong which has been committed in any existing law, suggest that redress can be obtained only by application to parliament. But if the right be already established by statute, and if the wrong consist in a violation of the right so resting upon the authority of parliament, it is not easy to conceive in what manner parliament may be able hereafter with more success to secure the objects of its enactments; certainly not without a more direct and important interference with the powers legislative and judicial claimed by the assembly than the judgment of the Court of Session can be supposed to effect.

It is said, however, that the legislative power claimed for the assembly has itself the authority of parliament as its foundation, because the statute of 1567, c. 7, after giving, to the patron who presents a person qualified to his understanding to the superintendent of the kirk, an appeal to the superintendent of the province, and from him to the general assembly if the person presented be not received and admitted, declares that the cause, being decided by the court of assembly, shall take end as they decern and declare. That which is the subject matter of appeal is to take end by the decision of the general assembly. What that subject matter is appears from the earlier parts of the statute, namely, the examination of the person presented, qualified according to the understanding of the patron. As to his qualification and his subsequent admission, a duty is to be performed after taking the presentee upon his trials, and which can have [342] no reference to a rejection of him, not for want of any qualifications, but by the dissent of an authority interposed

to the prejudice of the patronage, which it was the object of that act to protect. It is not disputed that as to matter of qualification, which is submitted to the decision of the church, the judgment of the assembly upon appeal is final. It has also been suggested that the provisions in the act of 1592, that the presbytery are to "put order to all matters and causes ecclesiastical according to the discipline of the kirk," amounts to a direct committal of all ecclesiastical affairs, and amongst those every thing connected with the admission and collation of ministers, to the exclusive jurisdiction of the church courts. But in this suggestion the proviso which immediately follows is overlooked, which provides that "the aforesaid presbytery be bound and astricted to receive and admit quhat-sumever qualified minister presented by His Majesty or laick patrons;" by which it is clear that the presentation was not a matter ecclesiastical as to which the presbytery were to put order, but that they were to be bound to receive and admit a qualified person presented to them, whatever order they might put to any matters or causes ecclesiastical. This act, so far from authorizing the presbytery to make regulations interfering with the right of patronage, prohibits them from doing so.

It was urged that many acts of the church have been acquiesced in, in regulating the qualifications of ministers as to education, knowledge, and other matters, and this is true; but all these concern the personal qualifications of the presentee, to be judged of by the presbytery upon the trials, leaving the right of presenting a qualified person untouched. The statutes give to the patron the [343] right of presentation, and to the church the power and duty of adjudicating upon the qualification of the presentee. The act of 1834 introduces a new authority, which destroys both; the dissenting majority, defeats the presentation of the patron, and prevents the adjudication of the presbytery. If, then, the civil right of presentation has been invaded by the proceedings of the presbytery founded upon the act of 1834, and if the statutes have not deprived the civil courts of the ordinary power of giving redress for invasion of civil rights, it will require strong authority to show that the Court of Session has not jurisdiction to take cognizance of this complaint, which is this: that the patron having by law and statutes a right to present a qualified person to the presbytery, who are by statute bound to receive and admit him, unless found upon examination by them not to be qualified, the presbytery have refused to receive and admit him without any examination or adjudication as to his qualifications; that is, they have refused without any justifiable reason to give effect to the presentation. Now, I understand it to be admitted, that if the presbytery were simply to refuse to receive or to act upon a presentation, or if they were proceeding to present themselves *jure devoluto* before the proper time had arrived, the Court of Session would have jurisdiction to interfere. In all these cases there is the same injury inflicted by the same act, namely, the refusal to give effect to the presentation, and as the cases only differ as to the grounds of the refusal, which are in all assumed to be untenable, it seems extraordinary that there should be jurisdiction in some of the cases and not in all. It is extraordinary, certainly, when the long-protracted struggles are considered between the patron and the church, that [344] so few cases are to be found in which the interposition of the Court of Session has been applied for, but such cases as have been produced appear to me to be very decisive upon the question of jurisdiction.

In the Auchtermuchty case (Mor. 9909), in 1733, the presbytery had rejected a person presented by a lawful patron without examination, and were proceeding to admit another; this was affirmed upon appeal to the assembly. The rejected presentee applied to the Court of Session by advocacy, that the settlement should be stopped until the right was decided; the Court sisted the proceedings, but the presbytery having proceeded, a petition and complaint were presented against them, when certain of their number appeared at the bar and apologized. The presbytery admitted the person not presented, and the cause having proceeded, an interlocutor was pronounced, "finding that the presbytery, refusing a presentation duly tendered in favour of a qualified minister, against whom there lies no legal objection, and admitting another person, the patron has a right to retain the stipend, and, therefore, finding the reasons of suspension relevant."

Many of the arguments urged in this case were used in that; but the result was, that before the wrong minister was admitted, the Court of Session acted against the presbytery by sisting their proceedings; but after he was admitted the remedy ap-

plied was necessarily confined to the stipend. Under both circumstances the Court exercised its jurisdiction.

In the case of Dunse (Mor. 9911), in 1749, the presbytery, disputing the patron's title, rejected his presentee without [345] any adjudication upon his qualification. The patron insisted in a process of declarator against the presbytery in the Court of Session, which by its interlocutor, declared that the pursuer had a sufficient right to present, and that the right had not fallen to the presbytery *tantum jure devoluto*. This interlocutor was reversed in this House, but for want of parties only, and in terms, without any judgment upon the merits. It is said, that the court refused to interfere to prevent the presbytery settling any other person, because that was interfering with the power of ordination, and the internal policy of the church, with which the lords thought they had nothing to do. Whether this be correct seems doubtful, but the case is at all events an authority of the Court of Session in a process of declarator establishing the right of the patron to present against the presbytery.

In the case of Culross (Mor. 9951), the presbytery rejected the patron's presentee, disputing his title, and settled another minister. The patron instituted proceedings for the stipend and succeeded, but the church being full the presbytery were not made parties, so that this case does not bear much upon the present.

In the case of Lanark (Mor. 9954), in 1752, the Court of Session, finding that the presbytery had admitted the wrong person, adjudged the stipend to the patron of the rejected presentee. In that case also the presbytery were not parties.

But in both the Kiltarlity cases (1 Sh. and B. 363, or 340, new edit., and 2 S. and D. 384, or 341, new edit.), the presbyteries were parties. The first was a case of suspension and inter-[346]-dict at the instance of certain parishioners to prohibit the settlement of a presentee. Two grounds of defence were pleaded: first, that it was incompetent by suspension and interdict to interfere with the proceedings of the presbytery in the settlement of a minister; and second, that the pursuer had no title to pursue. The court repelled the objection to the competency, as the question regarded the civil right of patronage, but decided in favour of the second defence.

In the second case of Kiltarlity the presbytery, having sustained a presentation, was held to be barred from objecting to it, and refusing to proceed to settle the presentee. This case also affords an answer to an argument much urged on behalf of the presbytery: that, as they had received the presentation, all that remained was purely ecclesiastical, whereas it appears from their proceedings that they avoided sustaining the presentation. They only in so far sustained it as to find themselves competent to appoint a day for moderating in the call; if they had sustained the presentation they would, according to the second Kiltarlity case, have been barred from refusing to proceed to settle the presentee. There has, therefore, been a refusal to sustain the presentation, which brings this case precisely within the others referred to, in which the presbyteries have been parties.

In the case of Lord Dundas (Mor. 9972) v. the Presbytery of Zetland and Gray, the presbytery rejected a presentation of the presentee of the patron, and settled another minister. The court decided in the terms of the declaratory conclusions, which were, that the presbytery [347] which had illegally rejected the presentation should give due obedience to it, according to the rules of the church.

In the cases of the Presbytery of Falkirk v. Lord Callander (Mor. 9961), 8th December 1696, the Presbytery of Ayr v. Lord Dundonald (Mor. 9961), the Presbytery of Paisley v. Erskine (Mor. 9966), and the Presbytery of Strathbogie v. Sir Wm. Forbes (Mor. 9972), those were all actions brought by presbyteries against patrons, to have it declared that the right of presentation had devolved to them *jure devoluto*. It is admitted that if the presbytery assumes the *jus devolutum* when the patron thinks it has not fallen, he has a remedy in the civil courts, and that in all cases of disputed patronage and of stipend the court has jurisdiction. From these authorities it is clear that the Court of Session has jurisdiction to adjudicate upon the right of patronage, and to correct any infringement of it as against another claiming adversely, and against the presbytery, whether claiming adversely *jure devoluto*, or simply rejecting without cause the presentee of the patron, as in the cases of Auchtermuchty, of Dunse, of Kiltarlity and Zetland, and the other cases referred to.

It is admitted that the court has jurisdiction as to the stipend after the admission of a minister by wrong. It would be strange if the jurisdiction could be exercised only after the evil had been completed, when the Court has jurisdiction to prevent it;—that it has jurisdiction when a wrong minister is admitted, but not when the right minister is rejected.

It appears to me for these reasons, that in this case a civil right has been violated by the presbytery, and that [348] the court has jurisdiction to take cognizance of the injury committed. It remains to be considered, whether there be any thing objectionable in the form of the proceedings, or in the interlocutor appealed from.

It was much relied upon in the court below, but not so much insisted upon here, that the act of 1834 had not been properly put in issue by the pursuer; the summons states and complains of that which is the real grievance to the pursuer, that which constitutes the injury to his right of patronage, namely, that the presbytery rejected his presentee without trial or taking cognizance of his qualifications, and expressly on the ground of the veto of the parishioners.

The act of 1834 constitutes no part of the pursuers case, and cannot justify the proceedings of the presbytery according to the case made in the summons; and if by law it does justify their proceedings, it is properly left to be brought forward by the defenders who rely upon it as consequential upon the case so stated. The summons prays a declaration of the plaintiff's right, and of the wrong which he alleges has been done to it, and certain specific relief as a remedy or compensation for such alleged wrong. It is not disputed that it is competent for the court upon a summons having petitory conclusions to confine its interlocutor to a declaration of right. That is what the interlocutor appealed from has done. The cases prove that when the presbytery has illegally rejected a presentee, the Court of Session exercises jurisdiction against the presbytery. What relief may ultimately be administered to the patron in that or in any other suit is not now the subject for consideration. If the court has jurisdiction over the subject matter, and over the parties defenders, it is clearly [349] according to its practice to declare by its interlocutor the right of the pursuers without proceeding to administer any remedy for the wrong it has sustained.

The result of the anxious consideration I have given to this case is the conviction, that the presbytery in the course they have pursued have violated and done wrong and injury to the patron's right of presentation, that the Court of Session have jurisdiction to take cognizance of that wrong, and that in the interlocutor they have pronounced there is no departure from the ordinary mode of exercising their jurisdiction, of which the defenders are entitled to complain.

In forming the opinions I have now expressed, I have confined myself to the questions of law which arise upon the pleadings between the parties. Such is the duty which I felt I had to perform as one of the judges of this the highest tribunal in the country. I have in doing this had no regard to the feelings which this controversy has excited in Scotland, and I have not permitted myself to consider the consequences which may follow from the judgment of this House, on whichever side it may be given. But having now discharged the duty of delivering my opinion upon the matter in contest, I may, before I conclude, be permitted to express the high respect I have always felt for the clergy of Scotland. Much as has been said in their praise, I am satisfied that they deserve it all; and that the parochial duties are in general performed in a manner the most exemplary and beneficial for the inhabitants.

If there be any feeling in the church still remaining that the exercise of private patronage is detrimental to the well-being of the establishment, and that it tends [350] to diminish its usefulness to the people, let it be remembered that the high character the clergy have attained, and the beneficial influence the church has exercised, have arisen, or at least been matured, under a system of lay patronage.

If your Lordships shall concur in the opinions I have expressed, and by your decision inform the clergy of Scotland what the law really is, I cannot doubt but that they will by their conduct and example inculcate the sacred principle of obedience to the law, of respect for the rights and interests of others, and of the sacrifice of private feelings to the performance of a public duty.

I again move your Lordships that the interlocutor appealed from be affirmed. Lord Brougham.—In again calling your Lordships' attention to this case, I

have only to state the great satisfaction which I feel, in finding that my noble and learned friend's view of the subject, and the grounds of his opinion,—an opinion which we have separately come to together,—are precisely the same which had presented themselves to my mind after the anxious attention that I bestowed upon this case. But I should not have troubled your Lordships with one word at present, except from the circumstance of my not having taken the precaution, which my learned friend has most properly done, of committing to writing my argument in giving judgment. The reason is not that I have at all altered my opinion of the great expediency, and in important cases almost the necessity, of pursuing this course which my learned friend observes I always did when I filled the situation, which he now much more worthily fills, in [351] the Court of Chancery, and which I have done also here and at the Privy Council. My opinion is precisely the same as it always was, of the expediency of pursuing that course. My only reason for deviating from it in the present case is, that I had not time, and, therefore, in the choice of difficulties, I thought it better to state my opinion without writing, than to delay the judgment so long as would have been necessary to enable me to commit it to writing. My Lords, had I done so, I undoubtedly should not have omitted a part of the subject to which my noble and learned friend has very properly directed your attention in the close of his judgment, that is, to the question of pleading. It is fit that I should now say that that had not escaped me, though it did escape me yesterday. I quite agree with my noble and learned friend that the pleading is correct in this case, and that it was not at all necessary to plead the act of 1834 of the general assembly. The argument which would maintain the necessity of pleading the act of the general assembly, at least if there is any similarity in the rules of pleading in Scotland to our rules, would be a complete abandonment of the legislative power of the general assembly; for if they had any power to make laws, nothing like good pleading would require the pleading of those upon the record. But, however, upon another ground, I agree, that it is not at all necessary. I equally agree that the judgment of the Court below upon the declaratory part of the summons is right.

Judgment affirmed.

*Appellant's Authorities.*—Thomson's edit. of Scots Acts, vol. ii. p. 534, stat. 1567, c. 3; Book of Kirk, MS. 468, Peterkin's edit. p. 115, 116; MS. 493, 494; stat. 1557, c. 36; Ersk. b. i. tit. iii. sec. 10; stat. 1567, [352] c. 6; 1579, c. 68; 1567, c. 31; Ersk. b. i. tit. v. sec. 24; stat. 1567, c. 7; 1579, c. 69; 1581, c. 99; 1584, c. 129; 1592, c. 114; Book of Kirk, pp. 11, 12, 15; stat. 1592, c. 117; 1612, c. 1; 5 fol. Acts, 298; 6 fol. Acts, 364, 411; stat. 1662, c. 1; 1669, c. 1; 1690, c. 1, 2, 5, and 23; Treaty of Union, 1705; stat. 1706, c. 6; Forbes, Tithes, 49; Ersk. b. i. tit. v. sec. 16; (Dunse Case) 5 Bro. Supp. 768; Morren's Annals, 145, 152; *Moncreiff v. Maxton*, 15 Feb. 1735, Mor. 9909; (Culross) *Cochrane v. Stoddart*, 26th June 1751, Mor. 9951; (Lanark) *Dick v. Carmichael*, 29th Feb. 1752, Mor. 9954; *Moncreiff's Life of Erskine*, 533; *Kiltarlity Case*, 1 S. and D. 363; Peterkin's Compend. *passim*; Hill's Church Practice, 57, 2d edit. p. 65; Bell's Decis. (1794), p. 170; *Gibson v. Barons of Exchequer*.

*Respondent's Authorities.*—Stat. 1592, c. 116; 1690, c. 23; 10 Am. c. 12; 2d Book of Discipline, c. 3. sec. 4, 6; Directory for Worship, 1645; Ord. of Min., Acts of Assembly, 1649, sec. 2; 5 Geo. 1, c. 29, sec. 9; Stair, b. iv. tit. iii. sec. 47; Bankton, b. ii. tit. viii. sec. 62; Ersk. b. i. tit. v. sec. 16; Dunlop on Patronage, ch. 8, sec. 283; Haddington, 31st July 1680, Mor. 9903; Lady Forbes, Feb. 1762, Mor. 9931; *Lord Dundas v. Nicolson*, 15th May 1795, Mor. 9972, and Bell's Cases, p. 169; Baillie and others, 28th Feb. 1822, 1 S. and B. 363, or new edit. 340; Presbytery of Inverness, 10th June 1823, 2 S. and D. 384, or new edit. 341; Presbytery of Falkirk, 8th Dec. 1696, Mor. 9961; Paisley, 10th Aug. 1770, Mor. 9966; Strathbogie, 2d Aug. 1776, Mor. 9972, App. voce Patronage, No. 2—(*English.*) Specot's Case, 5 Coke Rep. 57 (b), 58 (a), qualified by *Heale v. B. of Exeter*, Shower's Cases in Parliament, 88; *Albany v. B. of St. Asaph*, Cro. EL 119; *King v. B. of London*, 13 East, 419; S.C. 15 East; *King v. B. of London*, 1 Wils. 11; *King v. Mayor of Stratford on Avon*, 1 Levinz, 191; 1 Bla. Com. 389 (Coleridge's edit.); *Collifant v. Newcomb*, 2 Lord Raym. 1205; *King v. Blower*, temp. 1st Lord Mansfield,

2 Burr. 1045; 3 Bla. Com. 101, citing 2 Inst. 623; *Rex v. Campion*, 1 Sid. 14; *Regina v. Bailiffs and Burgesses of Ipswich*, 2 Lord Raym. 1233; *Ashby v. White*, 2 Lord Raym. 938; S.C. 14 How. St. Tri. 695; S.C. on Error in House of Lords, 2 Lord Raym. 958.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.

[353] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

RICHARD ALEXANDER and Others, *Appellants*.\*—Sir F. Pollock—Tinney; Colonel C. S. MACALISTER and Others (Caledonian Dairy Company Directors), *Respondents*.—Knight Bruce—Pemberton [7th May 1839].

*Partnership—Joint Stock Company—Contract*.—In an action by directors of a joint stock company against the other solvent partners, for relief of advances and obligations by the directors personally in the management of the affairs of the copartnery, Held, upon construing the contract of copartnership, (affirming the interlocutors of the Court of Session,) that the following defences ought to be repelled; (1.) that the partners were only liable, *inter se*, to the amount of the sums severally subscribed by them for and as their shares in the said copartnership; (2.) that the directors had no right to begin business, and no power to bind the partners for any debts or obligations on behalf of the said company, till the whole stipulated capital had been subscribed for and secured; and (3.) that the powers of the directors to borrow money on the responsibility of the company and the partners were restrained.

*Practice*.—Held that the Court may, before exhausting the whole pleas of the parties, lay down certain principles, by declaratory findings, which shall regulate the future proceedings in a cause, and be the foundation of ulterior findings, the consideration of which may be reserved.

[354] In the year 1824 the respondents were among the original projectors of a scheme, and issued a prospectus, for the establishment of a joint stock company for supplying the inhabitants of Edinburgh with milk and other dairy produce; the capital stock of the company was to be £50,000, to be raised by subscription, and divided into shares of £25 each. The committee of management purchased the lands of Wheatfield near Edinburgh for £12,000. "A meeting of subscribers" was held on the 2d February 1825, at which directors were named, and resolutions passed, so as to constitute the company, the capital of which it was resolved should be £50,000, divided into 2000 shares of £25 each. The directors were authorized to complete the purchase of the land requisite for the undertaking, and to erect suitable accommodations. A report read by the committee set forth, that the whole capital had been subscribed for; and the thanks of the meeting were voted to the committee for the purchase of Wheatfield. The secretary was directed to prepare a deed of copartnery. The lands of Meadowbank and an adjoining piece of land were soon afterwards purchased for £9700.

Thereafter a contract of copartnery was settled and approved of by the directors. By the first article it was declared, that the copartnership should be held to have commenced from and after the 28th January 1825; and it was further declared, that the subscribers should "have right to the profits, and be liable for the losses, arising from or upon the said business, and should be bound to relieve each other of all the debts and engagements of the company, but that only to the extent of and in proportion to their respective shares therein."

[355] By the second article it was provided, that the subscribers should have "right to the profits and be liable for the losses of said business, and should be bound to relieve each other of all the debts and engagements of the company, in the proportion of their respective interests or shares in the capital stock."

By the fifth article it was declared, that nine ordinary directors should be chosen; and that as certain gentlemen named formed the interim committee of management, and as it would require some time to arrange completely the details of the manage-

\* Reported 15 D., B., and M., 1061.

ment, and agreeably to the resolution and minute of the general meeting of shareholders, of date the second day of February last, it was thereby declared, that William Trotter, Esquire, etc. should be nominated and appointed directors of the concern, and should continue in that office from the date of the contract, and for two years from and after the last Monday of May thereafter.

It was provided by the eighth article, "that the whole account books, papers, letters of correspondence, and other writings relative to the business of the company shall at all times be open to the directors and superintending committee and members thereof respectively, but to no other members of the company, unless ordered by the annual general meeting; and also that the directors shall have full power to make the purchase of land, ground, or other premises which they shall deem necessary for the concern, and are hereby authorized to complete and carry into effect the purchases made of the lands of Wheatfield and Meadowbank, and to take all requisite measures for the erection of suitable accom-[356]modations for the dairy establishment, and to enter into all contracts or deeds necessary in the concerns of the company, and otherwise to carry into effect and execution the objects of the company, and to take all such steps as to them may seem expedient and beneficial in forwarding the prosperity of the establishment; and according to their sound discretion, to dispose of the lands of Wheatfield, or feu them; and also to feu such parts of Meadowbank, from time to time, as they think proper;" and further, "that the power of the directors, in the above mentioned and all other particulars, shall be subject to such limitation, extension, or alteration as a general meeting shall think fit; all which acts of administration shall be effectually binding and obligatory upon the company, and whole individual partners thereof; that it shall be in the power of the directors to borrow money, on the credit and security of the company, to the extent of three thousand pounds sterling, which they are hereby empowered to do, by way of cash account with some bank or banking company, provided there is stock of the company subscribed for and unpaid to that amount."

It was provided by the ninth article, "that the sums effeiring to the number of shares subscribed by the members of the said company respectively shall be advanced and paid in such instalments as the directors shall see proper to call for, and that in such mode, and at such times, and to such amount as they shall think proper, upon premonition of one month before the term of payment being given to the subscribers respectively, by letter addressed to each [357] of them, signed by the secretary and put into the general post office of Edinburgh, with legal interest of such part of said share so called for from the date fixed for payment, and until payment thereof is made; and in no event shall it be in the power of the directors to call upon the partners for a sum beyond that subscribed for by them respectively."

By the eighteenth article it was provided, "that a stated account, made out from the books of the company, and subscribed by the accountant and secretary, shall in all cases be sufficient to ascertain and constitute a balance and charge against a partner of the company, and no suspension shall pass of a charge so constituted, but upon consignment only."

The twentieth article declared, "that the directors shall not be liable for omissions, nor for the sufficiency or responsibility of securities or property on which they may lend out or otherwise invest the funds of the company, nor for the actions or intromissions of the manager, banker, clerks, or accountant, or any other officers or agents of the company, or any other persons intrusted with the business of the company, nor shall they be liable in *solidum* nor *pro rata* for one another, but each only for his own actual intromissions."

And the twenty-first article requires, "that each of the partners shall assign to the company, and the directors thereof for the time being, his own particular share and profits of the concern, in security of the debts and engagements of the company."

It is provided by the twenty-third article, "that previous to the last Monday of May eighteen hundred and twenty-six, on which day the general annual [358] meeting of the stockholders is to be held, and in every year thereafter, the books of the company shall be balanced, and a statement or abstract of the company's affairs shall, under the inspection of the directors and auditors, be made up and signed by the accountant of the company and secretary; and no transfer of the stock shall be admitted or entered in the books of the company for three weeks previous to the



said last Monday in May, nor till eight days thereafter, yearly; and the directors, or their accountant or secretary, shall be obliged to lay upon the table, at the said general meeting to be held upon the said last Monday of May yearly, the said statement or abstract, for the inspection of the partners present, the substance whereof shall be stated at the said court by the chairman or preses; and the said statement or abstract shall lie at the office of the secretary, open for the inspection of any of the partners, for the space of one calendar month subsequent to the said last Monday of May."

Thereafter the contract was subscribed by shareholders, to the extent of £20,000. The directors, while it was in the course of subscription, took measures for the erection of the necessary buildings, the contract price being about £5400, though they ultimately cost about £9000.

There having been a previous call of five per cent., a call of ten per cent. was made upon the shareholders in June 1825, and another call to the like extent in July following, but the calls were only partially paid; the sum thereby realized was inadequate to meet the engagements of the directors, and they borrowed money to pay the price of the lands purchased and for the [359] current expenses, partly on their own individual security and partly by heritable bond over Meadowbank, by some of their number as trustees for the company.

The first general annual meeting of the proprietors of the company took place on the 29th of May 1826, and was attended by the principal shareholders, including the directors. A report was submitted by the directors, and approved of, containing a full statement of the affairs of the company up to that date, and of the various arrangements which had been made for the completion of the purchases of the several heritable properties, the nature and terms of the building contracts into which they had entered for the erection of the premises at Meadowbank, and the state of progress of these buildings, which were then almost completed. The directors also explained, that "although names were put down for 2032 shares, amounting in sterling money to £50,800, of which the directors allocated 2000 shares, yet the contract was only signed by proprietors to the amount of 806 shares, being £20,150." The report set forth the difficulties which the directors had experienced in carrying through the different pecuniary and other arrangements, from the delay on the part of many of the subscribers in paying up their instalments.

The meeting authorized these directors "to adopt such farther measures, from time to time, as they may consider necessary for promoting the prosperity of the concern."

The affairs of the company became more involved, and the management more difficult, the subscribing partners declining to pay their different calls on the subscribed capital. The directors had to raise money [360] and make advances on their personal security. Annual general meetings were held in 1827, 1828, and 1829, at which the partners present (consisting always of the quorum required by the deed of copartnery) approved of reports on the state of the affairs.

At a general meeting in 1830 it was resolved to wind up the affairs of the company. It appeared from the reports on the affairs of the company, prepared by a juridical accountant, that "a total loss has arisen on the concern, as at 31st May 1834, of £36,685 19s. 2½d., and after deduction of the amount of calls on the partners received and applied (extending to £15,068 2s. 10½d.), there remains a deficiency beyond the recovered capital, and the estimated property and funds of the company, of £21,617 16s. 3½d.;" that almost the whole of the above-mentioned loss had arisen from the fall in value of the heritable properties and buildings below their original cost, joined to the loss of interest on the prices, and the expense of titles and securities arising out of the purchase of those properties. The directors, or those in whose right they now stand, had made large advances from their own private funds, for the purpose of liquidating the debts and obligations of the company. The total amount of the outstanding debts of the company, in so far as the same had been ascertained, including the advances made by the directors, and advances by certain other of the partners, for the company's behoof, and in extinction of its obligations, was then £24,504 10s. 3½d.

The defenders (appellants) who, besides the respondents, were the remaining solvent partners of the copartnery, having refused to contribute, with a view to make up this deficiency, an action was raised against [361] them in the Court of Session.

It proceeded in the name of the pursuers (respondents), "all directors and individual partners of the Caledonian Dairy Company," some of whom were also designed "as trustees nominated by the directors of the said company, and vested with the heritable property thereof, with consent and concurrence of Carlyle Bell and Alexander Cuninghame, Esquires, writers to the signet, as vested, in manner after mentioned, with the right to the debts and obligations after referred to." The summons then recited the establishment of the company,—the provisions of the contract,—the nature and extent of the business carried on,—the mode of management,—the final winding up, and the ultimate loss and bankruptcy of the concern; and after setting forth that some of the bonds have been assigned to Messrs. Bell and Cuninghame, though paid from the funds belonging to the respondents, and that the greater portion of the remainder consists of advances made by them on behalf of the company, it concluded, that the appellants should be "decerned and ordained, by decree foresaid, to make payment to the pursuers, conformable to the amount of their advances respectively, of the rateable proportions, corresponding to the respective shares of stock held by the said defenders, of the sum of £15,000, or of such other sum as shall be ascertained; in the course of the process to follow hereon, to be the amount of the advances by the pursuers respectively, on behalf of the said company, towards extinction of its debts and obligations, according as the rateable proportions thereof, falling on the defenders, shall be ascertained in the course of [362] the said process, together with the legal interest of said proportions from the respective dates of advance, and in time coming, during the not-payment: Further, the said defenders ought and should be severally decerned and ordained, by decree foresaid, to make payment to the pursuers of the rateable proportions effeiring to the defenders, according to their said respective shares of stock, of the sum of £20,000, or of such other sum as shall be ascertained, in the course of the process to follow hereon, to be the amount of the outstanding debts and obligations still due by the said company, as well as of any further claims that may yet emerge, and of all costs and expenses which may hereafter be incurred in finally winding up the said concern, as the same shall be severally ascertained in the course of the said process, in order that the pursuers may operate their relief from the said debts, obligations, and expenses, by applying the said rateable proportions thereof due by the defenders, along with their own proportion, in extinction of the same."

There were also conclusions for having it found that the appellants, in the event of any of their number becoming insolvent, should be liable rateably for any deficiency thereby occasioned; and there were also additional subsidiary conclusions with reference to the ultimate winding up of the concern.

In defence it was pleaded, 1st, that the liability of each partner was limited to the amount of the shares subscribed for; 2d, that the debts concluded for were contracted by means of loans and obligations entered into in violation of the contract, particularly the eighth article, and on the personal responsibility of the respon-[363]-dents individually; 3d, that the claim of the respondents was barred, in respect that they proceeded to carry on the business after they knew that the capital was not half filled up, without communicating that fact to the partners; and 4th, that it was barred, in respect that the whole losses had arisen from their own violation of the contract, their concealment and misrepresentation, and from their gross negligence and misconduct in the management of the company's affairs.

A record having been prepared, parties were heard before Lord Jeffrey, as Ordinary, who (6th December 1836) pronounced the following interlocutor:—"The Lord Ordinary having heard the counsel for the parties very fully, on the closed record and whole process, and made avizandum, repels the defence founded on the clause (or clauses) in the contract of copartnership, alleged by the defenders to import an absolute limitation of the liabilities of the partners *inter se* to the amount of the sums severally subscribed by them for and as their shares in the said copartnership; repels also the defence founded on the allegation that the pursuers or directors of the said company had no right to begin business, and no power to bind the partners for any debts or obligations on behalf of the said company, till the whole capital of £50,000 had been subscribed for and secured; and farther, repels the defence founded on the clause or provisions of the contract by which the defenders allege that the powers of the directors to borrow money on the responsibility of the

company and the partners thereof were restrained; and, before farther answer, appoints the cause to be enrolled, that parties may [364] explain in what way the cases of the several defenders are or may be affected by this deliverance, what findings or decernitures may be required to apply it to their several cases, and what farther determinations may be necessary to exhaust the cause as to the said several defenders, or any of them."

To this interlocutor his Lordship added the subjoined note, explanatory of the grounds of his opinion.\*

\* "The first of the above-mentioned defences appeared to be that chiefly relied on. It was rested mainly on the provision in the close of the first article of the contract, 'that the partners should be bound to relieve each other of the debts and engagements of the company only to the extent of and in proportion to their respective shares therein,' and partly upon passages in the 8th, 9th, and 13th articles, which were said to confirm the construction put by the defenders on this first provision. According to that construction, this provision was specially intended to protect the body of partners from the consequences of overtrading, or rash and imprudent dealings, on the part of the directors, and was equivalent to an injunction that they should at no time put more than the subscribed capital at hazard, under pain of being made personally answerable, and without relief, for the consequences of any more extensive speculations. Now, if any thing be clear in this case, the Lord Ordinary takes it to be, that this limitation of the provision to the case of directors having occasion for relief is totally inadmissible. It is in express terms a provision limiting the right of relief of all the partners, as against each other. The case of directors is not once named or alluded to in any part of the article; and it is not less, but more, extravagant to say that it applies exclusively to them, than it would be to say that they alone were exempted from its operations. If it had really been intended to impose such a restriction upon the powers of the directors to bind the company, it is inconceivable that the parties should have introduced it into this first article, which merely sets forth the universal and common-law rights and liabilities of the partners, instead of bringing it in as a limitation of the great general powers given to those directors by article 8, which does contain a special limitation as to borrowing, or as a qualification of the great immunities conferred on them by article 21.

"If the true meaning and effect of the restraining words now cited be therefore as the defenders contend, it necessarily follows that no one partner of the company who has been obliged by a creditor to pay any of its debts or engagements, or who is distressed by such a creditor, will be entitled to any relief from the other partners, beyond the amount which may remain unpaid upon the subscribed capital of each, and if all have paid up their whole subscriptions he will be entitled to no relief at all. Now the first question is, whether it is conceivable that so monstrous and unjust a provision could be intended, or could by possibility be admitted to have effect? The Lord Ordinary has never been able to get over this, and thinks that any construction of which the words are at all susceptible must be preferred to one which would lead to such a consequence.

"The defenders, indeed, endeavour to show that the consequences would all fall back upon the directors; and that if it was right that they should not trade beyond their capital, except at their own peril, there would be no harm in denying, even to an innocent partner, who might be subjected in the consequences of their so overtrading, all relief as against the other innocent partners, seeing, they said, that he might still have relief against the rash directors themselves; but this is evidently altogether fallacious. Take, first, the most favourable case for the defenders; assume, contrary to the fact, that the directors would do wrong in trading beyond the capital, and suppose that a private partner, having no concern with the management, is obliged to pay a debt so contracted, is there any justice or common sense in saying that he shall not be relieved by the other partners, who were equally liable to such distress? or, under the words relied on, would be enabled to claim relief from the directors who overtraded? Those directors are not liable for each other. The individuals who subjected the concern to the debt may be all insolvent, and the whole subscribed capital may have been long ago paid up. Then the directors are all necessarily partners; and it is not easy to see how they should not have the benefit of the provision in question as well as the

[365] Against this interlocutor a reclaiming note was presented to the Second Division of the Court, and on [366] advising it the following interlocutor was (2d June 1837) pronounced:—"The Lords having considered this [367] note with the other proceedings, and heard counsel thereon, adhere to the interlocutor complained of, [368] refuse the desire of the note, and reserve all questions of expenses."

others. There is confessedly no provision, nor any thing like a provision, in the contract, that the individual directors who overtrade shall be bound to relieve the partners who may be consequently distressed by the company creditors; and what the defenders seem to go on, in this attempt to escape from the result of their construction, is really nothing more than some vague notion of equity, and an assumed common-law liability of the directors, to an award of damages and reparation as the penalty of their so overtrading. In any ordinary case, however, there would plainly be no such liability; and in the cases most likely to occur there would be no shadow even of equity in seeking to subject them to such a penalty. There is, in point of fact, it must always be remembered, no declaration in the contract that no engagement shall ever be entered into beyond the subscribed capital. Now, suppose the whole of that capital paid up, and yielding great profits, under an admirable system of management, and that the directors, in order to increase those profits, contract for 100 more cows, and a corresponding range of new cow-houses, could it ever be said that this was a malversation, for which, in the event of any ultimate miscarriage, they could be made liable at common law in their own persons, and without relief from their partners? And if there would plainly be no such liability at common law, how is it possible to construe or spell it out of a provision in the contract which makes no distinction between directors and other partners; and instead of imposing any extraordinary liability on its members, consists wholly in a declaration (as the defenders at least allege) that they shall all be freed from the common and natural liability of partners.

"But the radical fallacy of the defenders' attempt to palliate the revolting consequences of their doctrine is that it is not true, in point of fact, that engagements which cannot be answered by the subscribed capital of the company must necessarily have been contracted by overtrading on the part of the directors; and that it is, on the contrary, undeniable, that cases must continually occur in which the natural right of partners to be rateably relieved of company debts by each other would be most unjustly cut off by that interpretation, while there was not the least pretext for recurring on the directors, or any one else, for reparation. Suppose the whole capital paid up and yielding a large profit, and the directors resolved, notwithstanding, to incur no new expense beyond the amount of the said capital actually in their hands. Suppose that the final call on the partners had recently yielded £10,000, and that this sum was deposited in a bank, and that on the faith of this they had contracted for £2000 worth of cows, and £5000 worth of new buildings, these undoubtedly would be engagements within their powers, and the line of their duty, even according to the rigid and imaginary restriction of the defenders. But suppose the bank to fail, the cows to die of distemper, the houses to be destroyed by fire, and the whole concern to be broken up before the prices of these articles were paid, and then suppose that the sellers and contractors should sue an individual partner for those company debts, and obtain decreet against him, could it be seriously maintained that he should have no relief whatever against his partners, but be obliged to pay £7000 of company debts out of his own pocket, from the mere accident of his having been selected by a company creditor in preference to all or any of those who were equally liable to their diligence? Yet, if the defenders' reading of the provision in question is the right one, this would be the inevitable consequence. The partners are only to relieve each other to the extent of their subscribed capital still unpaid; but in the supposed case it is all paid, and the debts having been contracted when there was abundant capital in the hands of the directors to answer them, even the shallow pretext of handing him over to them for indemnity would be excluded. It is needless, indeed, to go to such an extreme case as has now been supposed, for the purpose of testing the doctrine of the defenders, since, unless it be held that no company is to contract any debts or engagements after its subscribed capital is paid up, however ample the stock in which that capital has been invested may be to answer them at the time, it is obvious that

Alexander and others appealed.

[369] *Appellants*.—1. The action was ill-founded, because in a question *inter socios* the appellants could only be [370] made liable to the extent of the shares for which they originally subscribed, in respect of the express stipulations to that effect in the written contract.

unavoidable misfortunes may reduce the creditors to the necessity of coming on individual partners for satisfaction, and that the most unheard-of injustice must be done, if they were to be excluded from all claim of relief on their associates.

“The Lord Ordinary is satisfied, therefore, that this cannot be the meaning and effect of the provision relied on by the defenders; and the next question therefore is, what then is its meaning, and how are the words of it to be satisfied? These words, no doubt are awkward and ill assorted, but to him he will confess that they seem of very little importance; the whole passage from the word ‘declaring,’ in the first line of the page, to the end of the article, being, in his opinion, little more than an idle amplification of the elementary principle of all copartnerships, and which would be implied, though not once mentioned in the contract, viz., that the partners should share profit and loss according to their interest in the concern, the words, ‘but only to the extent of and in proportion to their shares therein,’ being merely a clumsy and tautological way of expressing a proportional liability, and which, with a slight variance, might have been more clearly worded as follows:—‘but each only to an extent proportional to his share in the stock of the said company.’

“But though the Lord Ordinary inclines strongly to think this, and no more, the true meaning of the words in question, he conceives that the peculiar form of expression may be explained by one or two suppositions equally inconsistent with the views of the defenders, and either of them far preferable to their interpretation. The clause, it will be observed, sets out with declaring generally, and without qualification, that the partners ‘shall have right to the profits, and be liable to the losses, arising upon the said business;’ and it is only after having made this separate and absolute provision that it proceeds to say, ‘and shall be bound to relieve each other of the debts and engagements of the company, but only to the extent of and in proportion to their shares.’ Now, the Lord Ordinary would suggest, that the debts and engagements of the company, thus contradistinguished from its losses, may have been meant of such debts and engagements only as might be satisfied without loss to the company, as being within the amount of the unpaid-up shares of the several partners; and that the limitation meant no more than this, that when any individual partner was distressed for debts of this description, he was to be entitled to proportional and total relief from the rest, but to the extent only of those unpaid shares, by means of which the matter might, in such a case, be settled without any sacrifice of the funds actually in the hands of the company, and vested in its business, and consequently without giving occasion to any thing that could be entered as loss in the books of the concern. When the debts and engagements, however, exceeded the amount of unpaid shares, they necessarily fell upon the input or vested stock (or its profits), and thus passed into the separate head of losses, for which, by the preceding part of the clause, the whole partners are made liable absolutely, and without any limitation.

“If this, however, be the just view of the provision, it is certain that the pursuers are entitled to judgment, the whole sums for which they now call on the defenders being either truly and literally losses, or debts and engagements, which remain after all the subscribed stock has been applied towards their liquidation.

“The second supposition (which is not inconsistent with the preceding), by which a just and reasonable meaning may be given to the words in dispute, is, that they were intended not to cut off the inherent right of a distressed partner to equal relief from the others, but only to oblige him to seek it simultaneously and proportionally from them all; to deprive him, in short, of the power competent to an extraneous creditor of the company, of selecting one or a few to bear the common burden, and to make it necessary at once to convene the whole, and to come against each only to the extent of the proportion indicated by the amount of his share in the concern. This, it is conceived, was a proper and laudable object, and will fully explain and satisfy the words of the provision in question.

“Understood in this sense, too, it has been carefully attended to by the pursuers in framing their summons, the conclusions being directed against the whole solvent

[371] The contract was framed on the basis that the partners were not to be liable under any circumstances [372] beyond the amount of the capital stock subscribed for by them respectively. Whether reference be had to [373] the provision which expressly declares, that their liability shall be limited "to the extent of and in pro-

partners of the company, and only for their rateable and proportional shares of the sums demanded.

"If the case had admitted of no other solution the Lord Ordinary would have adopted either of these constructions in preference to that of the defenders, and indeed he is strongly inclined to the views on which the last of them is founded; but he has already stated that he considers both as unnecessary, and is satisfied on 'the whole that the words so much relied on are mere surplusage, and mean nothing more than what was already expressed, and would indeed have been implied if the whole clause had been omitted. One main reason for this opinion is derived from the tenor of that part of the second head or article of the contract, in which the whole of the passage already referred to in the first article is carefully repeated, with one or two slight verbal changes, and the remarkable omission of the words 'but only to the extent of,' on which the whole case of the defenders depends. From the words 'bind and oblige,' in the fourth line of this second article, to 'shares of the capital stock,' in the ninth line, the whole is a literal transcript of the passage in the first article, including the obligation of relief, of which so much has been said, and the material thing is, that this obligation of relief is expressed in the second edition, without any limitation, except that of being proportional to the interest in the stock. It now runs thus,— 'and shall be bound to relieve each other of all the debts and engagements of the company in the proportion of their respective interests or shares in the capital stock.' What was the object of this anxious iteration of a very unnecessary clause the parties have been unable to explain, and the Lord Ordinary does not pretend to understand. But as it is undeniable, that all the other slight variances of expression in the six lines so repeated do not make the least change in the sense or substance of the provision, so the utter omission of the words on which the defenders exclusively rely, affords a strong and almost conclusive reason for holding that this also was a variance by which the sense was not thought to be affected, and that the clear and indisputable meaning of the last edition of the words must also have been that of the first. If it was not, there is a palpable contradiction in these two consecutive clauses; and a contradiction which cannot be extricated or reconciled. By the one clause, the partners are bound to relieve each other only to the extent of and in proportion to their subscribed capital unpaid, and by the other they are bound to relieve each other in proportion to their interests in that subscribed capital. As to the meaning of the last there can be no doubt, and that meaning is entirely conformable to justice and common law. The former is in some measure ambiguous, and admits, as has been seen, of various interpretations; and, according to the defenders' construction, it is utterly repugnant to justice, and without example in practice. If it admitted of no other construction but this, one of the contradictory provisions must give way, and the Lord Ordinary conceives that it cannot be that which stands last in the deed, and is alone conformable to equity and general law. If it does admit of construction, however, there can be no better guide to the true meaning than the immediate subsequent clause, in which the whole matter is resumed, with direct reference to the specific capital, which had not been previously defined.

"If this leading defence is not maintainable on the first article of the contract taken by itself, it is plainly in vain to hope that it may be aided by any of the rest. The special restriction upon borrowing in the close of the eighth article will be noticed in reference to the last defence. But as to any bearing it may be supposed to have on the first, it is enough to observe,—1st, that it relates expressly to the directors, and not to partners generally; and 2d, that it would obviously have been unnecessary if the first article had imported what the defenders now allege.

"The ninth article again plainly relates exclusively to calls on the partners for the instalments of their subscribed capital, and to nothing else. It regulates in great detail the forms of such calls, and the subsequent proviso that the directors shall have no power thus to call for any sum beyond that subscribed, manifestly relates to such calls only, and not to actions of relief by partners distressed for company debts, or

[374]-portion to " the shares subscribed for, or to those other clauses which no less unequivocally declare, that " in no event " shall calls be made upon the partners for sums beyond their subscribed capital, or which expressly debar the directors from borrowing money beyond the amount of subscribed capital, it appears very plain that

seeking to equalize the burden of its losses, after its business is at an end. The proviso was probably unnecessary ; but it was apparently suggested by the loose wording of an earlier part of the same article, in which the directors are empowered to make their calls ' at such times and to such amount as they shall think proper.' In fact, it is precisely equivalent to a parenthesis like this after the word amount, ' (but never exceeding the sum subscribed by each such partner,)' which would have been a better way of expressing what might very well have been left to implication, and would obviously have afforded no room for the strained inference of the defenders.

" The only other article referred to in relation to this first defence was the 13th, and when fully considered, it appears to make strongly against the views of the defenders. It relates to the right of a partner allowed to retire, or to sell his shares, to be relieved of all antecedent debts, etc., of the company. It first provides, that ' he shall be entitled to relief of the whole of such debts,' and then the other partners ' bind and oblige themselves severally to relieve him in proportion to their shares, and to the extent of their liability herein-before expressed.' Now, at the very most, this merely falls back on the original definition or measure of liability, and tends in no way to limit or define it. But looking to the clear and unqualified right of the retiring partner to be at all events relieved of the whole debts and obligations, and considering that on the defender's view of this original liability, he could have no relief at all, in the very probable case of the whole subscribed capital being paid up, when the creditors came to him for payment, it seems obvious that this liability could not be so limited as they allege, without imputing to this provision the most manifest inconsistency, as well as the grossest injustice.

" With regard to the defence rested on the allegation that the directors had no right to begin business, or undertake engagements for the company, till the whole capital of £50,000 was subscribed, it is not necessary to consider, whether there might not be cases where such a ground of pleading might be admitted. It is enough, that it is clearly excluded by the circumstances of the present. In the first place, the contract, though only begun to be signed in April 1825, expressly provides, that the copartnership shall be held to have commenced in January preceding, and refers to and recognizes in various places (and particularly in articles 5 and 8), the proceedings of various meetings of directors in February and March preceding. In particular it declares (article 5), that the directors appointed by a meeting of the 2d February shall be continued in office for two full years, so as that no interruption should be given to the operations in which they were engaged. To the Lord Ordinary it appears that no party signing this contract can be allowed to pretend ignorance of what had been done or sanctioned at these previous meetings. But the matter is not left to implication, for, in the 8th article of the contract, deliberately subscribed by the defenders, the directors are in express terms empowered ' to complete and carry into effect the purchases made of the lands of Wheatfield and Meadowbank, and to take measures for the erection of suitable accommodation for the establishment, and to enter into all contracts and deeds necessary,' etc. Now, the lands of Wheatfield had been already bought for a price of £12,000, and the lands of Meadowbank for £9750 ; and yet the defenders, who all sign before any thing like the amount of these sums was subscribed, do instruct the directors, on their responsibility, to carry into effect those purchases, and to grant all necessary deeds for that purpose. It is quite in vain to say that partners who thus expressly recognized and adopted as acts of the company purchases made four months before, and when there was not one farthing of actual subscription, must be held (upon mere implication) to have meant that nothing further should be done till £50,000 had been actually collected ; and that when they directed buildings to be erected on the lands so purchased they had no notion of authorizing any contract being entered into for that purpose till this whole capital was secured. If they declared it right and laudable to lay out £20,000 when they had no capital at all, it is extravagant to say that they would have reprobated the idea of contracting for necessary buildings to the extent of £9000, when they had a sub-

it was the meaning of all the subscribers to the contract, that their liability should be of this limited description. It might be very true, indeed, that a restricted liability of this nature could not be secured to the partners by means of the contract in any question with the public. A total immunity from loss could only be obtained by

scribed capital of only £20,150. The directors accordingly entered immediately into such a contract, and the buildings were actually in progress before most of the defenders subscribed. The Lord Ordinary cannot think it doubtful that they were fully warranted in so doing, by the express terms of the contract already in part recited. But in this way the company was bound, by the express authority of the defenders and the other subscribers, and before a single subscription was realized, to the extent of more than £30,000, which was the true origin of the debts still owing, and in fact, with the other unavoidable expenses of the experiment thus authorized, the source of the whole losses which have been sustained.

"This alone might dispose of the defence, that the directors had no right to expose the partners to hazard, or to bind them in any obligation till the whole capital was subscribed. But there is another provision in the contract which is separately conclusive upon this head. This is the latter part of the second article, which expressly declares, that it 'shall be in the power of the directors to retain, for behoof of the company, such number of shares as they may think proper of the said capital stock, to be disposed of by them in such way as they may think best for the company.' Now, under this provision, it is plain that the directors might have retained, and for as long as they thought fit, any proportion of the 2000 shares into which the £50,000 of proposed capital was to be divided; and it would be palpably absurd to say, that they were not to begin business so long as any part of these was so retained. How, then, can it be pretended that, under this contract, they were not entitled to begin business till the whole 2000 shares were appropriated? And what practical difference would it have made, if they had, by an express minute, declared the 1300 shares which were actually undisposed of, had been retained in terms of this provision, for behoof of the concern? In point of substance and effect they were so retained, and as completely at the disposal of the company and its managers as if a minute to this effect had been formally engrossed in the books. That it was not so engrossed may be an impeachment of their book-keeping or accuracy in entering their transactions, but can never deprive them of the substantial power, under which they have really acted, or subject them to forfeitures as for breach of an imaginary interdict against entering on business till all the shares are actually taken by individual partners, in the very face of this express licence and permission to the contrary.

"The last defence disposed of by the preceding interlocutor, is that founded on the concluding part of the 8th article of the contract, by which the directors are empowered to borrow 'on the credit and security of the company,' to the extent of £3000, provided there is subscribed capital unpaid up to that amount at the time. This, though properly an empowering clause, is contended to import a prohibition to borrow, except on those conditions, and this prohibition, the defenders say, the directors have violated, by borrowing to a much larger extent, and when there was no such unpaid capital; and they maintain they cannot be called on to relieve them of the consequence of such borrowings.

"Now, the short answer to this is, that there have been no borrowings 'on the credit and security of the company,' to a greater extent than is permitted by the contract; that the greater part of the transactions complained of under that name consisted merely in granting new securities for debts previously existing, and recognized in the contract itself, and the remainder in raising money on the personal credit of individual partners or directors, and afterwards advancing it to pay off the most pressing of the existing debts of the company. According to the Lord Ordinary's impression, there is no one case in which money has been raised, directly or indirectly, on the company's account, in order to extend its business (the case evidently contemplated in the provision referred to), or for any other purpose than to satisfy the claims to which the company was liable from the very beginning, or which ought to have been defrayed by the withheld instalments on the subscribed capital. It is needless to go here into the details of those proceedings; but with the exception of the sums actually advanced for those purposes out of the private funds of individual



charter or act of parliament. But it may be observed in passing, that the directors were authorized by the 37th section of the contract, "to apply for a royal charter of incorporation or for an act of parliament in favour of the company at any period they shall think proper." Hence, it appears that it had been contemplated by all parties that application should be made for a charter of incorporation, by which the plan of a limited responsibility might have been carried more fully into effect.

The first clause contained the important qualification as to this limitation of liability. It expressly declares, that the partners "shall have right to the profits and be liable for the losses arising from or upon the said business, and shall be bound to relieve each other of all the debts and engagements of the company, but that only to the extent of and in proportion to their respective shares therein." This qualification is set forth as a substantive provision in the very outset of the contract. It occurs in the very first clause. And it is quite clear that this is the operating clause. [375] It provides for the constitution of the partnership; the partners "bind and oblige themselves, their heirs, executors, and representatives whomsoever," to contribute and pay the full amount of the shares respectively subscribed for; and the right to the profits, and the liability for loss is regulated by it.

The ninth clause also expressly bears, "and in no event shall it be in the power of the directors to call upon the partners for a sum beyond that subscribed for by them respectively." These words not only proceed on the notion of, but expressly provide for a restricted liability. The directors were empowered to direct the shares subscribed for to be paid by instalments. So long as any portion of these instalments was not paid they had a certain security for any engagements which they might undertake. But in so far as related to indemnification from the partners their claim ceased with the amount of the shares. Whatever engagements they might enter into beyond this sum they could not look to the partners for indemnity. The partners were entitled to stand on the stipulation, "that in no event shall it be in the power of the directors to call upon them for any sum beyond that subscribed for by them respectively." If it had been the intention of the partners to undertake a general liability for each other, for all the obligations of the company, whether they exceeded the amount of the subscribed capital or otherwise, this clause would never have been introduced into the contract. It indicated, as plainly as words could do, that if the directors, by overtrading or mismanagement, exceeded the amount of capital, all obli-

directors, the Lord Ordinary is not of opinion that any farther investigation is necessary. With regard to these, a question may no doubt be raised, whether the condition of the company was not such as to have made it the duty of the directors rather to have allowed the creditors, whom they thus pacified with their own money, to have proceeded with diligence against its property, than to have delayed an inevitable catastrophe by such interference. If the defenders can make out any case of gross and pernicious imprudence of this kind, it will be open to them to do so under the preceding interlocutor, which merely finds that these were not acts of borrowing on the credit and security of the company, in contravention of the contract. To him it certainly occurs, that it would be next to impossible to make out such a case. By paying the most urgent debts of the company with their own money, they may have done no real service to the concern. But they would seem entitled, at all events, to come in the place of the stranger creditors, whose proceedings they thus arrested, and against whose claims it is admitted that the defenders would have had no protection.

"In these circumstances, it is needless to inquire into the justness of the legal assumption, that the grant of a limited power in a contract of this description implies such a penal prohibition against exceeding the limit, as in every case to infer the forfeiture of equitable rights, otherwise competent at common law, to persons in the situation of the pursuers; and it is equally unnecessary to consider the effect of the declaration, which immediately precedes this implied prohibition, viz. 'that the powers of the directors shall, in all particulars, be subject to such limitations, extensions, and alterations as a general meeting shall think fit,' taken in connexion with the fact, that the whole proceedings of the directors, with their books and documents, were submitted to several general meetings, subsequent to the public conclusion of all the transactions now complained of, and deliberately sanctioned by a general vote of approbation."

gations beyond it must be [376] held to have been undertaken on their own personal responsibility, and not on the responsibility of the partners.

The other clauses in the contract aided the same construction, in which there is nothing unreasonable, as it only imports a salutary limitation of the common law liabilities, which it was expedient in this instance to restrain.

2. As the greater portion of the debt concluded for in the present summons was contracted by means of advances made by the individual directors, or of obligations entered into by them on their personal responsibility, and ultimately paid by them out of their own funds, the appellants were not bound to relieve the respondents of any such advances or obligations.

This proposition had been met in the note of the Lord Ordinary by the inconclusive remarks, that there had been truly no borrowings, "that the greater part of the transactions complained of under that name consisted merely in granting new securities for debts previously existing, and recognized in the contract itself, and the remainder in raising money on the personal credit of individual partners or directors, and afterwards advancing it to pay off the most pressing of the existing debts of the company." All this, however, proceeds on a very obvious fallacy, in point of argument, and on a mistake in regard to the fact. The Lord Ordinary manifestly assumes, that the raising of money fell within the ordinary powers of administration of the directors, and that, provided they could raise it, without borrowing it, in the strict sense [377] of that word, their actings would be binding on the whole partners. It has been already shown, however, that this is a very erroneous view of the matter. According to the whole conception of the contract it was the manifest understanding of all parties that the administration of the directors was not to extend beyond the capital subscribed for, and that no debt was to be contracted beyond that capital. The raising of money beyond that sum implied an excess of power, whatever might be the form in which the transaction was carried through. The point to be looked to is not whether actual loans were made beyond the sum of £3000, but whether the credit and security of the company could be pledged to a greater extent. It was not the form of the transaction but the substance of it which must be regarded. Hence it followed, that in so far as the respondents have endeavoured to pledge the credit and security of the company beyond the capital actually subscribed for, the appellants are freed from all liability. Generally, if one partner draws a bill for a partnership debt, it becomes a debt by the copartnership, but not so in a company like this.

3. The appellants were not liable for the sums concluded for in this action, in respect that the respondents, contrary to the fair meaning of the contract, proceeded in the business of the partnership before the contract was subscribed for the whole stipulated capital, and that they afterwards persevered, when, in the knowledge that it was not then subscribed to the extent of one half of this capital, concealing from their copartners the important alteration which had occurred in the defalcation of the capital.

The appellants knew nothing of the relative number [378] of subscribers who had subscribed, and refused to subscribe the contract. It was the province of the directors exclusively to look to this; but when a change of so vital a character had occurred they were not entitled to proceed in the business without obtaining fresh instructions from the whole partners referably to the altered situation of the affairs of the company. That it was the deficiency of the capital which led to the action could not be disputed. Had the whole capital of £50,000 been subscribed the present question could not have been raised. The loss would have been distributed over an increased number of partners, and would have been less than the number of shares for which they had respectively subscribed. But further, it was the commencement of the business with an inadequate capital which has caused much of the loss. It was this which led to the whole system of borrowing, and caused to be included, as constituting part of the loss of the company, a sum of no less than £8107 16s. 6d. for interest on loans and debts; and by deranging the whole system of management from the beginning, diminished even the chance of success which the concern might have had under more favourable circumstances. It was impossible to doubt that the alteration that had taken place between February, when the respondents reported that the whole capital had been subscribed, and April thereafter, when they knew that not more than about £20,000 was to be looked to, was material; and could it be disputed that the managing partners

of a concern are bound to communicate all material facts to their copartners? The meeting of February authorized purchases to the amount of upwards of £20,000, believing that the capital was £50,000; but, if they had been [379] told that it was not to be the half of that sum they most assuredly would have altered their course. They would either have closed the concern, which might have been done at a small loss, or have reduced the scale of the establishment.

The Lord Ordinary notices the appellants "pretending ignorance" of what had been done. His Lordship says, that if they thought it right to lay out £20,000 "when they had no capital at all," it is extravagant to say that they would have reprobated buildings at a cost of £9000, "when they had a subscribed capital of only £20,150." But this is absolute perversion of the fact. In place of having no capital at all, when they authorized an outlay of £20,000, they believed, upon the written report of the respondents, that they had a capital of £50,000.

Independently of the interlocutors being erroneous on their merits there would be manifest injustice in repelling these defences, which extend so deeply into the merits of the action, before the appellants have had an opportunity of bringing forward their whole case upon the alleged acts of mismanagement, which they were confident would work their exemption from the present claim. No judgment ought therefore to be pronounced which would conclude them, by a decision in one branch of the cause.

*Respondents.*—1. The respondents, as directors and partners, or in right of directors and partners, of the Caledonian Dairy Company, were by law liable only rateably, according to the respective shares held by them of its stock, for the losses sustained and debts and obligations incurred by that company; and they were [380] entitled to be relieved of all farther proportions of said losses, debts, and obligations by the remaining solvent partners rateably, according to the interest which such partners respectively had in the concern.

In the first place, what each of the appellants was called upon to contribute towards the relief of the respondents was a sum proportioned to his own share of the stock. Had these claims been made by creditors who were not partners of the company the solvent partners would have been liable, conjunctly and severally, and each partner might have been sued *in solidum*. But as this is an accounting *inter socios*, the claim is framed upon a different footing, each of the appellants being sued only for his rateable proportion of the sums of which the respondents are entitled to be relieved.

In the next place, this was not an action for payment of calls to contribute to the stock of the company. The company has been dissolved, and the object of the action is merely to adjust and allocate among the different partners, according to their respective interests in the concern, the losses which have been incurred, and the debts which remain unpaid.

The appellants, accordingly, had not disputed that the respondents have a legal right to such relief as is thus claimed by them, unless that right is excluded by the conditions of the contract of copartnership; but they said that that contract contains stipulations which exempt them from their legal obligation so to contribute towards the relief of their copartners. The Court of Session had found that pretence to be altogether untenable, on the grounds so unanswerably stated in the note of the Lord Ordinary.

[381] 2. The contract of copartnership contained no condition importing a limitation of the liabilities of the partners, *inter se*, to the amount of the sums severally subscribed by them for and as their shares in the copartnership; but, on the contrary, it imposed upon them an express obligation to relieve each other rateably, according to their respective interests in the concern.

In no part of the first clause is the amount of the sums subscribed by the partners said to be the measure of their liability. From beginning to end of that clause the amount of the sums subscribed by them not only is not referred to for that purpose, but is never once mentioned for any purpose whatever. What the contract refers to as the measure of the liability of partners *inter se*, is just the equitable one established by the law of Scotland itself, viz. "proportions corresponding to their respective shares" in the company; and, in the next place, even had there been any doubt otherwise as to the meaning of the rule thus stated for regulating the liability of partners *inter se*, certain it is, that at all events it could not mean that the sums subscribed by the respective partners should be the limit of their liability. That meaning at all

events must be excluded; for, it will be observed, that the right of the partners to profits, as well as their liability for losses, and for relief of debts, was to be measured by the same rule. The words "only to the extent of, and in proportion to, their respective shares therein," apply to the one as well as to the other. The amount of the subscribed capital of each partner, therefore, cannot be the rule which is here prescribed for measuring the extent of his right [382] to the profits; and neither can it be the rule which is here prescribed for measuring the extent of his liability for losses and debts, because that liability is to be regulated by precisely the same rule as the right of profits. Whatever therefore may be the meaning of the rule thus prescribed for regulating the liability of partners in relief to each other, it cannot have that meaning which the appellants wish to engraft upon the words.

The appellants were not entitled to resist the claim of the respondents on the pretence that the directors of the company had not power to bind the partners for debts and obligations on its behalf till the whole capital of £50,000 has been subscribed for and secured; and they were not freed from their legal obligation of rateable relief to the respondents by the clause in the contract relating to the borrowing of money.

These positions were amply supported by the reasoning of the Lord Ordinary, and the opinion of the Court as expressed by Lord Medwyn (Report in Fac. Coll.). And there could be no danger to the ultimate and satisfactory adjustment of the rights of the parties in the further progress of the action by affirming these interlocutors, as every thing else was clearly reserved by the Lord Ordinary in disposing of three of the defences founded on.

The Lord Chancellor, throughout the hearing of the cause, intimated his concurrence in the views of the Lord Ordinary upon the merits of the defences, and moved that the consideration of the cause be adjourned, that their lordships might consider of the propriety in point of practice of affirming these declaratory findings at that stage of the proceedings.

[383] Lord Chancellor.—My Lords, in the appeal which was before your lordships yesterday, in consequence of what was pressed by the learned counsel for the appellants in his reply, I was desirous to take an opportunity of examining the proceedings, in order to satisfy myself, and to be able to state to your Lordships, whether there really was any danger, such as seemed to be anticipated by the learned counsel, namely, that by affirming the interlocutor of the Court of Session your lordships might be giving more effect to that decision than appears to have been intended by the learned judges who pronounced it. I find that the appellant himself, in stating his case, on the fourth page, states the grounds of his defence in these terms:—The action was resisted on the ground, 1, that the liability of each partner was limited to the amount of the shares subscribed for; 2, that the debts concluded for were contracted by means of loans and obligations entered into in violation of the contract, and on the personal responsibility of the respondents individually; 3, that the claim of the respondents was barred in respect that they proceeded to carry on the business after they knew that the capital was not half filled up, without communicating that fact to the partners; and, 4, that it was barred in respect that the whole of the losses had arisen from their own violation of the contract, their concealment and misrepresentation, and from their gross negligence and misconduct in the management of the company's affairs." Now, the interlocutor of the Lord Ordinary, affirmed by the Inner House, disposes of three of these grounds in the very same terms in which they are put forward by the defenders themselves. It repels [384] the defence founded on the clause or clauses in the contract of copartnership, alleged by the defenders to import an absolute limitation of the liabilities of the partners *inter se*, to the amount of the sums severally subscribed by them for and as their shares in the said copartnership." It repels also "the defence founded on the allegation, that the pursuers or directors of the said company had no right to begin business, and no power to bind the partners for any debts or obligations on behalf of the said company, till the whole capital of £50,000 had been subscribed for and secured;" and further repels "the defence founded on the clause or provisions of the contract, by which the defenders allege that the powers of the directors to borrow money on the responsibility of the company and the partners thereof were restrained; and before further answer appoints the clause to be enrolled, that parties may explain in what way the cases of the several defenders are or may be

affected by this deliverance, what findings or decernitures may be required to apply to their several cases, and what further determinations may be necessary to exhaust the cause as to the said several defenders, or any of them." Therefore, my Lords, according to a very usual course of proceeding in the Court of Session, it disposes of parts of the case, lays down the general principles by which the future proceedings are to be regulated, but it does not exhaust the case, but reserves the consideration of other matters, merely declaring certain points to be adjudged as the foundation of what the Court may hereafter think it right to do.

My Lords, it is consistent with the practice of the [385] Court of Session, much more than it is consistent with the practice of any court in this country, so to deal with the case. In a late case of great importance (Auchterarder Case, see *antea*, p. 220) your Lordships had an instance, where the summons containing declaratory and petitory conclusions, the court confined itself to the declaratory conclusions, leaving the petitory conclusions for further consideration. It declared the right, but it did not administer the relief, but left the question of what relief was to be administered for the further consideration of the court. So in this case the court says that the points set up in behalf of the defenders are not capable of being maintained, and it is not inconsistent with the practice of the Court of Session to repel those defences, but if the court think that there are other points which require further inquiry and further consideration, it does not exhaust the subject, but merely declares that in so far as the defence rests upon certain points the court is of opinion that the defence cannot be maintained. My Lords, the court has in this instance done no more than that. It has taken up the defences brought forward by the parties themselves, and it has adjudged that those defences do not meet the case made by the pursuers. It leaves the rest of the subject entirely untouched; and therefore I do not see the least danger to be apprehended from its being supposed that the interlocutor which has been pronounced can have any more effect than that which your Lordships yesterday were of opinion ought in substance to be pronounced, namely, that the defence relied on in these three grounds which constitute the substance of the interlocutor, are not defences which can protect the case of the defenders. Any other defence is open to them; it only declares [386] that these three grounds are not positions upon which the defence can stand.

Now, my Lords, that being very plain upon the interlocutor,—such being the understanding of the Lord Ordinary, and the clear opinion of the judges of the Second Division of the Court, and I may say the clear opinion of your Lordships upon the discussion of the merits of the case, in the way almost conceded by the learned counsel for the appellants, for no resistance could be made to the conclusion to which the Court of Session had come, the difficulty, if any, was supposed to arise upon this point of form. If your Lordships are of opinion, as I certainly am, that the point of form is not open to the observations which have been made upon it, your Lordships cannot hesitate, upon a matter which appears upon investigation to be extremely plain, to affirm the interlocutor of the Court below, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL—ARCHIBALD GRAHAME, Solicitors.

## [387] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

ALEXANDER CAMPBELL, *Appellant*.\*—Attorney General (Sir John Campbell)—Bagley; DUNCAN CAMPBELL, *Respondent*.—Dr. Lushington [3d June 1839].

[Mews' Dig. i. 333, 364; S.C. 7 Cl. and F. 166; 12 Shaw 870.]

*Appeal—Practice—Stat. 55 Geo. 3, c. 42, s. 4, 6, and 8—Stat. 59 Geo. 3, c. 35, s. 16.*—The partners of a distillery were convicted in penalties, which were levied from the appellant and respondent respectively: the appellant sued the respondent for his share of certain cash advances made by him for behoof of the company; the respondent brought an action against the partners for indemnity from the said penalties, on the ground of nonparticipation in the offence: the appellant, among other defences to such action, pleaded, that, the partners having been all involved in the same delict, there was no ground for contribution or indemnity by one against the other. The judgment of the Lord Ordinary or of the Court was not taken on that defence; and the Lord Ordinary sent the cause for trial by a jury. The judge at the trial gave no direction as to said defence, and no exception was tendered: and a verdict was returned for the respondent. The Court, upon motion with notice by appellant for a rule to show cause why the verdict should not be set aside and a new trial granted, refused to grant a rule to show cause why the verdict should not be set aside; thereafter the Court applied the verdict, and decerned for the sum found due, with costs, which were also subsequently decerned for: Held, that an appeal against such judgment, applying the verdict and decerning, was competent.

In 1820 the appellant and the respondent, and two individuals of the name of Macandrew, became partners [388] of the Easdale Distillery Company. This company carried on business from February 1820 till August 1822, and was dissolved in December thereafter.

In consequence of alleged misconduct by those in charge of the operative department of the concern, illicit spirits had been mixed up with the produce of the distillery, and a prosecution for penalties to the amount of £10,500 was instituted at the suit of the Crown in the Scotch Court of Exchequer, where the practice of the English Courts prevails.

The defendants (the present appellant, the respondent, and the Macandrews,) put in a joint plea of not guilty, and tendered evidence at the trial in Exchequer, which took place on the 17th of December 1823, and ended in a verdict of conviction against all of them, and in a judgment for the full amount of penalties. The defendants thereafter got the penalties modified to £3000. A writ of extent was issued, and their several proportions of the above mitigated penalties were levied from the appellant and respondent respectively.

In 1824 the appellant, who had made considerable advances in purchasing grain and other materials for the company's use, to the extent of upwards of £1500, raised an action in the Court of Session against the respondent, concluding for payment of £559 1s. 10d., being his share of this debt of £1500, and for any deficiency that might arise from the insolvency of the other partners.

In 1827 the respondent instituted an action in the Court of Session against the appellant and the two Macandrews, and one Hunter, a servant in the establishment, averring his own ignorance, and their knowledge, of the illicit practices carried on at the distillery, [389] and concluding for a total indemnity, at the hands of the appellant and of the other defenders, of the whole modified penalties in which they had been condemned. To this action the appellant pleaded in defence,—1. that the action was irrelevant; that the respondent being involved in the same delict with the appellant, by the verdict and judgment following thereon, could not legally sue to have the whole consequences of that delict thrown on the appellant, and himself relieved of them; and that no action lay at his instance against the appellant. 2. He denied,

\* 12 S. D. and B. 573, 870, 923.

in point of fact, that he ever knew, or was in the slightest degree accessory to, the improper practices alluded to.

Upon this state of the pleadings, the Lord Ordinary gave no judgment upon the objection to the relevancy of the action; but the cause being a proper one for trial by jury his Lordship remitted the case to the jury roll, and the parties went to trial on the following issues as settled by the Lord Ordinary:—

"It being admitted that the pursuer and defenders, Alexander Campbell and Donald Macandrew, and the late John Macandrew, were partners of a company for the purpose of distilling spirits at Easdale, and that the defender, Robert Hunter, was brewer or distiller to the said company; and that on the 17th day of December 1823 the said company were found liable in a penalty of £3000, as being guilty of contravening the revenue laws:—

"Whether the defenders, or any of them, were guilty of the said contravention of the said laws, whereby the said company were subjected in the said penalty, and obliged to pay certain expenses? And whether the defenders, or any of them, are indebted and rest-[390]-ing owing to the pursuer in the sum of £1171 5s. 1d., or any part thereof, with interest thereon, as the balance of the said penalty and expenses? Or whether the said contravention of the said laws was with the knowledge of the pursuer?"

The Judge who presided at the trial left the case to the jury, upon the evidence.

The jury returned a verdict in the following terms:—"At Edinburgh, the 22d, 24th, and 25th days of March 1834. Before the Right Honourable David Boyle, Lord President of the Second Division of the Court of Session, compeared the said pursuer and the said defenders by their respective counsel and agents, and a jury having been impanelled and sworn to try the said issues between the said parties, say upon their oath, that in respect of the matters proven before them, they find for the pursuer on both issues; and that the defenders are indebted and resting owing to the pursuer in the sum of £1059 5s. 1d., with interest, as libelled."

The appellant gave "notice of a motion for a rule to show cause why the verdict should not be set aside, and a new trial granted."

In discussing the motion "to set aside the verdict," the appellant insisted on his preliminary defence, and on the judgment and verdict in Exchequer, produced in evidence on the trial, as sufficient to quash the verdict as contrary to evidence; but he was met with the objection in point of form, that in *hoc statu*, on a motion arising out of the trial, the Court could only judge of the law so far as it applied to the direction given at the trial, and that no direction was given or required at the trial, nor exception taken upon this preliminary matter; and [391] that the ground on which the motion was made resolved into a plea which should have been taken at the trial, and stated by way of exception, and not by a motion for a new trial; and that as the verdict must stand, a motion for a new trial was incompetent. The Court thereupon made the following order (1st July 1834):—"The Lords refuse to grant a rule to show cause why the verdict in this case should not be set aside."

Thereafter the verdict, and the Judges' report of what had passed at the trial, were laid before the Court of Session; and the respondent gave the following notice of motion to enter up judgment:—"Take notice, that on the 4th current, Duncan Campbell, esq., the pursuer, will move the Honourable Court to apply the verdict of the jury in this case, to decern in terms thereof, and to find the defenders liable in the expenses incurred by the pursuer, and to remit the account thereof to the auditor to tax and to report. Dated at Edinburgh this 2d day of July 1834." The appellant opposed this motion, but the Court ordered the whole cause to the roll, when their Lordships pronounced the following judgment (4th July 1834):—"In respect of the verdict found by the jury on the issues in this cause, the Lords decern against the defenders, conjunctly and severally, for payment to the pursuer of the sum of £1059 5s. 1d., with interest as libelled; find the defenders liable to the pursuer in the expenses incurred by him in this action; appoint an account thereof to be lodged, and remit to the auditor to tax the same, and to report."

Thereafter their Lordships pronounced the following interlocutor (11th July 1834):—"The Lords allow the decree pro-[392]-nounced in this case for the principal sum of £1059 5s. 1d., and interest thereon as libelled, to be extracted *ad interim*."

Against these several interlocutors Alexander Campbell appealed.

The respondent having objected to the competency of this appeal before the appeal committee, their Lordships reported to the House that, on account of its importance in practice, the question of competency should be argued at the bar of the House by one counsel of a side; and on the 12th August 1834, the cause having been called on, the competency of the appeal (which then embraced the previous interlocutor of the Court on a motion for a new trial) was discussed.

*Appellant.*—The pleas on the merits which bore materially on the competency were shortly these:—1st, The action by the respondent is incompetent, in respect that he himself, as well as his copartners, being by the verdict in Exchequer found guilty of the offences charged, and condemned by the Court in the statutory penalties, no action can lie at the suit of either against his associates for relief or indemnity of these penalties; and no one of the co-partners can be permitted to recover in an action founding on the above-mentioned verdict and judgment, and at the same time asserting his own innocence of the charge of which, by these very proceedings, he stands legally convicted; and, 2d, he had urged the Lord Ordinary to dispose of the preliminary defences before trial, at every step of the cause.

Some smuggled spirits had been received upon the premises of this company, and certain violations [393] of the excise laws were committed by the company, in respect of which His Majesty's Advocate commenced a criminal prosecution for penalties, to the amount of £10,000, in the Scotch Court of Exchequer. Instead of resisting this prosecution, it was resolved to effect an arrangement with a view to mitigation of penalties. By a practice which occurs in Scotland, and which was also of frequent occurrence in England, the verdict in Exchequer was taken by consent, against all the parties, for penalties afterwards restricted to £3000. The present respondent, Duncan Campbell, was afterwards advised to raise an action, in the Court of Session, against his copartners, concluding to be relieved from the consequences of the verdict in Exchequer. Now, no such thing was known in the law of England, nor in the law of any other country, as an action for contribution among wrongdoers. That had been clearly settled in the well known case of *Merewether and Nixon* (4 Term Rep. 180), and also in the more recent case of *Colburn and Patmore* (1 Cro. Mee. and Ros. 72; S.C. 4 Tyrw. 677) in the Court of Exchequer. [Lord Chancellor Brougham stated, that it appeared to his Lordship that this was an action brought at the instance of one accomplice against his co-associates in crime. Such a thing was perfectly wild.] Such is precisely the case here; nevertheless, it would appear that a different view of this matter had been taken by the Court of Session, for instead of giving the defenders the benefit of the pleas which they had taken, an issue was prepared and ordered to be tried by a jury. Now the defenders had no alternative but to go to trial upon this issue, for the act of the 55 Geo. 3, c. 42, s. 4, enacts, "that it shall [394] not be competent, either by reclaiming petition or appeal to the House of Lords, to question any interlocutor granting or refusing such trial by jury." [Lord Brougham, C.:—Is the plea set forth in the record?] The conviction in Exchequer was set forth on the record, and formed the subject of substantive pleas in law. [Lord Brougham, C.:—Did you take a defence upon the conviction in Exchequer? I want to see the summons and defences.] There was no doubt of the fact that the plea in question had been brought out distinctly and broadly on the record in the Court below. In this state of matters, being, as their Lordships would perceive from the section of the act to which they were referred, compelled to go to trial, the case came before a jury, and a verdict was returned in favour of the pursuer (respondent). The defender (appellant) thereafter moved the Court to have the verdict set aside, in respect of the conviction in Exchequer. A motion was made in arrest of judgment. The Court below refused the rule, and they afterwards pronounced judgment, proceeding upon the verdict, ordaining the defenders to pay the pursuer the amount prayed for in the summons, viz. £1059 5s. 1d., with interest and costs. Against this latter judgment the present appeal was entered. The respondent has presented his petition, praying that the appeal may be dismissed as incompetent. The appeal is said to be incompetent under the act 55 Geo. 3, c. 42, ss. 6 and 8, and also by the 59 Geo. 3, c. 35, s. 16. Now the argument of the appellant was, that by interlocutors appealed from no point of law is decided; the interlocutor of the 1st of July being merely a refusal to set aside the verdict, and the interlocutors of the 4th and 11th July being merely to apply and give effect to the verdict. [395] [Lord Brougham, C.;



—Had you a demurrer in the Court below upon the plea?] My Lord, I am not aware that they have in Scotland any form of plea in the nature of a demurrer. [Lord Brougham, C.:—Was the plea made a preliminary defence? I am anxious to have a copy of the defence; and the better way perhaps is to allow this action to stand over-until I shall have had an opportunity of perusing the summons and defence.]

Lord Brougham, C., addressing Dr. Lushington:—Pray is this not a motion for an arrest of judgment, *non obstante veredicto*. There can be no objection to that; it is matter of familiar practice. But at any rate, do you mean to say that there is any clause in these statutes which shuts out the party from an appeal to this House? You cannot cut off the right of appeal by implication. The right of appeal does not stand upon any act of parliament. There is no act of parliament giving a right of appeal. That right is the constitutional privilege of all the King's subjects.

Dr. Lushington:—My argument is, that trial by jury in Scotland being entirely a matter of statutory introduction and regulation, there is no appeal, except where the statutes allow it.

Here the Lord Chancellor rose, and stated that he had now no difficulty whatever in recommending to their Lordships to sustain the competency of this appeal. Let the respondent's petition, therefore, be dismissed. Ordered accordingly.

On the following day (13th Aug. 1834) the cause was again brought under the notice of their Lordships by the respondent's counsel, *ex parte*, who stated, that since the matter was last before the House there had been furnished a copy of the notice of motion for a rule to show cause.

[396] Lord Brougham, C.:—I am not certain that there cannot be an appeal from the judgment, because they have entered up judgment.

The appeal subsequently dropped from the cause list, by default of the appellant in lodging prints of his case; but he having afterwards presented a new appeal, differing from the former in so far as he did not appeal against the order refusing the rule to show cause, etc., the respondent petitioned against this second appeal, on the ground of incompetency; and the matter having been referred to the Appeal Committee, their Lordships reported that the point should be argued, by one counsel of a side, at their Lordships' bar; which argument accordingly took place in session 1837.

The cause having stood over, was this day (3d June 1839) called on.

Lord Chancellor:—My Lords, this is a case which was heard at your Lordships' bar some time ago, and which had, in fact, escaped my recollection. The suit was for the purpose of recovering a contribution from one of several partners, towards the payment of the amount of a verdict which had been found at the suit of the Crown against all the partners for a breach of the excise laws. The jury having found in favour of the pursuer, an application was made to the Court of Session for a new trial, which was refused; upon which the judgment of the Court was pronounced in these terms:—"In respect of the verdict found by the jury on the issues in this cause, the Lords decern against the defenders, conjointly and severally, for payment to the pursuer of the sum of £1059 5s. 1d., with interest as libelled."

An appeal was presented to your Lordships' house against that decree of the Court of Session, and against [397] the order refusing a new trial; that took place in the year 1834. That appeal was met by a petition for dismissal upon the ground of incompetency; and to the extent of the order of the Court of Session refusing a new trial, there can be no doubt the appeal was incompetent, inasmuch as the act (55 Geo. 3, c. 42, sec. 4) prohibits parties from coming to this House, upon orders of the Court below upon applications for new trials. The present petition of appeal was then presented, which left out the order refusing a new trial, and appealed against the order I have just read, and another order of subsequent date consequential upon it.

The question now is, whether that can be dealt with as an incompetent appeal, being against the final interlocutor of the Court of Session. The order is for the payment of the money. There is nothing, undoubtedly, in the act which prohibits such an appeal. Your Lordships will not fail to observe under what difficult circumstances the appellant comes here. His real and substantial defence is this; that the penalties under the excise laws being, by the verdict of a jury, on behalf of the Crown,

found against all the partners, that one partner cannot recover, in a civil action against the others, a contribution for that which is a liability incurred by a wrong.

There was a plea on record, which set forth, to a certain extent, what was sufficient to raise the matter in issue coupled with something else. There was a plea raising that defence, but upon that plea no judgment of the Court was asked before it was sent to a jury; and the issues referring the matter to a jury were in these words:—“It being admitted that the pursuer [398] and defenders were partners of a company for the purpose of distilling spirits, and that the defender, Robert Hunter, was brewer or distiller to the said company; and that, on the 17th of December 1823, the said company were found liable in a penalty of £3000, as being guilty of contravening the revenue laws; whether the defenders, or any of them, were guilty of the said contravention of the said laws, whereby the said company were subjected in the said penalty, and obliged to pay certain expenses? and whether the defenders, or any of them, are indebted and resting owing to the pursuer in the sum of £1171 5s. 1d., or any part thereof, with interest thereon, as the balance of the said penalty and expenses? or whether the said contravention of the said laws was with the knowledge of the pursuer?”

Now the jury found this verdict. They say, “That in respect of the matters proven before them, they find for the pursuer on both issues, and that the defenders are indebted and resting owing to the pursuer in the sum of £1059 5s. 1d., with interest as libelled.” Now that finding involves a question of law as well as a question of fact, because, if there was no illegality in the original transaction which prevented one party recovering a contribution against the other, the defenders could not be indebted and resting owing to the pursuer. It was a point of law, therefore, arising at the trial, which must either have been assumed or decided before the jury could come to their conclusions.

Now it is said that the Learned Judge who presided at the trial did not explain to the jury what the law was. If he had been applied to at the trial to do so, [399] he would undoubtedly have given an opinion to the jury, as to whether the pursuer could recover with reference to that question. But it does not appear that any such application was made (see 12 S., D., and B., 573); so that neither in the first instance upon the interlocutor directing the issue, nor in the second instance when the issue was at trial, did the defender take the course which was clearly open to him, of asking the opinion of the Court, or the opinion of the Judge, as to the illegality of the transaction being an answer to the demand against him.

Under these circumstances the finding of the jury is one that cannot now be disturbed, inasmuch as an application was made to the Court of Session for a new trial, and the Court of Session refused a new trial, and against that interlocutor refusing a new trial no appeal can be presented to your Lordships' house. The present appeal is against the interlocutor giving effect to the verdict of the jury; that is to say, the jury having found that the defenders are indebted and resting owing to the pursuer in a certain sum. The interlocutor decreed that payment should be made. It is for the appellant to consider how far, in prosecuting this appeal, he is likely to succeed. But that is not now the question before your Lordships for decision. The question for your Lordships' decision now is, whether this appeal be incompetent. I find that it is an appeal against a final order of the Court of Session for payment, and I do not find any thing in the statute which raises any doubt as to its being competent to a party to come here for the purpose of asking your Lordships whether that interlocutor can be supported or not.

[400] Now the ground of the appeal is, that the verdict does not exhaust the whole merits of the question. Whether it does or does not exhaust the whole merits of the question is a matter about which your Lordships may be very well able to form your opinion on looking at the pleadings, but it is not a matter before your Lordships for decision. The question is, as to whether the appellant shall be sent away from your Lordships' bar upon the ground of having brought an appeal which it is incompetent to him to bring. It appears to me that there is no incompetency; whatever may be the result of the appeal itself is matter for the consideration of the appellant; but I think that the petition, praying that the appeal may be dismissed as incompetent, must be refused.

*Die Lunae*, 3 Junii 1839.—Respondent's petition to dismiss appeal as incompetent considered, and dismissed; and the appeal sustained.

W. S. GRUBBS—A. H. MACDOUGALL, Solicitors.

[401]    APPEAL FROM THE COURT OF SESSION, SCOTLAND.

Mrs. MARIA CAMPBELL STEWART,\* *Appellant*.—Pemberton—Sir William Follett; FERDINAND S. C. STEWART, and Attorney and Mandatory, *Respondents*.—Dr. Lushington—James Russell [3d June 1839].

[Mews' Dig. iii. 2031. S.C. 6 Cl. and F. 911. See *Cooper v. Phibbs*, 1867, L.R. 1 H.L. 149, and notes to *Stapilton v. Stapilton*, 1 Wh. and T.L.C., 7th ed. 223.

*Agent and Client—Transaction*.—Where a deed of agreement of compromise of their respective claims to the succession of a deceased relation had been settled and executed by three parties, one of whom afterwards brought an action of reduction of the agreement on the ground of lesion, through erroneous advice of her law agent, who was agent also of the two other parties, as to her legal rights, of which she was ignorant:—Held (affirming the decision of the Court of Session) that, upon the facts and written evidence of the transaction, the party had failed to establish relevant grounds for disturbing the agreement.

Frederick Campbell Stewart, a native of America, now deceased, succeeded in 1815 as heir of entail to the estates of Ascog and Whitebarony. Having been advised to sell the lands, Mr. Stewart instituted proceedings in the Court of Session to ascertain his powers under the entail; and the Court found, that although he was not effectually prohibited from selling the lands, he was bound, if he did sell, to reinvest the price in the purchase of other lands to be settled on the same series of heirs (F. C., and 5 S. and D. 418). Mr. Stewart appealed to the House of Lords against the finding as to reinvesting the price of the lands; and while the fate of that appeal was still uncertain Mr. Stewart, in 1826 and 1827, executed various deeds, providing for the event either of a reversal or affirmance, in favour of Mrs. Stewart his wife, of his two daughters, of his brother Professor Ferdinand Stewart, and of his sister Mrs. Anna Stewart. Mr. Stewart and his daughters soon afterwards died in France. In 1830 the House of Lords, reversing the decision in the Ascog Cause (4 W. and S. 196), found that Mr. Stewart was under no obligation to reinvest the price in the purchase of other lands. Mr. Wardlaw, the law agent in Edinburgh of Mr. Stewart's widow and nearest of kin, entertaining doubts as to their respective rights, obtained the opinion of counsel † upon a memorial for the trust disponees of Mr. Stewart.

\* Rep. 15 D., B., and M., 112.

† "Opinion by Francis Jeffrey, Esq. and Andrew Rutherford, Esq., upon Memorial and Queries for the Trust Disponees of Frederick Campbell Stewart, Esq., of Ascog.

"1, 2, 3, 4. In the event of its being decided in the House of Lords, reversing the judgment of the Court of Session, that the price drawn by Mr. Campbell Stewart is not subject to reinvestment as a surrogatum for the entailed estate, there can be no doubt that the price, along with the other moveable funds vested in the memorialists, must be held to have been the personal property of their constituent, and must be dealt with accordingly.

"The domicile of Mr. Stewart is of importance chiefly, it appears to us, as regulating the domicile of his daughters, who died before they had obtained any domicile of their own independently of his. The only question here is between the American and the Scotch domicile; for we see no ground whatever upon which it can plausibly be argued that he obtained any domicile on the continent of Europe. The claims of the Scotch domicile, and of the Scotch law in virtue of it, to regulate

[403] The parties having been advised by counsel to settle by compromise questions which appeared to be of a [404] difficult nature, a deed of agreement was entered into between Mrs. Stewart the widow, and Ferdinand Stewart and his sister Anna Stewart, which, after setting forth the particulars as to the succession and the uncertainty of the rights of parties connected therewith, contained a stipulation that the three parties, "with a view to avoid litigation, and being mutually disposed to an amicable arrangement," consented and agreed that the free proceeds of the whole estate and effects other than the entailed estate should be divided equally among them.

Mrs. Stewart subsequently brought an action of reduction for the purpose of setting aside this agree-[405]-ment, and in support of her action pleaded:—1. That the agreement had been brought about by undue concealment and misrepresentation of her rights, and her apparent consent obtained to a deed, the real meaning and import of which, as affecting her legal rights, she did not understand. 2. The agreement had been entered into when she and the other parties thereto were ignorant of the rights conferred upon her by the last will and testament of Mr. Stewart, and when they had in view only the deeds referred to and specified in the said agreement; she also pleaded that upon the said agreement being reduced she would be entitled, independently of the said will or testament, to claim as at the death of her husband, both by the law of Scotland and by the law of Virginia, which was that of his domicile, the full third share of all his personal estate and effects; and also to claim during her life, by the law of Scotland, the third part of the rents of any heritable property in Scotland in which her husband was infeft at the time of his death, as well as certain other benefits from which she had been excluded by the agreement.

It was pleaded in defence,—1. The grounds of reduction were not relevant, or sufficient in law to support the conclusions of the action. 2. The pursuer was not ignorant, but cognizant of her rights, and of the deeds by which the same were the moveable succession of Mr. Stewart and his children, is certainly attended with a great deal of difficulty, principally because of the fact, that he had unquestionably an American domicile before he came to this country; that it is a rule very general, in reference to intestate succession, though not, perhaps, without exception, that there can be only one domicile, and that a domicile once established cannot be lost, except by actual acquisition of another domicile; and that there is an absence of any proper residence or abode in Scotland. At the same time, there are many strong circumstances on the other side; and we are certainly not prepared to say that this is a case in which the Scotch law, which must be appealed to in the first instance, will feel itself to be controlled by the American domicile, and constrained to surrender the property within its jurisdiction to the distribution of a foreign law. We may add, too, that considering the property as in bonis of the children, the difficulty of the case appears to be somewhat increased, in consequence of the father's deed vesting the funds in the hands of Scotch trustees, and appointing them, at the same time, to be tutors and curators to his children.

"With respect to Mr. Campbell Stewart himself, we are of opinion that he must be held to have died testate, although, at the same time, it is not quite free of question, whether, under the particular provisions of this deed, the shares which are declared to be payable to the children or survivors on majority or marriage, vested in the children by the mere survivance of the father, or lapsed in consequence of their pre-decease before marriage or majority; and on the supposition of their lapsing, the whole funds must be held to be still in bonis of Mr. Campbell Stewart, and to be distributable as his intestate succession, seeing the trust deed makes no destination of his property, beyond his children and their issue. If, however, as we rather hold, the shares vested in each child upon survivance, then the funds must be distributed as the intestate succession of the children; and we are inclined to think that, in their case, there are some circumstances which strengthen the right of those whose interest it is to claim under the Scotch law.

"We have chosen rather to state where we conceive the difficulties to lie, than give any direct opinion upon the questions which suggest themselves; because, before forming a satisfactory opinion, some farther information may be necessary as to the facts; and because, in so far as regards the memorialists, or any practical

regulated, when she executed the agreement sought to be reduced. 3. That she had homologated the agreement and transaction.

After closing the record and hearing parties Lord Cockburn, Ordinary, pronounced the following interlocutor:—"The Lord Ordinary having considered the closed records and productions, and heard parties, [406] both of whom have renounced farther probation, finds, that the pursuer has not established any sufficient ground for setting aside the agreement brought under reduction; sustains this defence, assoilzies the defender, and decerns: finds the pursuer liable in expenses, appoints an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report. (Signed) H. COCKBURN."

"*Note.*—The pursuer wishes to reduce a contract by which a portion of her deceased husband's property was divided into three parts, of which she got one, and his brother and sister two, on the ground that she was thereby materially injured, and was led into the bargain from ignorance of her legal rights.

"The fact of her being materially injured, if the whole risks be taken into view, is not proved. The subject of the arrangement was complicated and difficult, as the consultations with counsel shew; and the doubtful and expensive disputes which might possibly have arisen, would have been among persons closely united by relationship and friendship. Contingencies had therefore to be considered, and peace to be obtained by concession, as is declared in the agreement, and transpires through all the correspondence. If the possible consequences of litigation and dissension are brought into the calculation, the reality of her lesion is at the least doubtful.

"The exact nature and extent of her ignorance is equally uncertain. That she did not know the whole law of her case, or cases, is probably true; as it is of most parties. But the certainty and the degree of her ignorance is by no means clear. Her evidence [407] of it consists entirely of letters which passed between her and her agent; but it is proved that she had personal interviews with him; and the

advice they may require, we can have no doubt, in the first place, that the rights of the competing parties must be determined in the Scotch courts, leaving each party to make effectual his claim as he can, under the law of which he founds; and, in the second place, that nothing but a judgment of the court will effectually exonerate the trustees, except, indeed, a compromise between all the parties, who, in any view of the case, can make a plausible claim under either the American or the Scotch law. We think such a mode of settlement would be very advisable in a case presenting so many difficulties, and threatening a very tedious and expensive litigation; but even if a compromise were gone into, it ought to be done judicially, and the trustees, at all events, should bring an action of multiplepinding, in which the several parties interested may lodge claims, and afterwards assent to judgment, in terms of any compromise they may agree to.

"5. Assuming that the succession is distributable by the law of Scotland, on which supposition it would have been vested, under the deed or otherwise, in the child last deceasing, we are of opinion that Mr. Stewart, and his sister Mrs. Tennent, must succeed equally as next of kin; that his act of naturalization gives him no exclusive right, and that she, as an alien, is not prevented from taking moveable succession.

"6. On the supposition of the law of Scotland regulating the succession of Mr. Stewart and his children, in which view only this question is of importance, we are of opinion that the widow has no right whatever to any part of the funds, except in so far as she claims her share of the goods in communion, or under Mr. Stewart's trust deed.

"7. In the event that the House of Lords shall affirm the judgment of the Court of Session, and that the price must be reinvested, we are of opinion that the bonds of provision executed under Lord Aberdeen's Act, in favour of the daughters, must be considered as moveable, and must, along with the residue of the trust funds, be distributable according to the law which shall be held to regulate the daughters moveable succession. These bonds are in no respect different from other personal bonds, except in this, that they are effectual against the heirs of entail, and that the rents of the entailed estate may be attached in payment of them.

(Signed) F. JEFFREY.  
AND. RUTHERFURD.

"Edinburgh, 3d April 1830."

points on which she now says that she was in the dark were ones on which it is very improbable that no communication then passed between them. Accordingly, she herself acknowledges in several letters that she always meant to make a sacrifice, and on grounds which shew that she knew more of her true legal position than is now admitted. For example, one of the principal averments on which this action rests is, that, in sharing the property with her brother and sister-in-law, she was not aware that the law of Scotland gave her more than a third, or rather than a life-rent of the third. Yet in her important letter of the 29th December 1831 to her sister-in-law, in which she explains what her inducements to enter into the contract had been, she says, 'I was quite aware that if I had recourse to a lawsuit the whole would probably be mine.' There are other letters with similar avowals.

"But assuming both injury and ignorance; she was confessedly misled solely by her own professional adviser;—a gentleman against whose intelligence or character nothing is said. It is alleged that he was also the agent of the opposite parties. But this was known to her, and it is not averred on the record that he betrayed the one client to the other; nor is there in any other respect the slightest fraud imputed to him. He honestly thought it best for her that she should enter into this arrangement, and she took his advice. She wrote to him, saying she thought the bargain better for her brother and sister-in-law [408] than for her, 'but I submit all these matters to your better judgment.' (Letter, 26th April 1830). Eight months after this, she repeats the objection in very explicit terms. 'I do not think the chances equal.' (Letter, 2d December 1830.) Nevertheless, after another pause of above two months, and more explanation from her agent, she signs the contract, which sets forth various deeds, judicial proceedings, professional consultations, and 'conflicting opinions, by different eminent counsel at the Scottish bar,' and declares, that the compromise is gone into 'with a view to avoid litigation, and being mutually disposed to an amicable arrangement.'

"It was found in the case of M'Allister (26th June 1827), that the circumstance of a party losing a judgment by being kept in ignorance by his agent, formed no ground for disturbing the party who had obtained it. On the same principle, whatever claim the pursuer may have against her agent, it does not appear to the Lord Ordinary that the ignorance or inadvertence of the legal adviser, by whom she chose to be guided, can, in a case free from all fraud, be made to affect third parties, who are not said to have been accessory to her being misled.

"The Lord Ordinary has not decided upon homologation as a separate defence, because he conceives it to be superseded *hoc statu*, by the failure of the pursuer to establish her own case. But undoubtedly, the acts from which homologation is inferred do throw a strong light on the real state of her mind and views, in reference to her own grounds of action. For they amount to this: that, at a period when it is nearly impossible to believe that she was in any [409] ignorance of her rights, she deliberately enforced what she held to be the meaning of this very contract, and gained materially, at the expense of the defender, by doing so. H. C."

Mrs. Stewart reclaimed, but the Court (22d Nov. 1836) adhered, and of new found expenses due by the pursuer.

Mrs. Stewart appealed.

*Appellant.*—The real question at issue is, whether a deed or contract can be supported against a party who has subscribed it, though it should turn out that the party never truly consented to any such deed? In cases of fraud or deception, a deed is set aside solely because it is not the deed of the party, and because the apparent consent given by the act of subscription infers no true consent by the party so subscribing. And this principle, it will be found, applies as strongly to the present case as it can to any case where a deed has been executed under the influence of fraud or deception.

Upon the circumstances admitted or proved it was clear, that, by some unaccountable mistake, which has never been explained, the appellant, a stranger to the law of Scotland, was entirely misled and deceived as to her rights, even under that law. By the law of Scotland, a widow is entitled, on the death of her husband, leaving children, to claim, as her right, the third part of his personal estate, not the life-rent of this third, as erroneously held out by Mr. Wardlaw, and also the terce, or third part of the rents, of any heritable property in which her husband has died infeft.

[410] It is not necessary to prove actual fraud, if it be an act which no person of sound mind, and not under delusion, could either have proposed or consented to under the agreement in question; she got nothing whatever for compromising her rights; the compromise gave her nothing to which she was not otherwise legally entitled. Relief is granted in such cases solely because the confidence of the party having been taken in by the fraud, her consent was never truly given to the transaction, notwithstanding any subscription, or other act, by which she might appear to have consented. In order to form a contract or transaction (Dig. lib. 2 tit. 14), there must, as the civilians define it, be "*duorum pluriumve consensus, in idem placitum*;" that is to say, there must be a true and genuine consent to the contract or transaction. The appellant is far from maintaining that where the nature of the contract has been correctly explained, it is necessary that the parties should be fully aware of all its consequences, or even of all its legal effects. It is quite conceivable that two parties may enter into a transaction or agreement in utter ignorance of their rights, and upon this very footing; and in that case the transaction or agreement may be binding upon both, whatever knowledge they may afterwards come to acquire. But suppose the one party, while he affected ignorance of the facts, was perfectly aware how they stood, will it be maintained that the other party, upon discovering this, and ascertaining how much he had been imposed upon, would be bound by the agreement? The concealment in this case might be held equivalent to fraud; but, in truth, the only [411] legal ground for setting aside such an agreement is, that both parties did not stand upon an equal footing. The principle is the same, if, by any misrepresentation or concealment, the consent of the party is obtained to an agreement to which he would not otherwise have assented. In such cases, it is immaterial whether the misrepresentation has originated from fraud or from gross error. It is, in this sense, that the maxim of the civil law, "*culpa lata dolo equiparatur*," is to be understood (respecting the maxim "*Culpa lata*," etc. see Bell's Digest, *voce Culpa lata*, and authorities there cited). It is the same in its consequences or effects. It equally takes in the confidence of the party who is imposed upon, and produces an apparent consent to an act to which no true consent is given.

It was not because the appellant did not foresee all the consequences and results of this agreement that she now sought to set it aside, but it was because it is altogether a different agreement from what it was represented to be; and an agreement of course to which she never gave her consent. She consented to enter into this agreement upon receiving what was represented to be at least the double of what she could have claimed by the law of Scotland, as the widow of her late husband, but it now appears that this was a gross misrepresentation, and that she gets less by the agreement than she was entitled to claim by the law of Scotland in her own right as the widow of Mr. Stewart.

The Court treated the agreement in question as a transaction which, however unfair or unreasonable, could not be opened up, entirely overlooking that it was a transaction to which the appellant had never truly given her consent. In England relief has been given [412] in circumstances which seemed far less to require it. Thus, in *Gordon v. Gordon* (3 Swanston, 400), it was held by Lord Eldon (Ibid. 467) that a party was entitled to relief against an agreement, "on the principle that, though family agreements are to be supported where there is no fraud or mistake on either side, or none to which the other party is accessory, yet where there is mistake, though innocent, and the other party is accessory to it, this Court will interpose." And in the case of *Murray v. Palmer* (2 Schoale and Lefroy, 474), Lord Redesdale set aside a "conveyance obtained from a woman in ignorance of her rights, and upon misrepresentation of the circumstances of the property, although she was of full age, and acquiesced in the sale, and received the interest of the purchase money for twelve years, and although she consulted with her friends and had their assent, they being in equal ignorance with herself." It had been said, that in the present case there is no actual fraud alleged, however gross and inexcusable the misrepresentation might be, under which the appellant was made to act. This perhaps might admit of doubt, if fraud, as Lord Hardwicke (*Earl of Chesterfield v. Janssen*, 2 Vesey sen. 155) has said, may not only "be actual, arising from facts and circumstances of imposition, which is the plainest case," but also may be "apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make,

on the one hand, and as no honest and fair man would accept on the other." Besides, upon the face of the agreement in question, and independently of all the written evidence by which the misrepresentation and [413] concealment practised upon the appellant are established, the deed bears such plain and intrinsic proofs of imposition, as to shew that it could not have been entered into, except under the influence of delusion, or by a person not capable of understanding her rights.

*Respondents.*—The averment of the appellant, that she entered into the agreement in question in ignorance of the fact now averred for setting it aside is not supported, but is, on the contrary, refuted by the evidence, while the error alleged to have been committed in point of law in arranging the terms of the agreement, is neither manifest, nor, although it were, is it a reason for disturbing the agreement, without evidence that it was caused by the fraud or fault of the respondent. *Dixon* (5 W. and S. App. 445) v. *Monkland Canal Company*, 17 Sept. 1831. The evidence in the cause establishes her knowledge of her husband's will.

If the contract or agreement be viewed as a "transaction," by which each gave up to the other part of what the law might have given them had they resorted to it, the appellant's grounds of reduction are still more untenable. The deed of argument set forth the doubts and conflicting opinions entertained "by different eminent counsel at the Scottish bar"—that "a trial at law of the very intricate questions arising thereon must be attended with very great delay, expense, and uncertainty. Therefore (it proceeds), and with a view to avoid litigation, and being mutually disposed to an amicable arrangement, we, the parties above named, the widow and next kin of the said [414] F. C. Stewart, have mutually consented, resolved, and agreed," etc. It might be proper to state the general result of the agreement as it affected the rights of parties involved in the different questions which it compromised and set at rest. On the one hand, the respondent gave up, 1st, his claim under the original agreement made with his brother, the appellant's husband, in July 1815, whereby the respondent was entitled to one fourth part of the rents or profits of the whole estates during his brother's possession; 2dly, his claim under the bond of provision made in his favour by his brother in May 1827; 3dly, his right to challenge, on the head of deathbed, the sale to Mr. Malcolm of the entailed lands of Kilmichael, at the price of £36,365, which had been sold by his brother's commissioners within sixty days of his death; and 4thly, any right which he might have had to challenge the previous sale, which had been made while his brother was an alien, before he obtained his act of naturalization. On the other hand, the appellant gave up the provisions in her favour, contained in the bonds or trust-deed of settlement executed by her husband; as also all claim to dower, jointure, annuity, terce of lands, third or half of moveables, through the decease of her husband, or his daughters, or either of them; but she did not give up her right to the estate of her husband, situated in America, under his will in her favour.

The principles of law applicable to such a transaction are very clearly laid down in *Stair's Institute* (b. i. tit. 7. sec. 9; and b. i. tit. 17. s. 2).

It was held in the case of *M'Allister* (*M'Allister v. M'Allister*, June 23, 1830; 4 Wilson and Shaw, 142), by the House of Lords (affirming the judgment of the Court of Ses-[415]-sion), "that a decree pronounced in reference to a question of English law, on the motion of the party challenging it, constituted *res judicata*; although he alleged he had acted under erroneous information as to the law of England." In that case there was what there is wanting here, clear and indisputable evidence that the party was misinformed as to the law, and did, upon the information thus given him, and upon it alone, give up a valuable succession. Still he was held bound by the contraction or transaction he had made. The Lord Chancellor observed, "If you choose to act upon the opinion of your agent, and not to examine evidence, you cannot say, after the judgment is pronounced, that you have now got evidence which you did not formerly produce." The mere circumstance in this case that the party who was her confidential agent and friend, and upon whose information the appellant says she relied, had acted as agent for the respondent in making up his titles, etc., does not appear at all to affect the decision in the above case as applicable to the present. The appellant knew that Mr. Wardlaw had so acted, and if she had had any suspicion that he would from that cause betray her interest, she might, if she did not actually do so, have taken other advice, as Mr. Wardlaw recommended. But she had no reason to



distrust him. He had ever manifested a very strong and sincere regard for the interest of the appellant and her family. The respondent might, under the circumstances, have been excused had he entertained some suspicion that Mr. Wardlaw might incline to favour, if he could, the appellant in the transaction, considering that he had, in maintaining Mr. Stewart's rights to sell the [416] estates, acted in direct hostility to the interests of the respondent; and that the respondent was, in truth, confiding in the appellant's agent as his adviser, when, on being invited to join in the agreement, as proposed by him, and as its terms were arranged by him, he consented to do so.

The case of *Hope v. Dickson*, (17th December 1833, 12 S., D., and B., 222) founded on by the appellant, does not apply, as there were special circumstances which do not exist here.

There is evidence that the appellant, before concluding the agreement in question, was aware of all the facts now averred by her for setting it aside, and therefore there is no ground for questioning it, so far as depending on ignorance of fact; and in so far as it is attempted to disturb the agreement, on the ground of *ignorantia juris*, while it is by no means obvious that she ever had the rights which she says were unduly compromised by the agreement, it is submitted that the ground is insufficient, without evidence that the respondent misinformed her of her rights, or, by other unfair means, induced her to enter into the agreement, of which there is no evidence, or even an averment.

Lord Chancellor.—The object of this suit was to reduce and set aside a deed or agreement signed by the pursuer on the 12th February 1831 by which she and the defender, the brother, and Mrs. Tennent, the sister of the pursuer's late husband, entered into an arrangement as to various matters of dispute which had arisen between them respecting the property of the pursuer's late husband.

[417] A new arrangement having been made between the pursuer and Mrs. Tennent, the present contest is only with Ferdinand, her late husband's brother.

The summons states three grounds for the relief prayed; first, an objection in form, which has not been relied upon; secondly, that she was induced to sign the agreement in ignorance of her rights, being misled by the person who acted at the same time as her agent and as agent for the other parties; thirdly, that she was at the time ignorant of the existence of a will executed by the husband by which he gave to her all his personal property, or at least that the effect of the will was overlooked by her, and that the deed or agreement proceeded upon the footing that no such will existed.

It is important to examine the facts recited in the deed in question, and then, by comparing them with the facts proved, to consider how far they were, by misrepresentation or omission, inconsistent with the truth. The deed states the succession in 1815 of Frederick, the appellant's husband, to certain entailed estates in Scotland, and that it being uncertain whether he (then residing in and a native of the United States) or his uncle or the defender were entitled, they had agreed that the party in possession should pay to each of the others one fourth of the income during his own life, and during such time as his widow might receive dower: that Frederick, who possessed the estates, had not paid any thing to the defender under their agreement: that Frederick, being advised that the entail was not effectual, instituted a suit in the Court of Session against the heirs of entail, and in 1827 obtained an interlocutor declaring that he might sell the estates, but that he was bound to reinvest the purchase money: that he appealed to the House of Lords, but died [418] before the appeal was determined: that Frederick in 1824 sold part of the estates, and in 1827 the other part, and died on the 26th May 1827, and that an action had been brought by the purchaser of part of the estate to have his title confirmed or for repayment of the purchase money, which was still depending, and that it had been determined by the House of Lords that there was no obligation to reinvest the purchase money of the estates, and consequently that the price must be considered as falling under a certain trust deed of settlement before recited; namely, the deeds recited being first a *mortis causa* deed by Frederick, securing under the powers of the entail £1000 to Mary, his only child by his first marriage; secondly, heritable bonds securing to the appellant £100 per annum, but which are stated to have been renounced by her; thirdly, a bond of

provision securing to his children with the former provision all he could by law charge upon the estate,—that is, for one child, one year's rent, to three or more, three years' rent; fourthly, a bond of annuity and provision securing to his wife £800 per annum; fifthly, making certain provisions for his mother and sister in the event of his being found to have dominion over the purchase money; and lastly, a trust deed of settlement, whereby he gave and disposed his whole heritable estate and effects in Great Britain to trustees, of whom Mr. Wardlaw was one, and whom he appointed his executor upon trust to pay his debts and legacies, and then one third of the income to his wife for life, the other annuity to be taken in part, and to pay over and divide the residue amongst his children, to be paid at twenty-one or on marriage; that he left only two children, Mary by his first marriage, who died in 1827, and Letitia by the appellant, who died 6th August [419] 1829; and that it was uncertain, owing to various circumstances, upon whom had devolved the right of succession to the prices of the said lands so far as unconsumed, and to the other personal estate left by him and his daughters; and that conflicting opinions were entertained on the point by different eminent counsel at the Scottish bar; and that a trial at law of the very intricate questions arising thereon must be attended with very great delay, expense, and uncertainty.

Therefore, the parties agree that the free proceeds of the whole estate and effects left by Frederick and his daughters in Great Britain or elsewhere in Europe, other than the entailed estates, should be equally divided between the appellant the widow, the respondent the brother, and Mrs. Tennent the sister; but it was agreed that this arrangement should not extend to any part of the entailed estates unsold or ineffectually disposed of at the time of Frederick's death, nor to any estate, property, or effects of him or of his daughters in America, the appellant taking such one third in full of all other demands in right of her husband or of his daughters, and the respondent taking his one third in full of his claim under the agreement with Frederick in America, and all declaring that any testament which Frederick had executed, if any such there be, in reference to his property in America, should take effect without being affected by the agreement.

It is to be observed that there is no inaccuracy, in point of fact, in the statement in this deed which could have misled the pursuer, of the two points relied upon by the pursuer, namely, the will of Frederick disposing of his personal estate, and the widow's title to the *jus relictæ*. The existence of a will is referred to as affecting property in America, and the share of the widow [420] under the agreement is expressed to be in full of dower, jointure, annuity, terce of lands, third of half or moveables, and every thing else which she could ask or claim through the decease of her husband or his said daughters, or either of them, in any manner of way.

It is, however, contended that the pursuer entered into this arrangement in ignorance of her rights upon both these grounds, which rights, it is said, were such that if they had been understood by her would have prevented her from acceding to the terms, as she only had secured to her what she was at all events entitled to, and that she thereby simply renounced all chance of a favourable decision in her favour upon the points really in doubt.

It is necessary to examine accurately the evidence in the cause as to these two points before the application of the principles of law to the case can be usefully considered.

In the first place it is to be observed, that there is not the slightest ground for imputing any fraud, procurement, or misrepresentation on the part of Professor Stewart, the other party to the negotiation. Indeed no attempt was made to rest the pursuer's case upon any conduct of his. Mr. Wardlaw must, I think, be considered as acting for both parties as he corresponded with both upon the proposed compromise, and before it was concluded, was in fact agent for both, and it is upon his conduct that the pursuer principally relies. After carefully examining all the documents in evidence I have no difficulty in concurring in the opinion expressed by all the Judges below that there is no ground for imputing any improper motive to Mr. Wardlaw, or of any intention to favour the respondent at the expense of the appellant. There are indeed but two circum-[421]-stances upon which any argument in support of such a supposition can be founded. The first is his letter of 2d October 1830 observed upon by Lord Medwyn (see Appendix to appellant's case, p. 63), and the other is the fact

that Professor Stewart consulted other counsel before he signed the agreement by which it is inferred that he had obtained information upon the rights of the parties which the appellants had not. As to the latter, I do not find it in evidence what this advice was; and as the appellant had seen the opinion of Mr. (now Lord) Jeffrey and of Mr. Rutherford, now Lord Advocate, upon the whole case, in which the will is brought under notice, I cannot think the fact of another opinion having been taken by Professor Stewart of any importance. As to the expression in the letter of 2d October 1830, "Mrs C. Stewart has never written to me withdrawing her consent, although the decision in the House of Peers has given the case a better aspect in her favour;" it does not appear why that decision should have induced her to withdraw her consent. If indeed the decision had been the other way, there would not have been any thing upon which the agreement could operate; but as the proposition was made in contemplation of such a decision, there seems no reason why either party should upon its taking place wish to withdraw from it.

I must therefore assume, because such I think to be the result of the evidence, that Mr. Wardlaw acted fairly, honestly, and to the best of his judgment in concluding the arrangement complained of, and that the pursuer's case must stand upon an imputed error in law of the common agent of all parties.\*

[422] Of the principal question which existed between the parties it is not necessary to say much; I mean that of the domicile of Frederick, the appellant's husband. The circumstances created a serious difficulty. The facts were honestly and I think fairly stated for the opinion of two very eminent lawyers in Scotland. They thought the case doubtful, and recommended a compromise (see opinion of counsel, *antea*, p. 402); and if the division of the property had taken place upon the principle of the chances of success being equal to both parties, upon that question there could have been no pretence for impeaching the arrangement.

Upon the question of the will I have felt no difficulty. No doubt the terms used are general enough taken by themselves to pass personal property of every description, but it is equally clear that such was not the testator's intention. By his bonds of provision in favour of his wife and children, and by the trust disposition, he had disposed of all he could dispose of in Great Britain. He then made the will, giving his personal estate to his wife, but referring to no subject matter except what was American; and next executed bonds in favour of his brother and sister burdening his Scotch estates, and by a holograph writ found by his widow with the trust disposition and will, he directs the will to be sent to America, and mentions the trust disposition as disposing of the property in Scotland. This will the appellant had during the whole negotiation in her possession, and it does not appear that Mr. Wardlaw had any knowledge of it; indeed the appellant's [423] letter of 17th March 1832 admits that he had not, but the agreement of compromise refers to it as applying to American property only. On 24th December the appellant having objected to the division of the funds under the agreement, demanded £1000 more from the respondent, stating that she was desirous of completing the agreement, but that she would not complete it on any other terms; and on 21st January 1832 she gave a receipt for £1000 to the respondent, which stated that it was paid in terms of the proposal contained in her letter of 24th December, and agreed to by his letter of 20th April, although she had before that time made a claim to all the property upon the expression used in the will, as appears by her letter of 17th March 1832.

Under these circumstances, it is not matter of surprise that the appellant did not in the first instance claim the property in Scotland under this will, or that having at last set up such claim, she abandoned it, and agreed to confirm the agreement without reference to it. Clearly, after this, there can be no question of impeaching the compromise upon any supposed title of the appellant to the property in Scotland under the will.

The only question of any difficulty remains to be considered, namely, the right of the appellant upon her husband's death to repudiate the provisions he had made

\* Lord Glenlee.—"It was a very poor compliment to the agent to say he had acted blamelessly. I have read the papers with a desire, if possible, to discover a fault, but so far have I been from doing so that I think it right to say that he acted a most friendly and judicious part throughout."—Rep. in F. C.

for her, and to claim her *jus relictae*. As to this the facts, as I collect them from the very numerous documents in the case, are as follow.

At the time of the death of the appellant's husband he had sold most, but not all, his entailed estates. The Court of Session had declared that he had a right so to do, but that he was bound to reinvest the purchase monies; against which latter declaration he had ap-[424]-pealed to the House of Lords, which appeal was then pending. In the disposition of his property he had provided for either event. If the judgment was to be affirmed, and the property therefore was to pass to the heirs of entail, he had, to the extent of his powers, charged upon the estate provision for his wife and daughters, and by the trust disposition he had, in the event of that judgment being reversed, given to his wife a life income in one third, and the residus equally between his daughters. In the one case it is stated that the widow's income would be £600 per annum, and in the other £800; but in neither, according to his disposition, would she have any power over any part of the capital.

It is quite clear that pending the appeal to the House of Lords she could not repudiate the provisions and claim the *jus relictae*, because in the event of the judgment being affirmed there would be no fund upon which it could operate; and if she had been apprised of her right to elect, it is hardly to be supposed that she would have exercised it as against her own daughter, and her daughter-in-law; it appears in fact that she did take the benefit of the provisions; indeed the receipt she gave to the respondent on the 21st January 1832 was expressed to be on account of the annuity payable to her from the estate of her husband to February 1831, the date of the agreement by which she in terms renounced all the provisions made for her by her husband, the jointure, dower, terce of lands, half or third of moveables, and every thing else which she could ask or claim through the decease of her husband or his daughters, or either of them, any manner of way. But this acceptance of his provision, and this renunciation of her rights as widow, ought not, it is said, to prejudice her; but that the compromise ought to be [425] set aside because she was ignorant of her right to repudiate the provisions and to claim the *jus relictae*; and notwithstanding some passages in her letters which were relied upon to prove the contrary, I think that the fair result of the evidence, unless she had for some reason abandoned it, is, that she was not aware of her having any such right, and that the agreement was concluded upon the supposition that her only title against her husband's property was to the provisions he had made for her. I think it equally clear that such was the impression upon Mr. Wardlaw's mind, for such were his representations both to the appellant and to the respondent. But whether this arose from any misapprehension of the rule of law, or from his knowledge of any act of hers amounting to or regulating her election, does not appear.

It is to be observed that in the memorial or case submitted to Mr. Jeffrey and Mr. Rutherford the facts material to raise this question are fully and fairly stated; and the sixth question put is, Whether Mr. Stewart's widow was entitled to any share of the succession? to which the answer was, "On the supposition of the laws of Scotland regulating the succession of Mrs. Stewart and her children, in which view alone this question is of importance, we are of opinion that the widow has no right whatever to any part of the funds, except in so far as she claims her share of the goods in communion or under Mr. Stewart's trust deed."

The opinion was sent to the appellant in a letter from Mr. Wardlaw, dated 6th April 1830, in which he tells her, that from the opinion she will find that if the law of Scotland is to be the rule she would get none of the money except the annuity for life; whereas, by the pro-[426]-posed division into three parts, she would have £20,000, which would leave an income of about £800 per annum, and the capital at her disposal.

This certainly does not accurately represent the opinion it purports to explain, unless he knew of facts excluding her election; and if he did not it is to me evident that this inaccuracy was unintentional. Indeed it appears that Mr. Wardlaw submitted a draft of the agreement to the same counsel, in which Mr. Stewart, in consideration of the one third of the proceeds of the sales, renounces all other claims; and in the letter to Mr. Rutherford which accompanied it represents it as in conformity to the advice they had given, and desires him to approve the draft if thought applicable to the circumstances. The draft was approved, and this reference being

had to this letter was not incorrectly represented in Mr. Wardlaw's letter of 3d December as a recommendation of the measure, which was much observed upon as giving a character to the approval of the draft which did not belong to it.

Now this draft stated all the facts upon which the appellant's right to claim the *jus relictæ* depends. The inadequacy of the consideration now relied upon, regard being had to such right was as much submitted to the consideration of those very eminent counsel as it could have been to Mr. Wardlaw; but they approved of the draft, which they were only to do if they thought it applicable to the circumstances, and thereby may be supposed to have approved of the proposed terms of compromise without again raising or suggesting the point upon which it is now sought to be set aside. In fact, beyond what is suggested in the opinion of 3d April 1830, the point does not appear to have occurred to any of the parties; and the question is, [427] whether a compromise and arrangement fairly and honestly entered into, in which the party now complaining acted under the advice of a professional adviser, who called to his assistance two of the most distinguished counsel of the Scotch bar, is to be set aside, because a point was overlooked in that party's case, which, if thought of at the time, might have prevented her from agreeing to the terms proposed, as it might have made a very material difference in the relative situation of the parties.

It must not, however, be assumed she only got what she must at all events have been entitled to, because had she at that time repudiated the provision made for her by her husband, and claimed the *jus relictæ*, the benefit she would have taken would have been subject to reduction from some of the circumstances alluded to by the respondent's counsel; but to those I think it unnecessary to advert, because the difference between what she was supposed to be entitled to, and what she might have derived, was, even after such deductions, considerable. The principle how far such an oversight will entitle a party to have the whole arrangement rescinded, may be considered without ascertaining the precise extent of the loss it may be supposed to have occasioned. If, indeed, it had appeared that the respondent had, upon the faith of this compromise, abandoned a case which otherwise he might have prosecuted against a purchaser, of setting aside the sale upon the ground of deathbed, an answer would at once have been given to the pursuer's case, as it would be impossible to restore the respondent to his original situation. The estate in question is not indeed enumerated in the exception in the agreement; but the exception applies to all other parts of the estate ineffectually disposed of, [428] which it would seem must include a sale reducible upon the ground of deathbed. I do not therefore rely upon that as a material circumstance, but proceed to consider the rule of law in this country and in Scotland, with reference to the alleged error or omission in the legal advice under which the appellant was acting, when she executed the deed of compromise and arrangement; and in doing this it must be kept in mind, that the mistake is upon a point of law only, and that not of foreign but of Scotch law. All the facts raising the point of law were fully known to all the parties; and the point of law, mistaken or not, attended to was, that the pursuer was entitled to repudiate the provisions made for her by her deceased husband, and to claim the *jus relictæ*; whereas the negotiation and the compromise proceeded upon the supposition, that if the law of Scotland was to prevail, she could only claim the benefit of those provisions.

The English authorities (though in the result altogether they appear to me to establish a sufficiently clear principle,) are not all consistent. One of the earliest is *Frank v. Frank* in 1 Chancery Cases, 84. It must be assumed that the fraud there alleged was not proved; but there being no proof of the recovery, the eldest brother had given up the freehold lands to the younger without consideration, upon a misapprehension of fact. But yet the Court denied him any relief, upon the ground that *modus et conventio vincunt legem*. *Cann v. Cann*, in 1 Peere Williams, 723, though often quoted upon this subject, and though valuable as recognizing the doctrine, is not for the fact of it of much importance, because the party seeking to be relieved from the agreement of compromise failed to prove that he had been injured by it.

[429] *Lansdown v. Lansdown*, in Mosely (case 190), p. 364, and also referred to in a note in 2 Jacob and Walker, 205, from the register's book, is a very strong case of setting aside a compromise, and a conveyance in pursuance of it; but it is

impossible to ascertain the facts. It appears that fraud was alleged against the younger brother, and Hughes, who had advised upon the rights of the two, was made a defendant, which could only have been upon an imputation of fraud; and in Mosely it is said, that the Lord Chancellor's decree proceeded upon the ground of the deeds "being obtained by mistake and misrepresentation;" but Mr. Jacob's extract from the register's book, no doubt correct, states the ground to be the deeds being "obtained by a mistake and misrepresentation of the law." It is, however, to be observed, that in Mosely the eldest son is reported to have said, that he would rather divide the estate than go to law, though he had the right; and that the Court is represented to have said, that the maxim that *ignorantia juris non excusat* did not hold in civil cases, which it will be seen has not been a doctrine recognized in modern cases. In *Stapilton v. Stapilton*, 1 Atkyns, p. 2, Henry, the eldest son, being illegitimate, Philip, the second son, received no consideration for the arrangement by which the estates, of which Philip was tenant in tail, subject to his father's life, were divided between them; but Lord Hardwicke (1 Atky. 10) approving the doctrine of Lord Macclesfield (1 P. Wms. 727) in *Cann v. Cann*, that "an agreement, entered into upon a supposition of a right or of a doubtful right, though it after comes out that the right was on the other side, shall be binding; and the right shall not prevail against the agreement [430] of the parties, for the right must always be on one side or the other; and therefore the compromise of a doubtful right is a sufficient foundation for an agreement," and he therefore maintained the arrangement, and decreed a performance of what remained to be done to carry it into effect.

In *Pullen v. Ready*, 2 Atkyns, p. 587, there was an agreement to divide property between brothers and sisters, upon the assumption that all were entitled under a will; and the fact that one of them had married without consent, which was by the will made a ground of forfeiture, did not appear to have been adverted to. Lord Hardwicke enforced the agreement, and, with reference to the argument, that although the marriage having been without consent must have been known to all the parties, yet that the consequences in law might not, observed (2 Atky. 591), "If parties are entering into an agreement, and the very will out of which the forfeiture arose is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with the consequences of law as to this point, and not be relieved under a pretence of being surprised with such strong circumstances attending it."

*Bingham v. Bingham*, 1 Ves. sen., 126, was not a case of compromise, but of a sale by the defendant to the plaintiff of an estate which was already his, and a return of the purchase money was decreed at the rolls, upon the ground of mistake. This case does not bear, therefore, directly upon the present. If it were necessary to consider the principle of that decree, it might not be easy to distinguish that case from any other purchase in which the vendor turns out to have had no title. In both there is a mistake, and the effect of it in both is, that the vendor receives, and purchaser pays money, without the intended equivalent. In *Gibbons v. Caunt*, 4 Vesey, 839, Lord Alvanley, speaking of agreements of compromise, says (4 Ves. p. 848), "If parties will, with full knowledge" "of the doubts and difficulties" "as to their rights," act upon them, though it turns out that one gains a great advantage, if the agreement was fair and reasonable at the time, it shall be binding. There was a case before the Lord Chancellor, who spoke to me upon it, in which it was held that the Court will enforce such an agreement, though it turns out that the parties were mistaken in point of law, even supposing counsel's opinion was wrong."

*Bilbie v. Lumley*, 2 East, p. 469, is directly opposed to the doctrine upon which *Lansdowne v. Lansdowne* is stated in Mosely to have been decided, for it was held that money paid by one, with full knowledge or the means of knowledge in his hands of all the circumstances, cannot be recovered back again on account of such payment having been made under an ignorance of the law.

In *Leonard v. Leonard*, 2 Ball and Beattie, p. 171, Lord Mannors, and, in *Stockley v. Stockley* (1 Ves. and Bea. 23), Lord Eldon, recognized the rule of equity as to agreements by way of compromise, particularly in family arrangements. In *Dunmage v. White*, 1 Swanston, p. 137, Sir Thomas Plumer refused to carry into effect an arrangement by way of compromise, but the circumstances were very peculiar. The parties had dealt with property which had belonged to the children, and over

[432] which they had no power, and the state of mind of one of the parties was relied upon in the judgment.

*Gordon v. Gordon*, in 3 Swanston, p. 477, proceeded upon a fraudulent suppression; but Lord Eldon fully recognized the rule, holding, that where there is good faith, honest intention, and full disclosure, if the members of a family will arrange their rights amongst themselves, their agreement will not be disturbed; because it is founded upon a supposition which imputes the character of legitimacy to the illegitimate, or illegitimacy to the legitimate.

In the third volume of Mr. Burge's excellent work (Commentaries on Colonial and Foreign Laws generally, and in their Conflict with each other, and with the Law of England, by W. Burge, Esq., Q.C., 4 vols. Lond. 1838), Commentaries on Colonial and Foreign Laws, p. 742, the authorities quoted from the civil law prove the recognition by that law of a similar principle. He draws this conclusion from them. Hence it is no ground for recalling the payment made under the compromise, that there was no cause for the compromise, and that nothing was owing. And again, the inadequacy of the benefit which the party may receive from the compromise, even though it should amount to *laesio enormis*, would not afford a ground for setting it aside, unless there had been fraud. It has indeed been said in some of the English cases, and particularly by Lord Alvanley, in *Gibbons v. Caunt*, 4 Vesey, 849, that the parties must be aware of the claims which are to be the subject of the compromise, and that they must act with full knowledge of all the doubts and difficulties that arise.

It is not necessary for the purposes of this case to inquire how far that exception to the general rule can [433] be supported, or how it is reconcilable with the principle, that mistake as to the law will not invalidate a compromise, because the claim of the widow to her share of the goods in communion is expressly pointed out to her, in the opinion of Mr. Jeffrey and Mr. Rutherford; and although it may well be supposed that she had not herself sufficient knowledge of the law of Scotland to understand the meaning of the terms used, they must be supposed to have been fully understood by her legal adviser, Mr. Wardlaw. It is true that he does not in his correspondence call her attention to this claim; and, he being dead, it is now impossible to ascertain from what cause this proceeded, whether because she had before elected not to make such claim, or from inattention on his part; nor is it material, because, in the absence of all evidence of fraud on the part of the agent, the client must be bound by his acts, and affected by the information he received. If it were necessary to show knowledge in the principal, and a distinct understanding of all the rights and interests affected by the complicated arrangements which are constantly taking place in families, very few, if any, could be supported.

That the laws of Scotland adopt the same principle as the laws of England upon this subject is proved by the passages quoted from Lord Stair's Institutes, b. 1. tit. 7. s. 9., and tit. 17. s. 2., and from the cases of *Macalister v. Macalister*, in 1830, 4 Wilson and Shaw, 142, and *Dixon v. Monkland Canal Company*, 5 Wilson and Shaw, 445, to which is opposed the single case of *Hope v. Dickson*, 1833, in 12 Shaw and Dunlop, 222, which was a case of homologation, and not of compromise.

[434] These authorities, indeed, prove that the principle is the same in the law of Scotland as in the law of England, and in the civil law; but as the instances in which it has been the subject of decision are comparatively few in Scotland, and as it has so frequently been the subject of adjudication by judges of the highest authority in this country, I have thought that it might be useful to bring together the principal cases in which it has been recognized and enforced in this country. The result is, that, in my opinion, the appellant has failed to establish any case of fraud or improper conduct in her agent, and that the points of law relied upon do not entitle her to be relieved from the arrangement she has entered into.

The interlocutor appealed from must therefore be affirmed, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of

the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON—ALEXANDER DOBIE, Solicitors.

[435] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

JAMES EWING,\* WILLIAM DUNN, and the MAGISTRATES and TOWN COUNCIL of GLASGOW, *Appellants*.—Attorney General (Sir John Campbell)—Knight Bruce; Rev. JOHN BURNS, D.D., and others.—Lord Advocate (Rutherford)—Pemberton.—A. M'Neill [6th June 1839].

[See *Heddlie v. Leith (Magistrates of)*, 1898, 25 Rettie, 801; *Kesson v. Aberdeen Wrights' and Coopers' Corporation*, 1899, 1 Fraser, 40.]

*Poor.—Parish.—Stat. 39 and 40 Geo. III. c. 88.*—Where lands had been disjoined and separated by act of parliament from a parish in which the same had been previously assessed for poor rates, and annexed to and made part of the extended royalty of a burgh;—In an action by the kirk session of the original parish against the owners and occupiers of houses on the disjoined lands for payment of the proportion of poor rates leviable on said lands, as if still liable to the original parish, and against the magistrates and council of the burgh, as liable in relief to the other private defenders:—Held upon construction of the act of parliament (reversing the judgment of the Court of Session), 1, That the owners and occupiers of houses on the lands so disjoined were not subject to their former liability for poor rates to the original parish, and also that the magistrates and council were not liable directly to the original parish, or in relief to the other defenders for such poor rates; 2, (also reversing as aforesaid) That an action directed not only against the alleged primary obligants but also against other parties as liable in relief to them, and a decree following thereon by which the parties as liable in relief [436] were ordained to make payment of sums decerned for against the primary obligants, in the event of such primary obligants failing to pay, were incompetent.

*Consuetude*:—Held that usage, or acquiescence in a particular construction of a statute, founded upon alleged circumstances and practice, to which the individual defenders were not parties, could not relevantly be admitted as evidence of such construction to be binding on those defenders.

In 1772 the property of the lands of Ramshorn and Meadowflat, part of and situated in the barony parish, was acquired by the magistrates of Glasgow. These lands continued to be liable for and to pay the assessments for the poor and other burdens to the barony parish, thus yielding a considerable sum in consequence of the increased value of the property and buildings thereon.

The magistrates of Glasgow having about the end of the last century contemplated an extension of the royalty by act of parliament, various communings took place betwixt the heritors of the barony parish and the magistrates with reference to the introduction of a clause into the proposed bill providing against the lands intended to be annexed to the royalty being relieved from supporting the poor of the barony parish. In the beginning of 1800 the trades house, who held part of these lands, passed the following resolution:—"That the said provost, magistrates, and council would not only free and relieve the inhabitants of the barony parish whose property is to be annexed to the royalty, of the statute labour, but also of the poor's rates in the said parish."

\* Rep. 15 D., B., and M., 936.



In the year 1800 a statute was passed (39 and 40 Geo. 3. c. 88,) intituled "An act for extending the royalty of [437] the city of Glasgow over certain adjacent lands, for paving, lighting," etc., "and for raising funds and giving certain powers to the magistrates and council, and town and dean of guild courts for the above and other purposes."

In the preamble it was set forth that "it is just and reasonable that the royalty of the said city should be extended over those lands, in consideration of the expense incurred in purchasing the same, and of the further sums of money which must be expended in paving therein, etc.; and also for the equal apportioning of the public burdens and benefits among all the inhabitants of the place."

By the second section the magistrates and council were "empowered to levy the same malls, duties, customs, conversion of statute labour, and other taxes within the said annexed grounds, as they are entitled to levy within the present royalty."

By the third section it was provided, "that the magistrates and town council shall hereafter pay, from the money raised for the conversion of the statute labour within the said city, to the heritors legally appointed to repair and maintain the public roads in the western district of the barony parish of Glasgow, £5 sterling yearly, as a conversion for the statute labour of the said annexed lands, and shall also, from the funds of the community of the said city, relieve the holders and occupiers of houses or lands in the said extended royalty of the poor's rates payable by them to the said barony parish as having been a part thereof before passing this act."

By the sixth section it was provided, "that it shall be competent to the sheriff and justices of the peace [438] for the county of Lanark to exercise the same powers and jurisdictions within the said lands hereby annexed to and comprehended within the said royalty, as are competent to the said sheriff and justices of the peace within the ancient royalty."

The tenure of the lands continued in virtue of the seventh section unchanged.

By the eight section it was enacted, "that the said magistrates and town council shall have full power to appoint stent masters, assessors, and collectors to assess and to levy from the proprietors and occupiers or possessors of the said annexed grounds, and of all such houses as are built or hereafter shall be built upon the foresaid grounds hereby annexed to and comprehended within the said royalty, an equal and rateable portion of the cess, trades stent, poor's rates, conversion of statute labour, and other taxes payable by the inhabitants of the city of Glasgow, in the same manner as they are now levied within the present royalty."

The tenth section provided, "that the several lands hereby annexed to the royalty of the city of Glasgow, besides the cess to be levied by the collectors of the town for and in respect of the houses and buildings erected thereon, shall remain liable and be subjected to the payment of a rateable proportion of the cess or land tax, and other public burdens imposed or to be imposed on the shire of Lanark for and in respect of the ground, which cess shall be paid by the magistrates and town council of the said city from the funds of the community, and shall be levied in the usual manner."

The eleventh section enacted as follows:—"And be [439] it enacted, that the said grounds hereby annexed to and comprehended within the royalty of the city of Glasgow, shall be and the same is hereby for ever separated from the barony parish, and are hereby annexed to the parishes within the said city to which they lie most contiguous, or to which the magistrates and town council shall by any act or acts of council hereafter direct and appoint."

The twelfth section provided, "that the tithes payable out of the lands hereby annexed shall be saved and reserved to the true owners thereof in the same manner as if this act had never passed."

The thirteenth section enacted, "that the right of patronage of such church and churches as shall be built and endowed by the community of the city of Glasgow upon any of the said lands hereby annexed to and within the said royalty, shall and the same is hereby declared to belong to the magistrates and town council of the said city, in the same manner as they hold and enjoy the patronage of the churches within the ancient royalty."

The fourteenth section was in these terms:—"Saving always, and reserving to His Majesty, and all other person or persons concerned, all rights and interest, other

than the present extension of the said royalty, which they had, have, or may have in the lands hereby annexed."

The act also contained provisions relative to paving, lighting, and cleansing the streets of the city, regulating the police, and appointing officers and watchmen, dividing the city into wards, appointing commissioners, raising funds, regulating markets, recovering penalties, and the limitation of actions, etc., which [440] are followed by this proviso in section ninety-ninth:—"And be it enacted, that all regulations, provisions, and other things whatsoever herein-before enacted, shall be equally applicable and shall extend and be construed to extend to the lands hereby annexed to and comprehended within the royalty of the said city, as to those comprehended in the ancient royalty of the said city in so far as is consistent with the former parts of this act, and excepting as hereinbefore expressly excepted."

After this act of annexation took effect, and down to the year 1810, the heritors and kirk session of the barony parish raised the sums required for the support of the poor by assessing the heritors of the annexed lands according to the valued rent, the magistrates actually paying the sums so assessed. In the year 1811 it became necessary to increase the amount of the assessment for the poor, and to lay the valuation upon the real rent instead of the valued rent, thus making householders as well as heritors liable. The magistrates and council remitted to a select committee to inquire into the question of liability, who in a report expressed their conviction that looking to the statute the increased demand would not be resisted. The report was approved and acted on. It did not appear that the householders on the annexed lands were parties to this report.

The magistrates continued, down to 1831, to pay the share of the poor rates apportioned on the inhabitants of the extended royalty; the largest sum levied in any one year in respect of the property within the royalty being £1795.

In 1831 the barony parish having demanded from [441] the magistrates and council a larger sum than had been collected, the magistrates and council, in December of that year, intimated their intention to resist farther payments until their liabilities were judicially determined.

Two of the wealthy inhabitants of the extended royalty, Mr. Ewing and Mr. Dunn, were in arrear in the payment of poor rates for the respective sums of £27 and £26 for the years 1830, 1831, and 1832.

In June 1833, in order to try the question and to recover the large arrears of poor rates then due, Dr. Burns, and Dr. Black his assistant and successor, ministers of the barony parish, for themselves and the other members of the kirk session, and William Robertson, the collector appointed by the heritors and kirk session, brought an action against Ewing and Dunn as individual heritors and householders, and against the magistrates and council, founding on the provisions of the third and other sections of the aforesaid statute; and setting forth, "That the intendment, legal import, and effect of the statute was to leave the properties of the defenders and the other heritors in a similar situation within the said extended royalty, subject to a rateable share with those of all the other heritors of the said barony parish, of the annual burden of supporting and maintaining the poor in all time coming, reserving the right of heritors to relief of the sums from the magistrates of Glasgow, as the burdens might arise or be imposed; or otherwise, to render the magistrates and council of Glasgow, as representing the community, directly liable to the pursuers and their successors for such assessments as might be imposed on the [442] properties of the said heritors in the part foresaid of the said extended royalty"; and concluding that the said James Ewing ought and should be decerned and ordained, by decree of the lords of our council and session, to make payment to the pursuers of the sum of £27 6s. sterling, with the legal interest thereof, or of the foresaid respective portions thereof" (specifying the items); "and the said William Dunn ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuers of the sum of £26 6s. 6d. sterling, with the legal interest thereof, or of the foresaid respective portions thereof as follows" (specifying the items), "reserving right to the defenders and to each of them to claim such relief from the magistrates of Glasgow as they or either of them may be able to establish in the premises; or otherwise, in case it should be found that the magistrates of Glasgow are now directly liable to the pursuers in the said sums, then and in that case the Lord Provost of the

city of Glasgow, and magistrates of the said city, and the other members of the town council thereof, as representing the community of the said city, and their successors in office, ought and should be decerned and ordained, by decree of the lords of our council and session, to make payment to the pursuers of the several sums of money, principal and interest, above specified; and the said defenders ought and should be decerned and ordained to pay the expenses of the process."

In defence Messrs. Ewing and Dunn pleaded, 1, that they are not liable, in respect of their properties libelled, for the support of the poor of the barony parish, as that parish now exists, and are not liable, [443] directly or indirectly, to be assessed therefor by the heritors and kirk session of that parish, or otherwise; 2, that on the contrary they are, along with the other inhabitants within burgh, liable for the support of the poor of the city of Glasgow alienarily; 3, that, having accordingly been assessed for the support of the burgh poor, and having regularly paid their assessments, the present action is wholly groundless as regards them, and they ought to be assolizied simpliciter from its conclusion, with expenses.

The magistrates and town council, referring to the separate defences for Messrs. Ewing and Dunn, pleaded that the sole ground on which the pursuers pretend to rest their case against them, is the enactment in section three of the statute, viz., "That the said magistrates and town council shall also, from the funds of the community of the said city, relieve the holders and occupiers of houses or lands in the said extended royalty of the poor's rates payable by them to the said barony parish, as having been a part thereof before passing this act;" and such being the case, they were not liable to the pursuers in the sums pursued for, or in any part thereof.

The cause having been debated in the Outer House, Lord Jeffrey, Ordinary, 15th March 1836, pronounced the following interlocutor, with a relative explanatory note \*

\* *Note*.—"The Lord Ordinary cannot persuade himself that there is any difficulty in this case, and thinks that it is impossible to read attentively through the fourteen first sections of the act, as they stand in their order, and entertain any doubt as to their true meaning and effect.

"The defenders, at the debate, did not find it convenient to proceed in this natural course. They went at once to the eleventh section, which provides in general terms for the disjunction of the annexed lands from the barony parish, and their annexation to the parishes of the old royalty: and then, contending that this disjunction, not being in any way qualified or limited in its terms, imported a total separation, and consequent liberation from all future parochial burdens in the parish from which they are disjoined, they went to the second section (as illustrated by the eighth,) to shew that they were accordingly subjected to a new, and, as they maintained, substituted set of burdens, in their new connection; and argued that, as a double liability was in no case to be presumed without express words, this was a conclusive confirmation of their views as to the effect of the absolute disjunction. They then proceeded to point out the very different terms in which the future payments of cess and statute labour money to the county, from which the annexed lands were disjoined, are provided for in the act, and the provisions there supposed to be made for future poor assessments; and concluded by suggesting that these last provisions, which they represented as being merely for relief from contingent and imaginary claims, must have been inserted to satisfy the groundless anxiety or apprehensions of the owners of the annexed property, but could never be held to import that the claims themselves were just or maintainable.

"The Lord Ordinary takes a very different view of the object and effect of the statute. It was enacted on the petition of the magistrates, and for the purpose of conferring a great benefit on the city, by putting under its municipal jurisdiction, and subjecting to its burghal assessments, a very wealthy and flourishing quarter of the actual town; at the same time, it was obvious that if this rich assessable district was to be entirely withdrawn from the parish and the county to which it formerly belonged, and exempted from all future contributions to their local taxations, a great loss would be sustained by these communities, and a proportionally heavier burden laid on what remained of them. It was necessary, therefore, to provide for this by special enactments; and it is impossible to read the act, and have any doubt as to the principle on which these are framed. That principle is,

annexed thereto:—"The Lord Ordi-[444]-nary, having resumed consideration of the debate, with the closed record, productions for the parties, [445] and whole

beyond all question, that the annexed lands shall be liable to a double assessment, but that the owners or occupiers shall only pay those chargeable for the city, and be relieved of such as continued due to the county or parish, by the public funds, or some particular branch of the public funds of the city. That this is the case as to the cess and all the other proper county burdens, and the statute labour, cannot possibly be disputed; and as there were obviously as strong, if not still stronger, reasons for applying the same principle to the assessments for the poor, the Lord Ordinary would not have hesitated to construe any doubtful or ambiguous words in the provision as to these assessments upon that assumption, and according to the analogy of the kindred provisions, as to which there was no doubt. But in fact it does not appear to him that the words, even if they stood by themselves, are in the least degree doubtful or ambiguous. The provision as to the cess, etc. (section 10) is, that besides the cess to be levied from the annexed lands for the town, they should also remain liable to their rateable proportion of the county cess, and all other county burdens; 'which cess,' etc. it is added, 'shall be paid by the magistrates and town council of the said city from the funds of the community.' Then, as to the statute labour, it is specially provided (and obviously in terms of a previous agreement), that an annual sum of £5 shall be paid by the said magistrates and town council to the heritors of the barony parish, 'as a conversion for the statute labour of the said annexed lands;' and then immediately after, and as the sequel of the same section, follows the provision as to the poor rates, in these words:— 'And they (the magistrates and council) shall also, from the funds of the said city, relieve the owners and occupiers of lands and houses in the said extended royalty, of the poor's rates payable by them to the said barony parish as having been a part thereof, before passing this act.' If this does not mean that the annexed lands were still to pay poor's rates (as well as cess and statute labour money) to the barony parish, and that the magistrates were to protect the owners and occupiers, by paying these rates for them out of the public funds, it is not easy to conceive what it does mean.

"Accordingly, the defenders are driven to great straits to give it a meaning; and actually maintained, at the debate, first, that the whole of this provision about the poor's rates really had no meaning, and must have been inserted by mistake, or *per incuriam*; and next, that it could only have been inserted to satisfy the groundless apprehensions of the owners and occupiers as to possible, but evidently incompetent claims on the part of the barony parish; or finally, that it might possibly relate to the arrears of former assessments. It is not thought necessary to make any remarks on these extraordinary suppositions.

"The variance in the phraseology, and indeed in the substance of the arrangements as to the cess and other county burdens, the statute labour and the poor's rates, on which the defenders dwelt largely, is very easily explained. The principle, it has been seen, is the same as to all; but the arrangements for carrying it into effect are naturally different, and the expression accordingly varies. The cess being a fixed and invariable sum, the provision is merely that it shall be annually paid over by the city, and there was in that case no need for any other arrangement. The statute labour assessment again was liable to fluctuation, though not to any great extent; and it was quite practicable, therefore, and seems to have been thought more convenient, to fix an average amount in the statute, which should be paid in all time coming, as its conversion. But the poor assessments were liable to great and incalculable variations; and (as the result has shewn) no fixed average could have been taken with any tolerable safety, as the rule of contribution in all time coming. They were, therefore, left to be settled as before by the annual assessments; and as these assessments must necessarily be made on the individual owners and occupiers of the annexed property, the burden taken by the magistrates is correctly expressed as an obligation to relieve those individuals, against whom personally a charge must have been first constituted, before the amount to be paid for them by the magistrates could in any one year be ascertained. The whole provisions, therefore, as to each and all of these county and parish burdens, are not only perfectly congruous and

process, finds, that according to the just and true construction of the act of the 39 and 40 Geo. 3. [446] c. 88., the lands thereby annexed to the royalty of the city

identical in substance, but the particular arrangements and expressions as to each are judiciously adapted for carrying the principle into effect.

"After this plain exposition of the words of the act, it can scarcely be necessary to say any thing as to the defenders main argument, that the general terms of the express disjunction of the district in question, from the barony parish, must necessarily import a disjunction *quoad omnia*. The conclusive answer is, that the statute has not left the nature or effect of that disjunction to inference, but has expressly provided and enacted in what respects, and to what effect, the disjoined property shall still be tributary to the parish from which it is divided, and has, in an especial manner, enacted, *inter alia*, that it shall still be liable to poor's rates in that parish; in fact, there is no civil burden for which it does not continue liable as before, both to the parish and the county; and while the annexation, with all its consequent liabilities, is complete and total, it may be truly said that the disjunction can extend to ecclesiastical relations only; for there is nothing else left on which it can possibly operate.

"One simple and obvious question brings out the palpable fallacy of the defenders whole argument. If it was really intended by the act to exempt the owners of the annexed territory from future poor assessments in the barony parish, why was it not so provided? and above all, why was a clause inserted looking so very like a special provision the other way? It could not be that the framers of the act trusted to the effect of the general words of the annexation and disjunction, for they leave nothing whatever to the operation of these words; every thing is separately and anxiously provided for. They do not rely on the express annexation and consolidation with the old royalty, even for the extension of the magistrates jurisdiction over the new territory; but this, with everything else, is specially enacted. But, unluckily for this trusting hypothesis, there is a special clause about those poor's rates, and the defenders theory is, that it was introduced to quiet the idle fears of the annexed owners, as to the possible insufficiency of the general words to secure their exemption. Whoever else trusted to the virtue of these words, therefore, it is certain that these owners did not trust to them; and that the legislature knew this, and in order to remove their distrust, is supposed to have put in this clause, binding the magistrates to relieve them from their imaginary perils. The Lord Ordinary must say, that this appears to him to be nothing short of a mere absurdity; if the object was not only to secure these owners from the barony assessments, but to quiet their foolish apprehensions of danger from them, was not the plain way to do this, just to enact that they should be exempted? or is it conceivable that, with this object in view, the legislature, having full power to settle the whole matter by a word, should take this indirect and really unintelligible course to effect it? It is needless to add, that the whole phraseology of the clause excludes this strange hypothesis. The magistrates are there taken bound to give relief, not against possible claims, but against 'rates payable to the barony parish;' and this relief is to be given, not by refuting the assessors, but by paying them, not by a successful argument on the effect of the clause of disjunction, but 'from the funds of the community of the city.'

"When the case is so clear upon the construction of the act itself, there is no need to refer to the powerful corroboration which this construction receives from what confessedly preceded its enactment, or from the interpretation which has, till very recently, been put upon it in practice. It is quite certain that when the act was in preparation the heritors of the barony parish required that satisfaction, both as to the statute labour and the poor's rates, which the Lord Ordinary thinks they have obtained by the clauses in question; and it is admitted, that after they had submitted their amendments, they allowed the act to pass without opposition. He is aware, however, that the admissibility of such evidence, however powerfully it may influence the mind, is very questionable, and, therefore, he in no degree rests his judgment upon it. With regard to the subsequent practice, however, he inclines to think, that when it has been uniform, of many years standing, and against the interest of those by whose consent it has been established, it may fairly be looked to for elucidating the true meaning of any doubtful or obscure enactment;

of Glasgow, and disjoined from the parish [447] of barony, and the owners and occupiers of the said lands, or of the houses and buildings thereon, are [448] not relieved from their previous liability for the assessments made or to be made for the support of the poor of the said parish, along with the other lands, and the owners and occupiers thereof, within the said parish; and that the magistrates and town council of the said city are bound to relieve the owners and occupiers of the annexed lands and houses and buildings thereon of the whole of the said assessments made or to be made for the support of the poor of the said barony parish, by paying over from the funds of the community of the said city the whole amount of the said assessments as they have or shall become due to the proper officer of the said parish, or person entitled to collect and receive such assessments; and therefore repels the defences set forth and maintained by both sets of defenders: Decerns in terms of the conclusions of the libel against the defenders, James Ewing and [449] William Dunn severally, for the sums of money concluded for against each of the said defenders, with interest upon the said several sums as libelled; and in the event of payment not being made of the said several sums by the said defenders, within twenty-one days after this interlocutor shall be final, decerns also against the other defenders, the magistrates and town council of the said city of Glasgow, and their successors in office, for such of the said sums as may then be unpaid: Finds the whole of the defenders, conjunctly and severally, liable to the pursuers in expenses; allows an account thereof to be given in; and remits the same, when lodged, to the auditor for his taxation and report."

Against this interlocutor a reclaiming note was presented by the defenders (appellants) to the second division of the Court of Session, and after hearing counsel their Lordships ordered cases on the whole cause; and thereafter (17th May, 1837), upon advising the cases, adhered to the interlocutor of the Lord Ordinary, and found the defenders (appellants) liable in additional expenses.

Messrs. Ewing and Dunn and the magistrates appealed.

*Appellants.*—The interlocutor of the Lord Ordinary adhered to by the Court is erroneous in point of form or substantial justice, and it is also ill-founded in its construction of the act. The error in the decerniture against the magistrates was pointed out to the Court, and, though adverted to by the presiding judge, was left uncorrected.

against a plain and precise statute, (at least since the union,) no practice can be of any avail, and the Lord Ordinary thinks the statute clear enough here. But the defenders can scarcely deny, that in their view of its meaning, its enactments are full of obscurity, and that it is competent, therefore, to refer to early and long continued practice for their elucidation. Now, the practice in this case amounts to no less than this, that ever since the passing of the act in 1800 down to 1831, the magistrates, upon whose petition it proceeded, have all along recognized their liability under the clause in dispute, and have every year paid over large sums, varying from £300 to £1795, as their share of the barony poor assessments. In 1811, when the first great increase of these assessments took place, the matter was remitted to a select committee, who gave in a full and well-considered report, expressing their clear conviction, that the increased demand could not be resisted, and this was deliberately adopted by the Council, and acted upon ever after. In 1821, some objections having been taken, not to the general legality of the charge, but to the way of ascertaining its amount, another committee of the town council was appointed to adjust this matter with the barony heritors, which they accordingly effected, and gave in a long and elaborate report to the council, with a scheme for checking the assessor's charges in a particular way, which was also adopted and acted upon down till 1831. In that year a new light broke in upon the magistrates, and it was discovered, that they who framed and carried through the act in 1800 were altogether mistaken as to its meaning; and that their practice, and that of their successors for thirty years was against its true construction, as well as their own interest and duty to the city.

"The Lord Ordinary thinks, that a more extravagant allegation never was brought forward in a Court of Law; and sees nothing but the greatness of the interest at stake, which can explain the conduct of the magistrates in embarking in so unpromising a litigation."

1. The kirk session might have a right to sue, but [450] what right had they to sue the corporation? There may be a question of indemnity between the private defenders and the corporation, but the barony kirk session have no right, in suing the party liable directly to them, to sue also any third party who may be bound to relieve their supposed debtor. But the judgment goes even further than the illegal conclusion of the summons requires, for it finds that if the private defenders fail to pay then the corporation shall make payment; thus Ewing and Dunn have been found liable in the expenses of a record loaded with unnecessary parties. Or suppose the obligation thrown upon the corporation, as betwixt them and the barony kirk session, then Ewing and Dunn are unnecessary parties.

2. As to the question of liability of Ewing and Dunn the Court was so far right in holding that it turns upon the construction of the statute; and keeping in view those canons of construction,—(1.), that a Court must so construe an act as to make every part of the instrument effectual, if it can be made so; (2.), that a clear and precise intention expressed in one part of the instrument is not to be held by implication or otherwise to be repealed or annulled from ambiguous expressions in another part, and thence inferring a different intention by the granter, see *Doe v. Hicks* (8 Bligh. 475), a case which depended in Chancery as well as in the courts of common law, and in particular the opinion of Tindal, C. J., rep. p. 484; (3.), that no question is to be raised upon the order in which the clauses are to be read, as the whole must be read as forming one [451] instrument, clearly there was complete disjunction by the eleventh section, in every respect, betwixt the annexed lands and the barony parish; and if they were “for ever separated” they thus became extra-parochial in all questions of jurisdiction and liability connected with the barony parish. Nay, more, the disjoined lands are declared to be assessable in an equal proportion of the poor rates payable within the royalty to which they are annexed. The Leith Case, *Hill v. Cunninghame* (25th June 1835, F. C., and 2 Sh. and M’Lean, 773), in which the principle of double assessment was discountenanced, differs a little from this, but there is no substantial distinction betwixt the two cases; there were no express words of disjunction in that case; and if it was decided as that case was, where there were no words of disjunction, the magistrates here ought not to have been blamed for disputing their liability when there are express words of separation as well as annexation.

There is not,—as would have been requisite to meet the respondents view,—any express clause of reservation of the rights of the barony parish, as was introduced to save the rights of the county for cess and the tithe owners. Against the magistrates there is confessedly no direct clause of liability, neither can any subsidiary liability be contended for. The judges affirmed the interlocutor of the Ordinary, but differed on the grounds, Lord Medwyn, upon the construction of the act, rightly differing from the Lord Ordinary and the other judges, but finding himself tied up by usage. Now as usage, to which the private defenders were no parties, could not be admitted in evidence, the other judges improperly took that view, and went equally far wrong in their [452] construction of the act, which Lord Medwyn put the right construction upon.

*Respondents.*—The question lies within the four corners of the statute; but still it is necessary to look to the pre-existing state of matters to which the act bore reference. Then, having regard to the language of the act itself, one finds that the construction, which it fairly admits of, is consistent with what was proved by extrinsic evidence to have been the intention of the parties, shown by their practice for the last thirty years. The heritors, and afterwards the heritors and householders, continuing to pay through the corporation just as the heritors paid before the act, redargues the presumption of separation, and shows that the separation was qualified so as to continue the liability of the separated lands to the barony parish, as well as what they should be liable for within burgh, the magistrates relieving them of the burden.

In construing a local act of parliament, if its terms be clear, there can be no relevancy in introducing usage or decisions of courts to control its meaning; but if the language be of doubtful meaning, and there have been decisions explaining it, a court is bound by the construction of other judges, even though originally there might have been room for letting in a different construction; not that usage of parties or decisions of a court can alter the clear meaning of the legislature, but that

if parties, for a period of years, put a construction, by practical observance, upon the enactments of the legislature, the court is induced and is entitled to look to this *contemporanea expositio* in explaining clauses of contradictory or doubtful import.

[453] If for thirty years the public has been in the practical observance of a statute, interpreting it by an uniform usage, a court of justice feels bound to give its support to that usage, which proceeds upon a direct recognition and no disregard of the act. Even in the construction of public acts usage is admitted,—*King v. Hog* (1 T. R. 728), *Stammers v. Dixon* (7 East, p. 200). In *Anderson v. Bank of England* (2 Keen's Rep. p. 328) the ground upon which the judges went when the case was sent for opinion at common law (3 Bing. new ed. 666) was, that the documents objected to were understood to be included among modern bills, and that usage was, so far, a strong confirmation of the statute; and the House of Lords gave effect to the same principle in the case of *Magistrates of Dunbar v. Heritors* (1 Sh. and M'Lean, 195).

Upon the point of form, there was nothing in the decree inconsistent with the alternative form of the summons. Now, both parties stated the same defence; if the private parties are not liable, then there is nothing in the clause of relief. The private parties cannot be allowed to plead that the action is good against the magistrates as liable in the claim of relief. The conclusions might have been directed against both sets of defenders; but there was no ground to complain that decree had been asked first against the private defenders, and then a decree of relief against the corporation in so far as necessary.

Lord Chancellor.—My Lords, this case, which was heard before your Lordships a few days ago, was an appeal from the interlocutor of the Lords of Session, [454] by which certain persons occupying lands in a district which formerly formed part of what is generally called the barony parish, contiguous to and now part of the burgh of Glasgow, were decreed to make payment of an assessment imposed by the authority of the barony parish; and the interlocutor proceeded to direct that in the event of those individuals not paying, the corporation of Glasgow should pay out of the funds belonging to that corporation.

My Lords, it appears to me extremely important to dispose first of that part of the case which is a decree against the magistrates of Glasgow; for, as your Lordships will very soon see if the interlocutor is clearly wrong in that respect, not only will that dispose of that part of the case, but that will most materially affect the ground upon which the learned judges in the court below have, as it appears to me, proceeded in the judgment they have formed.

My Lords, the act in which this interlocutor has been founded, as far as the magistrates of Glasgow are concerned, merely directs that "they shall also, from the funds of the community of the said city, relieve the holders and occupiers of houses or lands in the said extended royalty of the poor's rates payable by them to the said barony parish, as having been part thereof before the passing of the act." My Lords, those are the words to which it will be material to call your Lordships' particular attention in another part of the case, at present I consider them only as they affect the interlocutor against the magistrates of Glasgow.

My Lords, that is the only part of the act which has been relied upon, or can be relied upon, as imposing a liability on the magistrates of Glasgow; but, on [455] the authority of that proviso in that act, the judgment below has proceeded to direct payment by the magistrates of Glasgow to the authorities of the barony parish. Now, that can proceed only upon this, which is clearly unknown as a principle of the law of this country or the law of Scotland (and I am happy to find that that relieves me from any anxieties upon that subject), which is recognized in the judgment of the learned judges in the court below, namely, that a contract of indemnity between A. and B. is to be the foundation of a charge by the party contending to be actually indemnified against another party. If A. undertakes to indemnify B. against any liability to C. it is clearly a strange principle to contend that A. is consequently liable to C., and yet that is the only ground which I can find in this act, or the proceedings in this cause, on which the judgment of the Court of Session has been given against the magistrates of Glasgow, directing them to pay to the pursuers, namely, the authorities of the barony parish.

My Lords, the learned judges of the court below appeared perfectly aware of



the irregularity in that respect, but I must say they pass over that irregularity much more readily than it appears to me it was judicious to do; they seem to think that, being of opinion the occupiers were liable, and that the magistrates of the district were liable, to indemnify the community against what they might be called upon to pay, it was a matter of little consequence whether they were directed to pay directly to the pursuers, or whether they were only to be liable in the mode in which it was by the statute imposed upon them. My Lords, it appears to me to be of the highest importance that these distinc-[456]-tions should be kept up, because, if not, all principle may be set at defiance; if because in the abstract a liability to pay exists, and by some circuitous proceeding, practically the payment of that sum of money may be claimed, therefore the liability may be enforced in a suit that is not calculated to give effect to that liability.

My Lords, if then there is no ground for this, I have the satisfaction of knowing, from the report of the proceedings in the court below, that three at least of the learned judges expressed their opinion, some more strongly than the others, but all sufficiently to show, in the opinion of three, I think, of the learned judges below, the interlocutor was in that respect erroneous. My Lords, it will follow, of course, that whatever may be the case between the authorities of the barony parish and the occupiers within the ceded district, the interlocutor cannot be entertained as against the magistrates of Glasgow.

Now, my Lords, if that be so, your Lordships, adverting to the grounds on which the learned judges below have proceeded, will find that a great majority of them have founded their judgment, not upon the construction of the act of parliament so much as upon the course of proceeding which has been followed since the act passed; certainly the proceedings are of very considerable length, inasmuch as the act passed in the year 1800; but if in this suit the magistrates of Glasgow are subject to no liability, and if, as between the magistrates of Glasgow and the authorities of the barony parish, there is no privity, and therefore no liability, on the part of the magistrates of Glasgow to pay to the authorities of the barony parish, then it is [457] material to inquire if any such evidence was admissible between the parties on the construction of this act of parliament; whether there has been any practice of dealing between the parties in this case, who are the only proper parties to the litigation, namely, the occupiers in the barony parish,—the particular occupiers who have been selected for the purpose of compelling payment to the parish represented by them. The only evidence which has been so much observed upon at the bar, and which seemed to be so much relied upon in the judgment of the learned judges, is entirely that of transactions between the authorities of the parish and the magistrates of Glasgow.

Now, if the magistrates of Glasgow are entirely out of the suit, and they ought never to have been actual parties to the suit, and in adjudicating upon the rights of the parties to the suit, you may consider the magistrates of Glasgow as no parties to it, what evidence is there of transactions between the parties to the suit? That is, what evidence of practice is there, if evidence is admissible at all as against the occupiers, to show that they have by conduct of theirs, or conduct of those having interest in that property which they now possess, which for that purpose might be the same—what evidence is there to show that they have entered into any obligations not imposed by the provisions of the act? My Lords, there is obviously none. It is unnecessary in that view of the case therefore to inquire how it has happened that this course of dealing has taken place between the magistrates of Glasgow and the authorities of the parish. A very natural solution, I think, has been suggested, that as they were before the act passed in the habit of paying a small sum for a [458] particular district, that payment was continued without adverting to the particular provisions of the act. The attention of the inhabitants of the town was called to it only when the demand became so large as naturally to force itself upon the attention of those whose duty it was to consider the interests of the town.

My Lords, then I proceed to consider how the case stands as between the pursuers and the individuals occupying lands, and in respect of that possession of property being called upon to pay rates for the relief of the poor.

My Lords, there are two points which may be considered as free from all doubt, and which in point of fact have not been the subject of any dispute, namely, that ordinarily speaking, and without any special provision in the act for that purpose,

the liability to contribute to the poor rate of the parish can only affect those who are the occupiers of property within the parish. No doubt an act of parliament may impose that liability upon any individual, but if there be no act of parliament, if there be no statute for the purpose, then the liability is confined to those who are within the parish, and so the authorities of the parish have considered, because the rate is imposed on the property in the parish, the right, therefore, and the exercise of that right are in this case entirely consistent.

Well, then, the question is really a very simple one, when it comes to be considered whether there is anything in the act which takes this case out of the ordinary rule of law. Is this property occupied by these two defenders within the barony parish, or is it not? Now, my Lords, in the South Leith case there was not an act of parliament which took the land out of the parish of [459] South Leith, and annexed it to any parish in Edinburgh, but there was an act of parliament which included it within the royalty of the city of Edinburgh, and gave the magistrates of Edinburgh a right to levy rates on that ceded district. Some difference of opinion prevailed in the Court of Session how this was to be carried into effect, and how far the lands in question were or were not liable to pay the rates to the parish of South Leith. When it came to your Lordships' House those difficulties were removed; and though there was in that act no provision taking any of the lands out of the parish of South Leith, and annexing them to any parish in Edinburgh, your Lordships held that the act having imposed this liability on the lands to pay rates to the magistrates of the city of Edinburgh, that was sufficient to relieve them from the liability to pay rates to the parish of South Leith. My Lords, that case, therefore, would be applicable to the present if there had not been in this act that which you find in the eleventh section most clearly and explicitly enacted, and if there had not been such provisions in the act directing the lands in the case to which I have referred. According to the opinions of all the learned judges it appeared to them, that no question would be raised as to the liability of the inhabitants to contribute to the rates of South Leith under the eleventh section; the question is not, whether there is any obligation by the statute to pay rates not within the parish, but whether those lands are or are not within the barony parish, or whether they are taken out of that parish and annexed to other parishes.

My Lords, upon that point there is no ambiguity; the words are "such lands hereby annexed to and com-[460]-prehended within the royalty of the city of Glasgow shall be and the same are hereby for ever separated from the barony parish, and are hereby annexed to parishes within the said city to which they lie most contiguous, or to which the magistrates and town council shall by any act or acts of council hereafter direct and appoint." After that enactment had passed the legislature, and had become the law of the land, it is impossible for any man to contend any longer that those lands are within the barony parish. Then, if they are not within the barony parish, how is it that they can be made liable to rates? No doubt this act might have done what it did with respect to tithes, what it did with respect to cess, what it did to a certain extent with respect to statute labour; it might have enacted, that although all these lands ceased to be part of the barony parish, and therefore were placed in a position which would not make them liable to contribute to the rate for the relief of the poor of that parish, yet that they shall for certain purposes be still within the barony parish, and not only shall be within the barony parish, but that they shall contribute their proportion of the rates raised within that parish.

The question then is, has the act said so? My Lords, there are various sections in this act which if there were any doubt on the eleventh section would clearly manifest the intention of the legislature that this should cease to be part of the barony parish. It has said expressly that it shall not be for that purpose, and it is not necessary to advert to the other parts of the act. If it had not said so, and there had been any doubt whether or not this land were part of the barony parish, would not that afford the strongest possible [461] proof that it was no longer to be continued part of the barony parish, because if it continued to be part of the barony parish the liability to tithe would of course remain? But the act has taken care to provide for the interest of those entitled to receive tithe, a provision which would have been unnecessary if the lands had continued part of the parish; and, accordingly, it provides "that the

tithes payable out of the lands hereby annexed shall be and the same are hereby saved and reserved to the true owners thereof in the same manner as if this act had never passed."

My Lords, a similar provision is inserted with respect to the cess, although that perhaps is of more importance as keeping it within the county of Lanark than within the parish, except so far as this, that the parish being assessed for a certain contribution to the county, if these lands had been taken out of one parish and put into another, while the same sum would have been to be paid by the parish out of which this was taken, of course that would have thrown an additional burden upon those who remained occupiers and possessors of land within the parish, to the extent of the sum which otherwise would have been contributed by those whose lands were taken out of it, and, therefore, it was extremely proper that provision should be made to prevent the other inhabitants of the parish so suffering. The act therefore provides what it would have been unnecessary to provide if those lands were to remain within the barony parish, namely, that the same sum shall continue to be paid as had been paid for those particular lands.

So, with regard to the statute labour, the framers of the act conceived that the inhabitants of the barony [462] parish ought not to be sufferers by the loss of the amount of statute labour that had been contributed by the occupiers of those lands, and therefore the corporation undertook (and all this is matter of arrangement, which is found in the act itself) to pay a certain annual sum as compensation to the parish for that loss which they would otherwise sustain by the loss of that land. Your Lordships see therefore that there is a distinct enactment that these lands shall not continue within the parish, and you find in the three instances to which I have referred that a distinct provision is made, reserving to a certain extent compensation to the parish for the loss which the parish would sustain from those lands being taken out of it. Now, if there had been any intention in the act to extend a similar provision to the subject of poor rates, why did not the act contain some provision similar to that which is to be found with regard to those several other objects, but there is no such provision.

It was said by some of the learned judges in the court below that the reason was obvious, because the one was a fixed and the other an uncertain amount. That is no reason why there should not be a distinct enactment, that the land should be liable; the amount of charge would be still uncertain, but the obligation to pay that which would have been payable in respect of those lands would have remained and might have been as much the subject of a distinct enactment as the provision with regard to tithes, or cess, or statute labour, but there is no such provision in this act.

My Lords, the other provision in the act is to be found in the third section, and it is the same section which provides for the contribution by the magistrates [463] in lieu of statute labour, which makes it still more strong, and, in my opinion, still more free from doubt, that if there had been any such intention it would have been distinctly enacted in the act. That very section (the third) does distinctly enact, with regard to statute labour, "that the magistrates and town council shall hereafter pay from the money raised for the conversion of the statute labour within the said city to the heritors legally appointed to repair and maintain the public roads in the western district of the barony parish of Glasgow, £5 sterling yearly, as a conversion for the statute labour of the said annexed lands." There is no ambiguity or doubt as to that enactment. Then these words follow, "and shall also, from the funds of the community of the said city, relieve the holders and occupiers of houses or lands in the said extended royalty of the poor's rates payable by them to the said barony parish, as having been a part thereof before the passing of this act." The obligation as to statute labour is, that the magistrates shall pay to the parish; there is no such obligation with respect to the poor's rates, but the only obligation is that the magistrates shall from the funds of the community of the city relieve the holders and occupiers of lands of the poor's rates payable by the occupiers of the annexed lands to the barony parish. Now, why was that change? Why was not the principle of enactment which is applied to the statute labour applied also to the poor's rates? There can be but one reason, namely, because it was not the intention of the legislature that such a provision should be contained in the act. It was intended with regard to statute labour that there should be a liability on the magistrates to pay over a certain sum to the

[464] authorities of the parish. If there had been any such intention with respect to the poor's rates, beyond all doubt it would have been made applicable to the circumstances of the case, and would have been found in the act with regard to the poor's rate also, but there is no such provision to be found, the only enactment being that there shall be a liability to indemnify the occupiers in respect of the poor's rates payable by them as having been part of the parish before the passing of the act. If there had been any thing wanting in the other parts of the act to show that this land had ceased to be part of the barony parish, it would have been the very expression, "as having been a part thereof before the passing of the act," in the particular section which is relied upon as creating the obligation between the magistrates of Glasgow and the authorities of the parish; there is here an express recognition in the provisions of the act that the lands had ceased to be part of the barony parish.

My Lords, it is said that some sense must be given to this section; some sense no doubt must be given to it if possible. It is desirable to give a good sense to the section, but some sense must be given to it consistent with the expressions to be found in it; and when the section is used for this purpose, and treated as a matter so clear that no doubt can be entertained by any reasonable person as to the meaning of it, I beg your Lordships' attention to the consideration, how it is possible that the framers of this act could have had the intention, which is now imputed to them, in this section, namely, that the lands in question, though separated from the barony parish, should continue to pay to the authorities of the parish a portion of the [465] rate rateable on the parish. There is no such enactment; there is a mere contract of indemnity on the part of the magistrates and town council undertaking to indemnify the parties in respect of any possible claim. Now the language of the section clearly refers to something either existing or past; the words are "the poor's rate payable by them to the said barony parish as having been a part thereof before passing this act." Now what poor's rate was payable in respect of lands because they had been part of the parish having ceased to be part of the parish? No lands can be liable to the poor's rate because they once belonged to a parish after they have ceased to be part of the parish, but if there is an assessment on property not yet paid,—if there is a liability arising from the lands having been within the parish,—then there would be a claim to make good that which must otherwise be made up out of what remains part of the barony parish, however small the amount might be; it is very natural that they should be held liable for the rates imposed before this became a part of the city, and that the parish should require to be secured and indemnified even for the half year's rate that would be payable before the expiration of the poor's rate imposed upon the parish.

My Lords, the second question is, whether this proviso undoes all that the other provisions of the act intended to do, namely, to remove the lands from the barony parish, and annex them to the city of Glasgow; whether it is intended to subject them to the parish rates, though removed beyond the limits of the parish. The terms do not require that, and there is no doubt it would require a very distinct enactment to do that where the lands were made liable to contribute to the [466] city assessment. If it was intended that they should also remain liable to the barony parish, we should expect to find a distinct clause continuing the old rate while they would be liable to the new. In the act with respect to South Leith there was no such provision; there was no such separation of the lands of South Leith, but they were held to be discharged from payment in the one parish because they were liable to pay in the other. The principle of a double payment was held to be so objectionable in itself that it would require a very direct enactment; but your Lordships would, if you entered into the views of the respondent, put a construction upon the act in effect imposing a double liability. I find nothing from which it is to be inferred,—I find an unequivocal declaration, that the lands have ceased to be part of the barony parish, and I find no enactment by which, being so separated from the barony parish, they can be held or made liable to the poor's rates imposed upon that parish.

My Lords, for these reasons I have very anxiously looked into this case; seeing the very strong opinions which have been expressed by the learned judges in the court below, I have been led to review the conclusion to which I came upon the hearing, to an extent leading me to exhaust every means in my power to ascertain whether there was any ground for the construction of the court below; but on the fullest consideration I have come to a conclusion directly the reverse; and having done so I feel it my

duty to advise your Lordships to reverse the interlocutor of the Court of Session. And, my Lords, this being a claim by the authorities of the parish, first of all, against the magistrates, and for which there was no case, and next, against the occupiers of these houses on a claim of liability to which they are not subject, it is but just that the parties making that claim and failing in the claim should pay the costs of the proceeding in the court below. The expense of the proceeding in this house being an appeal against the judgment of the court below is not matter of question; but the course I should propose to advise your Lordships to adopt is, to reverse the interlocutor of the Court of Session, and to assoilzie the appellants from the conclusions of the summons, and to direct the respondents to pay the costs in the court below.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed, and that the appellants be assoilzied from all the conclusions of the summons: And it is further ordered, That the said respondents do pay or cause to be paid to the said appellants their costs of this suit in the Court of Session in Scotland.

RICHARDSON and CONNELL—DEANS and DUNLOP, Solicitors.

[468]      APPEAL FROM THE COURT OF CHANCERY, IRELAND.

ALICIA O'CONNOR and Others, *Appellants*—Knight Bruce—Pemberton—Lowndes;  
JOHN MALONE, *Respondent*—Attorney General (Campbell)—Jacob—Hall  
[6th June 1839].

[Mews' Dig. vi. 651; xi. 423. S.C. 6 Cl. and F. 572; and see also Sau. and Sc. 516.]

*New Trial—Verdict—Evidence—Venue.*—A party in a cause in equity to establish the trusts of a will under which he claimed estates of great value, stated and adduced evidence that he was the eldest legitimate son of a marriage of his parents in January 1801, and an issue having thereafter been sent to trial at law, the evidence at which trial adduced by the same party went to show that the marriage had taken place in January 1802, and the party having got a verdict; and the Court of Equity having, upon motion by the adverse parties, ordered a new trial, before a jury of the same county, upon payment of the costs of the former trial, and allowed the former verdict to be used in evidence at the new trial, Held, 1, (affirming in part said order,) That a new trial ought to be granted, in respect that the issue sent had not been satisfactorily tried, the case made at the trial being different from that made in equity; 2, (further affirming in part said order,) That manifestations of applause by one or more of the jury at the close of the speech to evidence of the counsel for the successful party at the trial, was no sufficient reason for altering the venue, or for directing the new trial to be had in one of the counties where the estates in question were situated; 3, (reversing in part said order,) That the verdict obtained on the former trial ought not to be given in evidence on the new trial of the issue; 4, (further reversing in part said order,) That costs of the former trial ought not to be allowed to the party who got the verdict, but that said costs ought to be reserved.

[469] Observed, per L. C., When a Court of Equity has directed an issue to be tried at law, in order to ascertain the facts by which that court is to be guided in the exercise of its equitable jurisdiction, and after a trial of such issue thinks fit to order a new trial of the same, it is not the practice of the Court of Equity, in making such order, to interfere with or take any notice of the former verdict, to the effect either of setting aside that verdict, or of allowing it to be given in evidence on the new trial; and that a practice which had prevailed in the Court of Chancery in Ireland, of setting aside the former verdict on ordering a new trial, was erroneous.

In 1836 John Malone (respondent) filed a bill in the Court of Chancery in Ireland with the view to establish a title as heir tail male to estates of great value in Westmeath

and other counties in Ireland, devised by the will of the Right Honourable Anthony Malone, dated in 1774. In his amended bill the respondent set forth that he was the eldest legitimate son of Captain Richard Malone deceased, who was the second son of Richard Malone, the brother of the original settlor; and that the marriage of his parents had taken place on the 22d day of January in the year 1801, in Townsend Street chapel in the city of Dublin.

Mrs. O'Connor and others (the appellants), trustees under settlements of said estates, by their answer denied the legitimacy of the respondent, and maintained that the alleged marriage of the respondent's parents was illegal, the same having been solemnized by a Roman Catholic clergyman, the respondent's father being at the time and for twelve months previously a protestant. Issue was joined, and witnesses examined for both parties in the Court of Chancery. After several witnesses had been examined for the [470] respondent, but before publication, the appellants' solicitor discovered that there had been a son born of the same parents at Preston in Lancashire, in the month of June or July 1801, and baptized by the name of Anthony Malone in the Roman Catholic chapel at Preston on the 26th of July 1801. The solicitor for the appellants apprised the solicitor for the respondent of this circumstance. After publication it appeared from the depositions that several of the respondent's witnesses, including the mother of the respondent, had given evidence that the father and mother of the respondent had returned from Preston, and ceased to reside there in the end of the year 1800; and that they had been married, as stated in the amended bill, in the city of Dublin on the 22d of January 1801.

The cause came on to be heard on the 13th of November 1837, whereupon, by consent of parties, the Lord Chancellor of Ireland (Lord Plunket) directed an issue be tried in the Court of Queen's Bench, "whether the plaintiff was the heir at law of Richard Malone deceased, who was the son of Richard Malone, one of the brothers of the Right Honourable Anthony Malone in the pleadings mentioned?" That issue was tried before Mr. Justice Crampton and a special jury of the county Dublin, and a verdict had for the plaintiff (respondent). In stating the case at the trial, the respondent's counsel announced that the witnesses in the equity cause had been mistaken as to the true date of the marriage of the respondent's parents, which had really taken place in January 1802; and evidence was accordingly adduced by the respondent to prove that the said marriage had taken place in Dublin in January 1802.

[471] The appellants applied by motion, with notice, to the Lord Chancellor Plunket, to set aside the verdict on the ground of surprise on the trial and variation from the case made in the equity cause; and also that a new trial might be directed before a jury of any county save the county of Dublin. The motion was founded on the judge's report of the trial, and on affidavits by the appellants' solicitor, that said solicitor had relied on the respondent attempting to prove that said marriage had taken place in January 1801, and that Anthony, the elder brother of the respondent, had died without issue, and that the appellants were prepared to prove that said marriage could not have taken place in 1801. The affidavits of the solicitor and his clerk further set forth, that two of the jurors clapped and applauded in the jury box on the conclusion of the speech to evidence of the respondent's counsel.

The Lord Chancellor of Ireland (Lord Plunket), on the 19th of February 1838, made the following order:—"It is ordered that the motion for changing the venue and for setting aside the said verdict be refused; that there be a new trial of the said issue, with liberty to the plaintiff on such new trial to give such former verdict in evidence as he may be advised, the defendants to pay the costs of the former trial, the costs of the motion to abide the result of such new trial."

The appellants appealed. The petition of appeal praying in substance that the above order might be varied, by directing that the former verdict should be set aside; and that the new trial of the issue might take place before a jury of some county in Ireland [472] where the lands in question or some of them lie, and that the appellants should not pay the costs of the former trial.

*Appellants.*—A new trial had been ordered, and was absolutely necessary, not merely in reference to the amount of the property at issue, but also regard being had to the proceedings at the trial, which showed that a verdict so obtained was as worthless as the inconsistent evidence on which it proceeded. The former verdict had not

been set aside, although it was the practice in Ireland to do so in ordering a new trial, and the Lord Chancellor of Ireland had not said whether he was satisfied with that verdict or not, but had ordered a new trial, and had allowed the former verdict to be given in evidence on a new trial. Now, where a new trial had been ordered, the former verdict had always been set aside; it might not always have been so in form, but in substance that was the nature and effect of the order for again trying the question. There was no difference in the form of order whether the judge be satisfied or not. In *Seton on Decrees* (p. 350) there is the form of an order for a new trial of an issue in *Watmore v. Watmore* (M. R. 14 Feb. 1815), where certainly, if the former verdict be not expressly set aside, there was no order that it should remain part of the proceedings, or be given in evidence at the new trial. In *Locke v. Colman* (2 My. and C. 42), and in *Mudd v. Suckermore* (Rolls 1835), where new trials had been ordered, the former verdict had been entirely disregarded, and no order made for giving it in evidence. The reason why the former verdict could not [473] be entertained as part of the proceedings, a new trial being judged necessary, was, that a verdict cannot be made evidence at law until it has ripened into a judgment, and then it is conclusive betwixt the same parties in the same matter. See Phillips's Evidence by Amos (vol. 2, p. 510, 8th edit.), and the case of *Vooght v. Winch* (2 B. and Ald. 662), and the cases therein cited. In equity, the Court, seeking to inform its mind, may order a new trial, as in *Stace v. Mabbot* (2 Ves. sen. 553; see also Ves. Sup. 429), *Cleeve v. Gascoigne* (1 Amb. 323-24), and in *Harder v. Sise*, cited in Vernon, 285, in which last case there were five trials, and a case in Lord King's time, noticed in 2 Ves. sen., p. 554, by Lord Hardwicke in his judgment in *Cleeve v. Gascoigne*; but nothing had been said about giving the former verdict in evidence. But the authorities upon the point were supposed to be controverted by the judgment of Lord Hardwicke in the case of *Baker v. Hart*, twice reported (3 Atk. 542; S.C. 1 Ves. sen., 27), and which case required explanation and investigation. In Atkyns, Lord Hardwicke is made to say, "Where it is a matter of inheritance, the court without setting aside the first verdict, for the more solemn determination, in some cases direct a second trial; and if the court direct such trial without setting aside the former verdict, then the former may be given in evidence, and will have its weight with the jury, and therefore it is a very material difference to the parties; because, if I was to direct a new trial on my setting aside the first verdict, the defendant would lose the benefit of urging the first verdict in his favour at another trial."

[474] In Vesey senior (p. 28) the expressions are, "the application here is not to set aside the former verdict; and in doubtful questions relating to inheritances a court of equity frequently grants a new trial without setting aside the former verdict, which is of great consequence to the parties, for then it may be given in evidence, though not conclusive, either party being at liberty to show on what grounds it was obtained; but courts of law in that case always set the former aside." But both reports were now understood to contain an inaccurate account, both of the facts of the case and of the order made for the new trial. The registrar's books, however, correctly set forth the order, and it appeared there was no order about giving the former verdict in evidence on the second trial.

The conduct of juries had frequently been made the ground for directing a new trial of issues, see *Dent v. Hundred of Hertford* (2 Salk. 645; 1 Strange, 642), *East India Company v. Bazett* (Jacob, 91), in which last case a verdict was held not satisfactory, as the jury had been under great difficulty, and there was not a period sufficient for consideration, between the existence of the difficulty and its removal. Lord Eldon observed, "There is this difference between a motion for a new trial in a court of law and in a court of equity. In a court of law if a jury find the fact, though the judge may think differently, yet it is permitted to stand, for the finding of the fact is the province of the jury; but here the verdict is somewhat more than the verdict of the jury, it must be such as to satisfy the Court that it can make that its own [475] declaration of the fact which the jury have made theirs." [Lord Chancellor: A court of equity does not set aside a verdict at law; it only declines to act upon it.] Neither was there any practice in Ireland to sanction the giving the former verdict in evidence, *Harrison v. Cumming*, in 1808, being the only case in Ireland found upon a search of the records.

2. The venue ought to be changed. The circumstances under which the former verdict was returned, indicated a feeling and partiality not merely in the minds of the individual jurors animadverted on, but a strong prejudice in reference to the matters under investigation; one of the counties where the lands in dispute lay ought therefore to be preferred.

3. Costs ought not to have been awarded. There may have been cases in which costs were awarded (*Cleeve v. Gascoigne*, 1 Amb. 323; So, in *Stace v. Mabbot*, 2 Ves. sen. 553), even where a new trial had been granted, but never where the verdict was so objectionable as this was, being plainly not such a verdict as could ever be deemed satisfactory by the court that directed the issue; and the blame clearly lay with those who got up a case so inconsistent with that made in equity.

*Respondent.*—The value of the property in question might be deemed a good reason for enabling the parties to try the issue again, before being concluded upon claims, the ascertainment of which had been attended with difficulty. But there was nothing else in the case to justify the application for setting aside the former verdict, or for disturbing the order in so far as it allowed that former verdict to be submitted along with the [476] evidence to be adduced on the new trial. The course which the appellants had adopted in supporting their application, made it incumbent upon the respondent to go fully into the judge's report of the trial, to ascertain how far it was such a verdict as must have been satisfactory to the court that directed the issue. For it was very clear that the admission or rejection of portions of evidence which ought, in strictness, either to have been excluded or let in, formed no sufficient ground for insisting that a court of equity must set aside or disregard the verdict; as that court, seeking merely to inform itself as to the facts upon which its determination might rest, looked to the effect of the evidence in judging how far the verdict was satisfactory; see *Bootle v. Blundell* (19 Ves. 494), *Hampson v. Hampson* (3 Ves. and Beam. 41), *Barker v. Ray* (2 Russ. 63); in which last case Lord Eldon (p. 75) observed, "Issues are directed here to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed here; and looking at the depositions in the cause, and the proceedings both here and at law, he is to see whether on the whole they do or do not satisfy him. It has been ruled over and over again that if on the trial of an issue a judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet if this court is satisfied that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon [477] such grounds." Now the report of the judge who tried this case did not express any dissatisfaction with the verdict, neither had the Court of Equity in Ireland held it unsatisfactory. Indeed, a careful consideration of the report of the trial showed that no other verdict would have been satisfactory to that court, and therefore parties were not to be excluded from the benefit of a previous investigation, the verdict on which could not be impugned. It was not sufficient to allege surprise at the trial, unless it was surprise of such a nature as must necessarily have prejudiced the cause by producing a different result from what the other party might have been prepared to bring about. Besides, it was admitted, that the appellants were aware that there must have been some mistake, and that the marriage could not have been had in January 1801, and that the respondent could not have been the eldest born after a marriage in that year. And the question being whether the respondent was the eldest legitimate son of a marriage betwixt certain persons named, and a marriage being proved, there could be no prejudice to the appellants, when the effect of the whole evidence was looked to, and the mistake explained. The admission of the former verdict was urged on the authority of Lord Hardwicke in *Baker v. Hart* (3 Atk. 542; 1 Ves. sen. 27), who, in both the reports of that case, was made to use the expressions as if familiar in the practice of the court at the time.

2. The venue had for obvious reasons been fixed in the county of Dublin, where the prejudice upon questions of local importance must have been less than in the counties where the lands were situated. Any manifest [478]-tation of feeling (supposing it to have been as stated in the affidavits) could not attach disabilities to other jurors impartially chosen.



3. Costs were properly found by the court not dissatisfied with the verdict, and which allowed that former verdict to be used on the new trial.

Lord Chancellor (14th March).—My Lords, this is a case of very great importance, not only from the value of the property in question, but on account of the peculiar circumstances which appear to have taken place in the court below. Upon the case itself, therefore, from the opinion which has been entertained by the court below by a very eminent and learned person, your Lordships perhaps will think it advisable, whatever the impressions of your Lordships may be, to look very carefully through the papers before you proceed to give your final judgment upon this appeal.

But, my Lords, there is another reason which induces me to advise your Lordships not to proceed further at the present moment. In the course of this discussion a question has been raised shewing a practice in the courts of equity in Ireland, which is certainly quite inconsistent with the practice which exists in the courts of equity in England. Now, my Lords, there is no reason whatever why the practice of the courts in the two countries should be different. It certainly does appear to have raised a great difficulty in explaining the case of *Baker v. Hart* (3 Atk. 542; S.C. 1 Ves. sen. 27); for the practice might be somewhat different in Lord Hardwicke's time, and can only be explained by supposing that the practice in [479] equity in this country is different from that in Ireland. My Lords, in order to ascertain that, I have directed a search to be made from 1750 backwards, in order to see whether those expressions attributed to Lord Hardwicke in the case of *Baker v. Hart* are or are not supported by the authorities in the Court of Chancery. That search has not yet been completed, but as far as it has gone, there is no instance to be found in which the order has set aside the verdict, or in which there is contained any direction as to giving or not giving that verdict in evidence on a new trial. I shall very shortly be furnished with the further result of that inquiry, which I have directed to be made; and I believe, before I call your Lordships' attention to this case again, which I propose to do in the course of next week, that I shall be able to get some further information upon the point as to what passed in the court, beyond what is found in the printed reports and in the registrar's book. It is an extremely important question in this country and in Ireland; and on so important a point in equitable jurisdiction it is desirable that your Lordships should have all the information before you upon that subject, before you finally dispose of this case.

Judgment deferred.

Lord Chancellor (6th June).—In this case the Lord Chancellor of Ireland directed a new trial of an issue which had previously been tried, for the purpose of ascertaining who was the heir at law of Richard Malone. Upon the propriety of the new trial no question has been made; but three points have been raised as to the propriety of some of the directions given upon that order for a new trial. The order directed that the verdict which was obtained upon the former trial of the issue should [480] be laid before the jury upon the second trial, and be used as evidence; it directed the appellants to pay the costs of the previous trial; and another point contended for here by the appellants, as having been erroneously disposed of below, is that the trial which is to be had should not be in the county where the former trial was had, namely, in the county of Dublin.

My Lords, the question therefore for your Lordships to consider is, in the first place, whether the order for the new trial ought to contain the direction with regard to the verdict upon the former trial. It certainly struck me as a very singular direction, and when the case was argued at your Lordships' bar, I had no recollection of any such provision being contained in any order for a new trial. I did not even recollect that I had ever seen an order, in which the court had taken notice of the verdict in a former trial. I directed searches to be made, and after the most diligent searches which the registrars of the Court of Chancery have been able to make, carrying them back for two centuries, there is no instance found but one, which I shall presently call your Lordships' attention to, in which an order for a new trial has taken any notice of the verdict in the former trial. The reason is perfectly obvious. In a court of law the verdict is a necessary part of the proceedings in

the cause; it is the foundation of the judgment of the court. If therefore the verdict which has been obtained is not such a verdict as in the opinion of the court to be properly the foundation of a judgment, the court puts the case in a train for having it tried again; and it necessarily sets aside the verdict, inasmuch as the opinion of the court is, that that verdict ought not to be the foundation of the judgment to be pronounced. But when an issue is directed by a court of equity [481] there are no further proceedings upon the verdict; the object of the verdict is to satisfy the court of equity as to the facts. It is not therefore a case in which any thing further is to be done. All that a court of equity does in directing a new trial,—the mind of the judge being made up upon the evidence, or the result of the evidence,—is to put it into a course of further investigation, in order better to satisfy himself of the facts before he proceeds to adjudicate upon the right of the parties.

In this case it was said the new trial was granted not on account of any thing unsatisfactory which had taken place on the first trial, but because as it concerned the inheritance of an estate, the parties proceeding at law would in the ordinary course of things have had an opportunity of trying their right over again in several ways; and therefore that it was not thought proper on the part of the Lord Chancellor of Ireland that he should at once determine the rights of the parties without giving them an opportunity of another trial; and two cases were cited upon that point which were before me,—one when I was Master of the Rolls, and the other when I was in the Court of Chancery. These cases are *Locke v. Colman*, in 2 Mylne and Craig, p. 42, the other *Mudd v. Suckermore* (Rolls, 1835), which was before me at the Rolls, and in which I proceeded upon that principle. *Mudd v. Suckermore* was not in its circumstances the same as the present case, although it involved very much the same principle, because that was not the case of an issue directed by the court for the purpose of informing the mind of the court, but it was a case in which the court superseded the proceedings in the cause, giving [482] the parties leave to bring an ejectment; and the question was, whether an ejectment having been tried, and the question being with respect to the inheritance of an estate, the court should proceed to an adjudication without giving the parties an opportunity of another trial. And I observe that in my note of the judgment in that case, I drew the very distinction to which I have now called your Lordships' attention. I observed, "The distinction between these cases in which the court directs an issue, and those in which it gives the plaintiff an opportunity of establishing his title at law, is most important to be attended to. In the first, the object is to ascertain the facts by which the court is to be guided in the exercise of its equitable jurisdiction, and therefore necessarily takes upon itself cognizance of the evidence at the trial, and grants or refuses a new trial without regard to those rules which guide a court of law upon this subject. In the other, it only suspends its proceedings till the right is settled at law; and being so settled it acts upon that without regard to the evidence upon which such right has been established or inquiring whether it was properly established or not." Therefore the case of an ejectment brought with the permission of the court, and an issue directed by a court, are not analogous, and do not come within the same principles. At the same time it is quite true that the court does as it did in *Locke v. Colman* (2 My. and Cr. 42), where there was a question of right to be ascertained depending upon the custom of a very extensive manor; I thought it right, although there was no objection to the trial, that there should be an opportunity of again investigating the circumstances upon which the right of the party depended, by a new trial.

But, my Lords, I cannot think that that applies at all to this case, because it appears to me, without entering at all into the particulars,—which I carefully avoid, as the matter is to be tried again,—that there was enough in the circumstances of the first trial to make it the duty of the court not to act upon that verdict, but to give the parties an opportunity of again proceeding to trial. The party claiming as heir had in the equity cause stated the marriage of his parents, under which therefore he claimed as their legitimate issue, as a marriage in January 1801. That was the case he made in the pleadings, and it was the case he proved by witnesses in the cause where witnesses were examined, who spoke to the marriage as being in January 1801. It appeared that the parents of the claimant had gone to Lancashire, and that some evidence was to be obtained there. Both parties went into Lancashire;

and then the party opposed to this claimant found that in the summer, the month of August, I think, of 1801, another child (named Anthony) had been born and baptized there; so that if the marriage had taken place in January 1801, the plaintiff could not possibly be the heir, because there was thus another brother, Anthony, born subsequently to the marriage, and anterior to the period of the birth of the plaintiff. It appears that that fact was brought to the attention of the agent for the claimant; notwithstanding which, when publication took place, and the cause came to be heard in equity, it appeared that witnesses had been examined and proved,—when I say proved, I say they deposed to the marriage being in January 1801.

[484] The issue was then directed, and the parties went down to trial, and when they came down to trial it appeared then for the first time (there is some evidence of there being a communication made to the opposite agent before), but I say the first time with reference to any evidence given on the trial,—that the claimant set up a marriage not as in January 1801 but as in January 1802, which of course displaces Anthony, who was born in the summer of 1801.

Now, whether such marriage be hereafter to be established or not I do not at present at all inquire; it must necessarily be the subject of further investigation of the evidence before it goes to a new trial; and I shall therefore carefully abstain from saying any thing which can lead to a supposition that I have formed a very conclusive opinion as to the evidence upon which the claims of the parties are to be decided. But it is quite clear that, under these circumstances, the party who went to trial to meet the case to be made out was not at all prepared to meet the case which was brought before the court. He might have had a certainty of success if the case of the claimant had been adhered to as at first set out; because, if the claimant had continued to set up his title under a marriage in January 1801, all that it would have been necessary for the defendant to do would have been to show the birth of Anthony in the summer of 1801, and the case must have gone against the claimant.

Now this may have been a misapprehension or misstatement on the part of the witness, and may be set right on a further trial; but it cannot be said that the trial which has taken place was at all calculated to try the real question between the parties. For these [485] reasons I think it was quite right to grant a new trial. Upon that there is no dispute. But the ground upon which a new trial is to be granted is in order to try that over again which has not been satisfactorily tried, arising from the misapprehension (as I take it for the present purpose) of those who acted for the claimant in referring the marriage to another year, namely, 1801 instead of 1802.

But that is not the only point raised with reference to the grounds upon which a new trial is granted, although it is no doubt a very important one. With regard to the direction in the order, that the verdict in the former trial may be used upon the second trial,—why is that verdict which has been obtained under such circumstances to be used upon the new trial? If the case goes down to the jury for a new trial, with the order of the Lord Chancellor of Ireland that the verdict may be used upon that trial, it is all but directing the jury to find the same verdict on the second trial, because it is telling the jury that the Lord Chancellor is satisfied with that verdict; and if the Lord Chancellor is satisfied with that verdict, no doubt it would naturally make a very strong impression upon the mind of the jury that they ought to be satisfied with it also, unless there is some very important variance in the evidence between that produced on the first trial and that produced on the second. Again, if the Lord Chancellor was satisfied with the verdict, why should he send the case back to a jury? or why should he in terms direct the jury to take notice of that verdict, when by granting a new trial he has in substance declared that he does not think proper to give credit to it himself, at least to the extent of adjudi-[486]-cating upon the rights of the parties in respect of that verdict? The case therefore stands entirely by itself. No instance has been produced in which the court has directed a verdict to be used. If the verdict be evidence without such direction, of course that direction is improper, because then it is giving it as legal evidence, an importance beyond that which ought to be given to it. If, on the other hand, it be not legal evidence, then it is directing the jury to try the rights between the parties upon that which the law does not recognize as legitimate and proper evidence. Upon the question therefore, whether the order ought or ought not to contain the

direction to use that verdict upon the new trial, I have not, from the beginning of the argument up to this time, entertained the slightest doubt.

But that raises another point perhaps not very important in the present case, but important as showing a considerable variance in the practice in Ireland from that which prevails in this country, and which in cases where the circumstances are precisely similar would be undoubtedly inconvenient, and ought to be altered, unless there is some good reason for it. It was stated, and I think that appears upon the cases with which your Lordships have been furnished, that the course of proceeding in Ireland is to set aside the verdict in directing a new trial; I would observe that that appears to me to be an erroneous proceeding. The inquiries which I have had made into the cases in this country, carried back for nearly two centuries, do not furnish any instance but one of such a proceeding; and when I refer your Lordships to that one case, it does appear to me that there is quite sufficient in the circumstances of that case to explain how it happened [487] that such a provision is to be found in that order. The only case to be found is that of *Harcourt v. Cresswell* in 1723, and it is furnished to me by one of the registrars of the Court of Chancery, but evidently we have not the terms of the order. Whether the order contains that I am not able to say; but what fell from the Lord Chancellor in giving his judgment was in these words:—"To set aside the verdict as being against evidence or for excessive damages; for the trial being directed to satisfy the conscience of the court, and there appearing to have been means used to influence the jury, the conscience of the court cannot be satisfied with the verdict; therefore set aside the verdict and proceed to a new trial, and commit the party who is found guilty of tampering with the jury." It is quite obvious that that is not the order, but that these were the words which fell from the court at the time the order was made.

Now that case, and a case which I shall presently refer your Lordships to, namely, a case before Lord Hardwicke, are the only authorities I believe to be found in the records of the court, or in any records at all, foreign to the existing practice of not setting aside the verdict, or at all interfering with the verdict which has been obtained. The case which has been referred to, which was before Lord Hardwicke, is *Baker v. Hart*, which is very imperfectly reported in Atkyns (3 Atky. 542). I have, from the registrar's book, obtained a full note of the order and of the proceedings; and what appears to be the real history of that case explains some of the expressions attributed to Lord Hard[488]-wicke, and which, according to the statement of the facts in Atkyns, are not at all intelligible. That also is a case where an ejectment was brought; the question of legitimacy there turning upon the fact of the date of the marriage of the supposed husband and the mother of the claimant. The claimant brought an ejectment, and obtained a verdict; affirming, therefore, the validity of the marriage of the parents. Afterwards a bill was filed, and the same question was raised, and two issues were directed; first, whether the daughter of the parties was the heir of the father, and upon that if the jury should find that she was not the heir of the father, then whether the other party claiming was the heir of the father. Those two issues went down to trial, and the jury found that the daughter was the heir of the father. Necessarily, therefore, if they found that the daughter was legitimate she would stand first, and the other would not be the heir. There were three verdicts; the verdict in ejectment, and the verdicts upon those two issues. Now, in that case Lord Hardwicke is made to express himself in these words:—"Where it is a matter of inheritance the Court, without setting aside the verdict, for the more solemn determination, in some cases, direct a second trial; and if the Court direct such trial without setting aside the former verdict, then the first may be given in evidence, and will have its weight with the jury. And therefore it is a very material difference to the parties; because, if I was to direct a trial on my setting aside the first verdict, the defendant would lose the benefit of urging the first verdict in his favour at another trial." His Lordship is made to say that it [489] had been stated by the judge who tried the issues, that the jury had been very much influenced by the verdict in the first trial. That must necessarily be in verdicts for ejectment, where the two are tried together. Those expressions, attributed to Lord Hardwicke, would assume that it was the practice of the Court of Chancery, upon an application for a new trial, to set aside the former verdict. But, my Lords, if any such practice existed, it would have been found of course in the

registrar's searches, but no instances have been found except the one to which I have now referred.

I cannot therefore consider that that is the practice of the court. How those expressions of the Lord Chancellor are to be explained it is not now necessary to inquire. The investigation I have had made satisfies me that the impression which I entertained at the time this appeal was heard is correct,—namely, that it was not the practice of the court in directing a new trial to take any notice of the former verdict. Lord Hardwicke, it would appear from the report, assumed that if there is nothing said about the former trial, the verdict may be given in evidence. My Lords, I apprehend that Lord Hardwicke could not so have expressed himself, it being a well known rule of law that a verdict without judgment is no evidence at all, and the reason why at common law the courts will not receive as evidence a verdict without judgment is stated to be, because it does not appear that it may not have been set aside or disregarded, or that the court may have thought proper not to act upon it. There can be no judgment upon a verdict obtained in an issue directed from a court of equity. If, indeed, there be an order in equity acting upon the verdict, it would give the same quality and sanc-[490]-tion to the verdict which a verdict after judgment has at law. But when the court of equity for any reasons thinks proper to send the issue to a new trial, I apprehend that a mere verdict would not be evidence in the second trial of the issue; and whether it were used or not, it is quite obvious that the jury would be directed by the judge not to pay attention to the verdict which the court in granting a new trial had thought proper to disregard. Those expressions of Lord Hardwicke really appear to me to be quite unintelligible with reference to the known practice of the courts of equity.

I have thought it desirable, seeing that the practice in Ireland was a practice somewhat different from that which existed in England, namely, of setting aside the verdict where a new trial was directed, to call the attention of your Lordships to the state of the proceedings, in the hope that the courts of equity in Ireland may think it expedient to adopt a course of practice which has always prevailed and does now prevail in this country.

I therefore propose to your Lordships to reverse the order of Lord Plunket in so far as it has reference to the former verdict, leaving it as a simple direction that the parties should proceed to a new trial.

My Lords, the next point is with reference to the costs. The order of Lord Plunket directs the parties in applying for a new trial to pay the costs. In the view which Lord Plunket seems to have taken of the conduct of the parties, I was not very much surprised that that direction is contained in the order, because if it merely were an order applied for, and for the security of the respondent, it might be right to make such an order to indemnify him against the costs of the [491] trial. That assumes that there is no objection upon the face of the former trial, and that the party applying has not any ground of complaint against the conduct of the parties on the other side in the former trial; and I take it that that is his Lordship's view of the case. But without expressing any opinion as to the result of the evidence or the probable result of a new trial, I certainly see that looking at the conduct of the respondent upon the first trial, there was no chance whatever of the appellants obtaining from the hands of the jury a fair decision upon the real question between them. Differing therefore as I do from the Lord Chancellor of Ireland upon that point, I necessarily differ from him as to the propriety of the direction he has given with regard to costs. It appears to me that the costs of the former trial ought to be reserved, and the court will see better how to dispose of the question of costs when it sees how the rights of the parties are established by the verdict.

With regard to the other point of which the appellants complain, or rather the variation in the order which they ask for, that the trial may take place in some other county, and not in the county of Dublin,—the only fact stated as a ground for changing the venue is the indecorous manifestation of feeling exhibited by the former jury, not upon the verdict being pronounced, but at the conclusion of the address of the counsel for the claimant. On the one side that is attributed to too much feeling in some of the jury in favour of the claimant; on the other side it is attributed to mere admiration of the very eloquent speech which had been concluded by the counsel.

Neither one nor the other would justify the jury in [492] the expression of feeling or applause in which some of them indulged; but I cannot consider the fact of some gentlemen of warm feelings happening to be upon that jury as disqualifying another jury of the county of Dublin from exercising the duty which devolves upon them of trying the question. It is very well known that in most instances there is more feeling in the county in which the property is situated than in another county where the jurors selected are not likely to have any connexion with either the one side or the other. I do not think there is any sufficient case stated to induce the House to alter the venue, or to direct the second trial to be had other than in the county in which the former trial took place.

The result, therefore, if your Lordships concur in the view I take of this case, will be to order a new trial, directing the costs to be reserved, and striking out that part of the order which takes notice of the former trial.

The House of Lords ordered and adjudged, That the said order of the Court of Chancery in Ireland, in part complained of in the said appeal, be varied, by omitting so much thereof as directs that the plaintiff be at liberty on such new trial to give the said former verdict in evidence, and that the defendants Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, the trustees, do pay the costs of the former trial; and that, subject to such variation, the said order be and the same is hereby affirmed: And it is further ordered, That the question of the costs of such former trial be reserved till after the new trial directed by the said order shall have been had.

PEMBERTON, CRAWLEY, and GARDINER—W. R. KING and SON, Solicitors.

**[493] APPEAL FROM THE COURT OF CHANCERY, IRELAND.**

EDWARD SHEEHY and Others, *Appellants*.\*—Pemberton—Jacob—James Russell; MATHEW FITZMAURICE DEAN, Lord MUSKERRY, *Respondent*.—Knight Bruce—Sir W. Follett [11th June 1839].

[Mews' Dig. i. 331; vi. 489; x. 1650; xi. 579; S.C. 7 Cl. and F.; 1 Ll. and G. t. Plunk. 568; see also 1 H.L.C. 576, and note thereto.]

*Leasing Power*.—Question: Husband and wife, by post-nuptial settlement, convey part of the wife's estates to a trustee to the use of the husband for life, remainder to their eldest son for life, and with an ultimate remainder in fee to the husband, and a power to him to lease "for any term or terms of years or lives, and with or without covenants for renewal, and in case of the determination of all or any of the aforesaid lease or leases to make new or other leases thereof in manner aforesaid, and with or without any fine or fines, as he should think fit." He was also empowered "to raise or levy, by sale or mortgage, any sum or sums of money not exceeding in the whole £20,000, or to charge the premises therewith," for such uses as he should appoint, and to charge to any amount for younger children. The husband and wife afterwards executed three leases of portions of the estates comprised in the settlement, for terms of 999 years, upon which fines were taken. One of the leases contained a clause permitting the lessee to graff and burn the surface, and also a clause of surrender; and another contained clauses making the lessee dispunishable for waste, and permitting him to cut [494] timber, etc., and to graff and burn the surface, and in this lease was included part of the wife's estate not comprised in the settlement; the latter lease, and also the third lease, were made subject to existing freehold leases. The amount of the fines received upon the making of these and other leases was £10,208. The husband subsequently mortgaged those estates, subject to the aforesaid leases, for a sum of £10,500. The mortgagee filed a bill of foreclosure in

\* Reported in Lloyd and Goold's Rep. temp. Sir E. B. Sugden, C. 183, and 1 Lloyd and Goold, 182.

the Court of Exchequer, and obtained a decree, in pursuance of which the lands were sold, subject to the leases. The first tenant in tail under the settlement filed a bill, impeaching the said decree, and also the leases as having been made contrary to the leasing power. Whether the leases were an undue exercise of the leasing power?—Remitted for reconsideration.

*Practice—Enrolment of Decree—Rehearing.*—Circumstances in which, without deciding on a ground of appeal, that a decree alleged to have been duly enrolled was incompetently opened, and a rehearing allowed, it was held (recalling the decree on rehearing), that parties were not bound by their consent at such rehearing not to take another case for opinion of court of law;—and the cause remitted to court below to hear parties as to the validity of said leases.

In 1732 John Fitzmaurice, being seised of an estate in fee simple in possession in the lands of Springfield, subject only to a legacy of £1000 charged thereon for his sister Mary, by ante-nuptial settlement conveyed Springfield to trustees, subject to the legacy of £1000 to the use of himself for life, with remainder to the first and other sons of his said intended marriage in tail, with a power to himself to charge the lands with £4000 for the younger children of his marriage, and in default of issue male of his marriage remainder to himself, his heirs and assigns.

[495] There was issue of the marriage one son, John (younger), and a daughter, and upon the marriage of the latter in 1759, John (elder), by virtue of the above power, charged Springfield estate with £4000 and £1000 (the sister's portion he had paid off), and conveyed the lands for a term of 200 years upon trust to raise the sum of £5000 by sale or mortgage, which charge became vested by mesne assignments in John Godley. Previous to 1760 John Fitzmaurice (elder) had purchased fee simple estates called Farrihy and Gurtahedy, and after the death of his wife Anne, having married Hester Littleton, he conveyed to trustees, by a post-nuptial settlement, in 1763, the Farrihy and all other estates in Limerick county of which he had power to dispose, to the use of himself for life, remainder to Hester for life, to whom he also granted a life use after his own death in his personal estate. John Fitzmaurice (younger) died in 1775 intestate, leaving an only child, Anne; and after him, in the same year, died John (elder), also intestate, without issue of his second marriage, leaving Anne his grand-daughter and his heiress at law, and Hester his widow, him surviving. In 1775 Anne, then a minor, married Sir Robert Tilson Deane, afterwards Lord Muskerry; and in 1776, in order to terminate existing differences between Hester the widow and Sir Robert, a deed of compromise was executed between Hester and Sir Robert and Anne his wife, whereby upon recital of the settlement of 1763, in consideration of Hester assuring to Sir Robert all her right and interest in and to the real and personal estate of her late husband, she (Hester) and Sir Robert conveyed to trustees the Springfield and Farrihy and Gurtahedy estates, for a term of 99 years, with powers to lease or [496] mortgage the same, to secure to Hester an annuity of £1083 6s. 8d. in and subject thereto, in trust for the use of Sir Robert and Anne his wife, and the heirs and assigns of the latter.

Anne attained majority in 1779, when there being two sons of the marriage, a settlement was executed on 25th May 1779 between Sir Robert and Anne his wife of the first part, and Thomas Lloyd of the second part, whereby for assuring the lands therein mentioned, and for making a provision for a jointure for the said Anne, and a further provision for the children of the marriage, they granted to Lloyd, his heirs and assigns, the Springfield and Farrihy estates (the property of Anne), to the use of Sir Robert for life, without impeachment for waste; remainder to Anne for life, without impeachment for waste; remainder to Robert Fitzmaurice Deane, their eldest son, for life, and to his first and every other son in tail male; with remainder to the second son, John F. Deane, for life, without impeachment for waste; with an ultimate remainder to Sir Robert; and it was thereby agreed, "that it shall and may be lawful to and for the said Sir Robert, from time to time and at all times during his life, to lease or demise all, every or any part or parts, parcels or parcel of the aforesaid towns, lands, tenements, hereditaments, and premises, for any term or terms of years or lives, and with or without covenants for renewal, and in case of the determination of all or any of the aforesaid leases or

lease respectively, from time to time to make new or other leases thereof in manner aforesaid, and with or without any fine or fines as he shall think fit;” and it was also agreed, that it should be lawful to and for the said Sir Robert to charge [497] and encumber all and singular the said towns, lands, tenements, hereditaments, and premises aforesaid, or any part or parts thereof, with any sum or sums for the younger child or children of the said Sir Robert begotten or to be begotten on the said Dame Anne, in such proportions and manner, and payable at such time or times, as he shall by deed or will appoint;” and further, that it should also “be lawful to and for the said Sir Robert to raise and levy, by one or more sales or mortgages of all or any part of the premises, any sum or sums of money, not exceeding in the whole the sum of £20,000, or to charge the premises aforesaid therewith, to and for such use and uses as he shall at any time or times by deed or will appoint.”

By the same deed Sir Robert and his wife covenanted that they would, before the end of the then next Trinity Term, levy a fine of the said towns, lands, tenements, and hereditaments unto the said Thomas Lloyd and his heirs, to the uses of the said indenture of settlement. On the same deed there was an endorsement signed and sealed by Sir Robert and his wife, in the following words:—“It was agreed between the parties within mentioned, previous to the execution of the within deed, that the within-named Robert Fitzmaurice Deane and John Thomas Fitzmaurice Deane, and every other child of said Sir Robert Tilson Deane and Dame Anne his wife, who shall, under the limitations within mentioned, be possessed of the premises within mentioned, or any part thereof, to make leases of the whole or any part thereof for any term not exceeding three lives or thirty-one years, provided such lease be made to commence in possession, and that the best improved yearly rent that can be had [498] for the same at the time of making such lease be reserved thereby, and that no fine or other consideration shall be taken for or on account of the making thereof.”

Sir Robert and Anne, by indenture dated 26th August 1779, in consideration of £1000, demised to William Sheehy for a term of 999 years, at a rent of £20, the lands of Rosnerelane, and also part of Springfield, subject to a lease of the latter in 1746 by John Fitzmaurice to Isaac Howell for three lives, at the rent of £40 3s.; and Sir Robert covenanted for himself and his wife, their heirs, executors, etc., to levy one or more fines unto the said William Sheehy, his executors, etc., of all the premises thereby demised. The lands included in this lease were part of the premises comprised in the settlement of 25th May 1779. By indenture of lease dated 28th October 1779, Sir Robert and Anne, in consideration of £2000, demised to Roger Sheehy the younger the lands of Clonmore, part of the lands in the settlement of May 1779, for a term of 999 years, at a yearly rent of £150, with permission to Roger Sheehy, his executors, etc., during the continuance of the term to graff, cut, and burn the soil and surface of the lands thereby demised, without incurring or being liable to any penalty or forfeiture for the same, notwithstanding the several acts to prevent the pernicious practice of burning land, and with power to Roger Sheehy to quit and surrender the demised premises at the end of every year of the term, upon giving six months' notice in writing. By indenture of lease dated 4th June 1780, Sir Robert and Anne, in consideration of £5780, demised to Roger Sheehy the elder, portions of the Springfield estate and Gurtahedy, being (excepting [499] Gurtahedy) part of the lands in the settlement of 25th May 1779, subject to the remainder of the terms unexpired of different leases then subsisting, and set out in a schedule annexed to the lease, to hold the same for a term of 999 years, at the yearly rent of £50, without impeachment for waste, and with power to the lessee, his executors, etc., to cut, fell, and carry away all timber and other trees then growing or which thereafter should grow on the said demised premises, and to graff and burn any part of the said demised premises as often as he or they should think proper, with a covenant on the part of Sir Robert and his wife to levy a fine or fines to Roger Sheehy, his executors, etc., for the effectually confirming the said demise. In the schedule were specified five leases for lives of different portions of the lands as then subsisting, and all executed previous to the settlement in 1779, the rent reserved by the lease being less than the former rents; the leases to the Sheehys containing usual clauses of entry and distress, etc., and a reservation of the royalties.



Sir Robert and his wife levied no fine pursuant to the above covenants. Sir Robert, by means of fine taken upon these and other leases, raised £10,208.

By deed, dated 29th April 1780, reciting the settlement of 25th of May 1779, and the power therein to raise not exceeding £20,000 by sale or mortgage, Sir Robert mortgaged to St. John Chinnery the Springfield and Farrihy estates, subject to the leases to the Sheehys, for £6000. Sir Robert was, in 1780, created Baron Muskerry. By deed, dated the 7th of April 1783, reciting the settlement of 1779, and the mortgage of 1780, Lord Muskerry executed a further mortgage to St. John Chinnery of the Springfield and Farrihy [500] estates, subject also to the leases to the Sheehys, for £4500.

In 1780 Hester Fitzmaurice, her annuity being largely in arrear, filed a bill in chancery against Lord Muskerry, the lessees in the several leases being made parties, praying that those leases might be declared fraudulent and void as against her; and that the amount due to her on her annuity, an account being taken, might be raised by a sale of the lands comprised in the trust term created for securing the said annuity. In 1790 Hester died, whereupon her executor, Lord Westcote, revived her suit, and by amended bill made Sir B. Chinnery, the personal representative and heir at law of St. John Chinnery his brother, a party, and putting in issue the two deeds of mortgage for £6000 and £4500. All the defendants, except Lord and Lady Muskerry, answered; and in December 1779 there was decree to account. On 27th of January 1802 the master, by his report, found £10,819 due to Lord Westcote as representative of Hester Fitzmaurice, and £5000 due to Godley. On the 18th of November 1802 Lord Redesdale, C., on hearing the cause, directed that the sum of £10,819 due to Lord Westcote should be raised by mortgage of the estates, and that the trustees of the term of ninety-nine years securing the annuity should execute mortgages of the remainder of the term to a trustee, to be named by Lord Westcote; and also declared that the several leases to the Sheehys were fraudulent and void as against the said Hester and her trustees and Lord Westcote; and that the full and fair rents for the estates, discharged from the said leases, ought to have been paid from time to time to the receiver in the cause, and referred it to the master [501] to set fair rents on the estates comprised in the leases, and take an account of what was due for such rents, after giving credit for the sums paid by the tenants to the receiver; and also declared that in case the tenants should redeem the said mortgage by payment of what should be found due for rents beyond the rent reserved in their respective leases, or by payment from their own money, they should be entitled to stand in the place of Lord Westcote for so much as they should pay beyond the rent received by their respective leases.

Sir Broderick Chinnery in 1784 had, in the name of his brother St. John Chinnery, filed a bill in the Court of Exchequer against Lord and Lady Muskerry to foreclose the mortgages of 29th April 1780 and 7th April 1783, pending which suit St. John died without issue, leaving Sir Broderick his heir at law his executor.

By deed dated 11th December 1802, Lord Westcote, in consideration of £4000, assigned to Sir B. Chinnery the sum of £10,819, and the full benefit of the decree of 18th November 1802, and by indenture of the same date the trustees of the term of ninety-nine years (created by deed in 1779 to secure Hester's annuity), by Lord Westcote's direction, and in pursuance of the decree of 1802, mortgaged the lands comprised in the said term to the said Sir B. Chinnery, his executors, administrators, and assigns.

In 1804 Sir B. Chinnery revived the exchequer suit, and obtained a decree to account; and in 1806 a sum of £20,085 7s. 9½d. was reported due to him on the mortgages executed to Sir B. Chinnery, and also £10,819 as assignee of Lord Westcote, and £5000 were reported due on Godley's mortgage. Godley assigned this charge to Sir B. Chinnery during the same cause. [502] In February 1807 there was a decree in the exchequer suit for a sale of Springfield and Farrihy estates, for payment, with interest and costs, of the sum reported due on the footing of the mortgages, subject nevertheless to the debts decreed to Godley and Lord Westcote, and to the remedies for receiving thereof, pursuant to decree of 1802, and subject to the several leases to the Sheehys.

In 1808 Sir B. Chinnery died, after bequeathing to his two sons the sums due

on the several mortgages, and on Lord Westcote's claim, and his will was proved and the suit revived by Alice, his widow and executrix.

Under the decree of 1807 in the exchequer suit, Springfield and Farrihy were put up for sale, subject to Godley's and Lord Westcote's demand, and the leases to the Sheehys. On 8th May 1812, Alice, executrix of Sir B. Chinnery, became purchaser, and the estates were conveyed to her, but the deed of conveyance was executed by the Chief Remembrancer only. Robert Lord Muskerry died in 1818, leaving Anne Lady Muskerry and two sons, John Thomas Deane Lord Muskerry and Mathew Deane, him surviving.

In May 1819 John Thomas Lord Muskerry and Anne Lady Muskerry (his mother) filed the original bill in this cause. But John Thomas Lord Muskerry having died in 1824 without issue, and his mother dying in 1830, Mathew Lord Muskerry (the respondent) by amended bill in 1826 against the widow and children of Sir B. Chinnery, and the representatives of the Sheehys, the lessees, after stating the transactions between Robert Lord Muskerry and Sir B. Chinnery, charged that the said several leases were not authorized by any power in the settlement of 1779; that Lord Muskerry, having raised £10,208, by taking fines upon leases, and also [503] £10,500 by mortgages to St. John Chinnery, had exceeded his powers to charge under the settlement of 1779, which limited him to £20,000; that such mortgages having been made subject to said fraudulent leases were contrary to the intent and meaning of the power; that the account in the exchequer cause was fraudulent and erroneous, and that if due credits had been given nothing would have been found due in respect of said mortgages; that the decree in the said cause was also erroneous in directing a sale for the payment of a subsequent mortgage, subject to a prior mortgage and other prior incumbrances, without providing for the payment thereof out of the produce of the sale, and likewise impeaching the said decree on other grounds; and prayed that the leases to the Sheehys might be declared not to have been warranted by the leasing power in the settlement of 1779, and fraudulent and void as against the plaintiff (respondent) claiming in remainder under the said settlement; and that the mortgages to St. John Chinnery might be decreed not warranted by any of the powers in said settlement, and void as against plaintiff (respondent); and that the exchequer decrees might be decreed as fraudulently obtained; and for an account of what was due to Alice as representative of Sir B. Chinnery, or Lord Westcote's and Godley's demands, and that in taking such account such sums only should be allowed as Sir B. Chinnery actually and *bona fide* paid as assignee of Lord Westcote and Godley respectively, and in case the said mortgages or either of them should be declared a subsisting lien on said estates, then that an account might be taken of the sums due in respect thereof; and that upon payment of the sums actually and *bona* [504] *fide* paid for the same, the plaintiff might be entitled to redeem the mortgaged premises; and for a reconveyance of the same; and for an account also of the sums received by Sir B. Chinnery or his representatives, or which without wilful default he or they might have received out of the Springfield and Farrihy estates, etc.

The cause was heard before Lord Plunket, C., on the 29th of November 1832; and his Lordship directed a case for the opinion of the Court of Common Pleas upon the following question:—"Whether the leases, bearing date respectively the 28th day of August 1779, the 28th day of October 1779, and the 14th day of June 1780, made by Sir Robert Tilson Deane, who was afterwards created Baron Muskerry, and Dame Anne his wife, to William Sheehy, Roger Sheehy the younger, and Roger Sheehy the elder respectively, or any or either and which of the said leases were or was warranted by any power contained in the deed bearing date the 25th day of May 1779?" all further directions being reserved.

The Court of Common Pleas certified that the leases were not warranted by any power contained in the deed of settlement of 1779.

Alice Chinnery died intestate, after the argument in Common Pleas, leaving her two sons her surviving. The cause came on (4th of February 1835) before the Lord Chancellor (Sir E. B. Sugden) for further directions, upon bill, answer, and this certificate.

When the cause was called on the counsel for the plaintiff (respondent) was understood to state to the court that there was an arrangement in progress with respect to the demands arising on the mortgages, in which the counsel on both sides had con-

curred; but [505] that as the Chinnerys, in whom the mortgages were vested, were lunatics, a reference was necessary, and that a petition had been presented.

The Lord Chancellor referred it to the master to inquire and report whether the proposed compromise would be for the benefit of the lunatics. His Lordship stated his wish to have the assistance of two of the common law judges in deciding the question as to the validity of the leases.

That question came on, 11th February 1835, to be argued before the Lord Chancellor, assisted by the Lords Chief Justice of the Common Pleas and Chief Baron.

In the course of the argument the Lord Chancellor stated that his attention had been withdrawn from the facts of the case from the time it was stated that a compromise had been entered into, and as the bill had been filed to impeach the mortgages and the sale, and as the Chinnerys and Lord Muskerry had agreed to withdraw from the consideration of the court the question as to the validity of the sale, he did not think he had jurisdiction to decide upon the validity of the leases, and that he was now differently placed than he would have been if the proceedings had been continued against all the parties, and wished to hear one counsel of a side, whether in the then state of the pleadings he could decide upon the validity of the leases.

By the decree as made up (12th Feb. 1835), after reciting that the plaintiff had, by his counsel in open court, waived insisting on any relief as sought by his bill in respect of the said final decree of the Court of Exchequer, and the said sale in pursuance thereof, and that it had appeared that under the said decree in the Court of [506] Exchequer, the said lands were sold to the purchaser Alice Chinnery, subject to the said indentures of lease of 28th October 1779 and 4th June 1780, it was ordered that the plaintiff's bill should be dismissed with costs as against the defendants the representatives of the lessees of the leases of 28th October 1779 and 4th June 1780 (the lessees who appeared at the hearing), save as to costs incurred in respect of the said proceedings in the Court of Common Pleas, as to which it was declared that all parties should abide their own costs. The said decree of 12th of February was, as the appellant contended, duly enrolled.

On 8th May 1835 the respondent presented his petition to Lord Plunket, Lord Chancellor of Ireland, praying for a rehearing of the cause, whereupon his Lordship was pleased to make an order, without notice to the appellants, that the case should be set down to be reheard.

On the 16th May 1835 the appellants Edward Sheehy and John Sheehy applied to the Lord Chancellor to set aside the order for rehearing, as having been obtained by the suppression of the fact that the decree of 12th February 1835 had been enrolled. Affidavits were filed in support of and against the motion.

On the 28th May 1835, on debate in open court, the Lord Chancellor made the following order: "Whereas Mr. Warren and others, of counsel with the defendants Edward and John Sheehy, this day moved the court to set aside the order of rehearing dated the 8th day of May instant, and also moved for the costs of the said motion: Upon debate of the matter, and on reading the said order; the decree of the 12th day of February 1835; the affidavit of John Walsh, filed the [507] 15th of May 1835; the order in Chinnerys, lunatics, of the 5th day of February 1835; the report of the 8th of April 1835; the affidavit of the plaintiff, filed the 23d of May 1835; the affidavit of William Furlong, filed the same day; the affidavit of Theophilus Latouche, filed the same day; the notes on hearing of 21st November 1832 and the 12th of February 1835; the general rule of the 31st of March 1819; the two certificates of the clerk of the rolls, dated the 11th day of May 1835; as also the new rule 132; and hearing what was offered by Mr. Blackburne and others of counsel with the plaintiff; and Mr. John Walsh, solicitor for defendant, and Mr. William Furlong, solicitor for plaintiff, attended: It is ordered by the right honourable the Lord Chancellor of Ireland that the said enrolment be opened for the purpose of the rehearing the cause."

On the 4th June 1835 the cause accordingly came on for rehearing, and was further heard on the 6th, 8th, and 11th June, before the Lord Chancellor of Ireland, when his Lordship pronounced a decree, which states, that it appeared to the court that the recital in the decree of dismissal that the respondent waived any relief against the exchequer decree and the sale thereunder, was erroneously inserted in that decree; and on reading the order of reference, and inasmuch as the reference

was depending at the time of pronouncing the decree of dismissal, and the Chinnerys were present in court insisting on their rights, it was ordered that the decree of dismissal should be reversed, and the master's report be confirmed; that the compromise therein set forth be carried into effect. The respondent was declared [506] entitled to redeem the mortgages on payment of £24,000 and interest within twelve months; it was further ordered, that the premises be reconveyed discharged of the mortgages, and in default of payment the respondent to be foreclosed; and the respondent was further ordered to release the claims of dower due to Anne Lady Muskerry deceased; and the cause was ordered to stand for further hearing, with liberty to all parties to adopt any defence they might be advised arising out of the said compromise and the decree.

In pursuance of the decree of 11th June 1835 the cause came on to be further heard before his Lordship on the 13th day of July 1835; whereupon his Lordship having proposed that any direction which the counsel for the said defendants Richard Boyle Chinnery, Maria Chinnery, and Louisa Chinnery should require for the purpose of protecting their interest in respect of their having a good and sufficient tenant or tenants of the lands and premises comprised in the several leases in the pleadings mentioned, in the event of the said leases being defeated, be inserted in any decree now to be pronounced; and the counsel for the said defendants Richard Boyle Chinnery, Maria Chinnery, and Louisa Chinnery at the bar declining the same; and "upon reading the case submitted for the opinion of the justices of His Majesty's Court of Common Pleas of Ireland, and the certificate of the learned judges of the said court, therein setting forth that the said case had been argued before them by the counsel of the parties, and that they had considered it, and were of opinion that the leases in the pleadings mentioned, bearing date respectively the 26th day of August 1779, the 28th day of October 1779, and the 14th [509] day of June 1780, made by Sir Robert Tilson Deane, Baronet, afterwards created Lord Muskerry, and Dame Anne his wife, to William Sheehy, Roger Sheehy the younger, and Roger Sheehy the elder respectively, were not warranted by any power contained in the deed of settlement bearing date the 25th day of May 1779; and the said defendants the lessees, Edward Sheehy, John Sheehy, William John Sheehy, Bryan Sheehy a minor, by the said William John Sheehy his father and guardian, Anne Westropp, Thomas Johnston Westropp a minor, by the said Anne Westropp his mother and guardian, by their counsel in open court, declining to accept an offer made by his Lordship to send the said case for the opinion of His Majesty's Court of King's Bench; and upon reading the conditional decree, bearing date the 26th day of April 1832, against the defendants James Keatinge and Henry Singer Keatinge, the orders of the 7th and 15th days of June 1832, and the affidavit of service thereof: it is this day, that is to say, Monday the 13th day of July 1835, ordered, adjudged, and decreed by the right honourable the Lord High Chancellor of Ireland, that the said conditional decree be and the same is hereby made absolute against the said defendants James Keatinge and Henry Singer Keatinge: And it is further ordered, adjudged, and decreed, that the said decree of the 12th day of February 1835 be and the same is hereby reversed; and it is hereby declared that the insertion therein of the waiver by the plaintiff therein recited was not warranted by the facts: And it is hereby further ordered, adjudged, and declared, that the said three several leases in the pleadings [510] and in the said certificate of the Court of Common Pleas specified, bearing date respectively the 26th day of August 1779, the 28th day of October 1779, and the 14th day of June 1780, made by the said Sir Robert Tilson Deane, Baronet, who was afterwards created Lord Baron Muskerry, and Dame Anne his wife, to William Sheehy, Roger Sheehy the younger, and Roger Sheehy the elder respectively, are not, nor is any or either of them, valid at law or warranted by any power contained in the deed of settlement of the 25th day of May 1779, and that there is no ground for sustaining any or either of them on equitable principles; and the said leases being invalid at law and not sustainable on equitable grounds, it is hereby further ordered, adjudged, and declared that the same are void: And accordingly it is further ordered, adjudged, and decreed, that the three several leases be and they are hereby set aside respectively: And it is further ordered, adjudged, and decreed, that an injunction do forthwith issue to put the plaintiff into possession of the premises comprised in the said three several leases respectively: And it

is further ordered, that the said defendant Mary Bourke, the heiress at law of Thomas Lloyd in the said settlement of the 25th May 1779 named, be paid her costs of this suit by the plaintiff, and that the said defendant John Robert Bourke be likewise paid his costs of this suit by the plaintiff: And it is further ordered, that the plaintiff and the several other parties do abide their own costs respectively: And it is further ordered, that the deposit made by the plaintiff on setting down the cause for rehearing be paid back to the said plaintiff's six clerk, [511] and accordingly the plaintiff may make up and enrol a decree as aforesaid, for performance whereof the process of this court is from time to time to issue as is in such cases usual."

The appellants appealed against the order for rehearing made on the 8th May 1835, the order for opening the enrolment of said decree of the 12th February 1835 made on the 28th May 1835, and the final decree made on the 13th July 1835.

*Appellants.*—The decree of dismissal of the 12th of February 1835 was duly enrolled; and if so, the Court of Chancery ought not to have made the order of 28th May 1835 for opening the enrolment of the decree of 12th of February 1835, but should have suffered the respondent to have sought redress by appeal to the House of Lords, in case he thought himself aggrieved by the decree of dismissal; the more especially as the respondent had obtained the order of the 8th May 1835 for rehearing the cause without notice to the appellants, by their withholding from the Lord Chancellor all knowledge of the fact of the decree of the dismissal having been duly enrolled.

The respondent having by his counsel in open court withdrawn from the consideration of the court the question whether the sale of the Springfield and Farrihy estates to Dame Alice Chinnery, subject to the leases the interest in which had become vested in the appellants, was impeachable or not, he was not in a situation to impeach the validity of the leases. The recital contained in the decree of Lord Chancellor Plunket, "That the recital contained in the said decree of dismissal of the 12th day of February 1835, [512] stating that the said plaintiff, Mathew Baron Muskerry, by his counsel in open court, had waived insisting on any relief, as sought by his bill in respect of the final decree pronounced by the Court of Exchequer in his bill mentioned, and the sale in pursuance thereof was erroneously inserted therein, being unfounded in fact, and not warranted by any statement or waiver made on the part of the said Lord Muskerry," is an averment made without evidence, and contrary to the fact, and contrary to the averment of the decree duly made and signed by the Lord Chancellor, in whose presence and hearing the waiver took place.

The validity of the appellants leases, as against the parties claiming under the settlement of May 1779, is recognized by Lord Redesdale's decree in 1802 and the decree of the Court of Exchequer in 1807; and the lessees are moreover entitled to the benefit of the decree of 1802 in respect of the sums of money which they paid in pursuance of that decree and the agreement of the 16th of May 1803. The leases are warranted by the leasing power contained in the settlement of the 25th of May 1779; and even if the leasing power were ambiguous in its terms in respect of any of the provisions contained in any of the leases, yet the respondent, claiming as a volunteer under the parties who introduced such ambiguous expressions into their deed, ought to be prevented from taking advantage of any such ambiguity, but on the contrary any ambiguity therein ought to be construed in favour of the appellants claiming under lessees who paid large fines and entered into covenants to pay rents equivalent to the value of the land when leased, or such fines and such leases being [513] in all respects *bona fide* in respect to the lessees, and without any ground for suspicion on their part of the settlement of 25th May 1799 being in any degree impeachable, or the leasing power being insufficient to authorize the leases and the clauses therein contained.

Although the leasing power should be construed as not expressly authorizing the taking of fines on leases, yet inasmuch as there is no express restriction in the settlement against taking such fines, and as there is an express power therein authorizing Sir Robert Tilson Deane to raise or levy by sale or mortgage any sum of money not exceeding £20,000, the fines should be deemed to be part of the £20,000 raised by sale of so much of the rents as would otherwise have been reserved in the leases, and as in fact the most beneficial way of exercising the power of raising the £20,000

as respects the rights of the persons entitled in remainder; and although Sir Robert Tilson Deane by his subsequent mortgages to St. John Chinnery raised a sum of money, which together with the fines exceeded the £20,000 by a sum of £708, yet such subsequent dealings with St. John Chinnery could not affect the validity of the previous leases. The lessees and the appellants are claiming under them as purchasers for valuable consideration, without notice of any ground of claim on the part of the respondent, or of those under whom he derives, to impeach the validity of the leases, and are therefore entitled to rely on their title as such purchasers for valuable consideration as against the respondent claiming under the post-nuptial settlement of 25th May 1779. Even if at law the leases should be considered as not authorized by the leasing power, yet the respondent was not entitled to the aid of a court of equity to set aside [514] leases *bona fide* made in consideration of large sums of money paid by the lessees, such lessees and their representatives having been suffered to remain in undisturbed enjoyment of the demised premises without any adverse claim for forty years, during which period they had necessarily expended large sums of money in the improvement of the lands, and which leases had been acquiesced in by all parties as due executions of the leasing power in Lord Westcote's cause, in which cause the leases were the subject of discussion before Lord Redesdale, then Lord Chancellor of Ireland, who made a decretal order therein in the year 1802, sustaining the leases against all parties except prior incumbrancers; and the validity of which leases was also subsequently recognized by the Court of Exchequer in the foreclosure cause in the year 1807, and the lands decreed to be sold subject to such leases, under which decree Dame Alice Chinnery had become the purchaser of the lands expressly subject to those leases.

*Respondent.*—The course pursued, which the appellants objected to, and the result of the rehearing, could not reasonably be complained of; for the final decree appealed against only brought the cause on the merits back to the position in which it stood upon the certificate of the Court of Common Pleas, finding that the leases were not warranted by any powers in the deed of 1779. Lord Chancellor Sugden ought, before over-ruling that decision, to have directed another case for opinion. And if the appellants stood merely on point of practice it was clear that the question whether the decree had been enrolled or not was so doubtful that the safe course to pursue was for the Lord Chancellor to open the [515] enrolment, with a view to a rehearing, the affidavits showed that the Master of the Rolls held there had been no enrolment. It appeared that the solicitor for the appellants lodged two engrossments of the decree in the rolls office, the first transmitted by the registrar, and the second by his six clerk; but these were mere transcripts of the decree, made up in the short form as directed by the new rules, which new rules do not apply to enrolment of decrees or alter the practice with respect to enrolments; and all that the deputy keeper of the rolls could certify was, that a parchment copy of the decree, signed by Sir Edward Sugden, Chancellor, had been lodged at the office; thus the decree had not been duly enrolled according to the established practice of the Court. It was at least a doubtful question whether the new rules had changed the practice, and it was, therefore, a fit case in which to exercise the discretionary power of the Court to open the enrolment, and not to suffer the party to be prejudiced by the uncertain state of the practice; because, by reason of the appellants joining as they have done, it is incompetent for them to object to the opening of the enrolment of the said decree.

There was a mistake, in point of fact, as to the relief prayed against, the sale in the exchequer having been waived; the sale was waived and had been waived long before, but the relief against it was never waived. In point of law, though a sale be made subject to impeachable leases, they may be afterwards impeached, especially if the purchaser do not object, as in this instance.

Besides, the decision of the Court of Common Pleas was right, but in any event, ought not to have been over-ruled, (as it was by Sir Edward Sugden's decrees,) [516] unless upon a case sent to another court, which was offered by Lord Plunket but declined by the appellants.

Lord Chancellor.—My Lords, in this case I felt particularly desirous to deliver my judgment in the presence of the counsel who argued it; so long a time having

elapsed I think it right to enter more minutely into the facts of the case, in as far as they bear upon the two points which were raised in the argument.

The first point in this case is one of form and practice, namely, whether the decree appealed from was regular? or in other words, whether it was competent for the court in the then state of the proceedings to pronounce such a decree? In order to come to a conclusion upon this point it will be necessary shortly to examine the different interests of the parties to the cause.

In 1775 Anne Fitzmaurice was seised in fee of the Springfield estate, subject to a charge of £5000 vested in John Godley, and in fee absolutely of two other estates, called Farrihy and Gortaheedy. She married Sir Robert Deane, and her mother-in-law Hester making a claim upon the estate, it was arranged that she should accept an annuity charged upon a ninety-nine years term over all the estates in full of her demand.

In 1779 a post-nuptial settlement was made of the estates of Springfield and Farrihy, under which the questions in this cause arise. Under that settlement, after life estates to the husband and wife, the estates were limited to the two sons then living for life, remainder to their sons in tail male, remainder to any other sons of the settlor in tail; power was reserved to [517] Sir Robert Deane of granting leases and of charging the estate with £20,000.

This power of leasing he exercised by granting a lease dated 26th August 1779, which is now vested in the appellants William John Sheehy and Bryan Sheehy; by granting another lease, dated 28th October 1779, now vested in the appellants Edward and John Sheehy; by granting another lease, dated 4th June 1780, now vested in the appellants Ann Westropp and Thomas Johnston Westropp. He also exercised the power of charging the estate by two mortgages to St. John Chinnery, one dated 29th April 1780 for £6000, and the other 7th April 1783 for £4500.

On the 18th November 1802 a decree was made in a suit instituted to compel payment of the arrears of the annuity secured to Hester under the deed of the 20th June 1776, the right to which was then vested in Lord Westcote by mortgage of the estate charge; and it was by that decree declared that the leases were fraudulent and void as against their charge, and that the tenants were to account for the full value from the year 1784, but the tenants were to be at liberty to redeem the charge, and as against the estate to be repaid what they might pay for that purpose either by way of rent or sums advanced by them. This suit was instituted in 1782, and soon afterwards, that is, in 1784, Chinnery the mortgagee filed a bill in the Exchequer to foreclose, and in 1787 a decree was made merely of reference to take the accounts, and soon after the decree in the chancery suit, that is, in December 1802, Lord Westcote assigned to Chinnery the mortgagee all his interest under the decree of the 18th November 1802.

[518] On the 19th February 1807 a decree of foreclosure was made in the Exchequer suit, upon the report of the deputy remembrancer, who found a large sum due upon Chinnery's mortgage, but subject to the decree in Chancery of November 1802, and to the leases, and to another mortgage of £5000 then vested in Godley, but which was afterwards assigned to Chinnery the plaintiff. Under this decree a sale of the Springfield and Farrihy estates took place before the remembrancer, and Alice Chinnery, in whom the mortgage was then vested, became the purchaser, but subject, according to the decree, to Lord Westcote's charge, Godley's mortgage, and the leases.

In 1812 a conveyance was directed to be made under their purchase, but it was not executed except by the deputy remembrancer. In 1819 a bill was filed in the Court of Chancery in Ireland by the respondent, then first tenant in tail, and the other parties then interested under the settlement of 1779, impeaching the title of the mortgagees and of the leasees. In 1832 the cause came to be heard before Lord Plunket, who directed a case for the opinion of the Court of Common Pleas as to whether the leases were warranted by the power. In February 1834 the certificate of the Common Pleas was obtained, finding that the leases were not warranted by the power contained in the settlement of the 25th May 1779.

Before the cause came on for hearing upon this certificate, an arrangement having taken place between the plaintiff, the now respondent, and the Chinnerys, in whom the mortgages and Lord Westcote's charge were then vested, the Court was informed that no judgment was required as between the plaintiff and the mortgagees; [519]

upon which Sir Edward Sugden, then Lord Chancellor of Ireland, expressed his opinion that the plaintiff having waived all relief against the mortgagees, and as to the sale in the Exchequer suit, no judgment could be pronounced as to the leases, and therefore dismissed the bill as against the defendants claiming the several leases. Before this time, that is on the 5th February 1835, one of the parties interested in the mortgages being a lunatic, a reference was made to inquire whether the proposed arrangement would be for the benefit of the lunatic; and after the decree, that is on the 8th April 1835, the master reported in the affirmative. This decree, according to the case made by the defendants, was enrolled, but that is denied by the plaintiff.

On the 8th May 1835 an order for rehearing was made as of course; and on the 28th May 1835, upon an application by the appellants to discharge the order for rehearing, an order was made to open the enrolment for the purpose of the rehearing.

On the 13th July 1835 Lord Plunket pronounced his decree upon the rehearing, carrying into effect the terms of the arrangement giving to the plaintiff the benefit of the redemption on payment of the sum agreed to be paid upon account of the mortgages and charges, and as against the lessees declaring the leases void, they having declined to take another case for the opinion of the King's Bench.

The appeal is against the order of the 8th May 1835 for a rehearing, the order of the 28th May 1835 opening the enrolment, and the final decree of the 13th July 1835. The two first may be considered together, the question as to both being the regularity and propriety of the order for rehearing, that is whether [520] under the circumstances the Court was precluded by the enrolment from rehearing the cause.

It appears from the affidavit of Mr. Furlong that it was a subject of doubt whether there had been in fact any enrolment of the decree; the deputy keeper of the rolls having objected to the engrossments left with him, as being merely copies of the decree in the short form, and that he had, therefore, consulted the Master of the Rolls, who was of opinion that they were not to be considered as an enrolment, and therefore he declined to give any certificate of the enrolment, and, in fact, there was not any such certificate. Mr. Furlong, the plaintiff's solicitor, having received this information, explains the reason of his not having made any application to the Court to vacate the enrolment; but it appears that the defendants, Edward and John Sheehy, moved to set aside the order for a rehearing upon the ground of the decrees having been enrolled, whereupon Lord Plunket ordered that the enrolment should be opened, for the purpose of rehearing the cause.

There certainly is a want of regularity in this proceeding, which may perhaps be accounted for by the doubt which appears to have existed as to whether there had in fact been any enrolment; and if the Lord Chancellor was of opinion that under the circumstances there had been no enrolment, or that there was doubt about it, or that if the enrolment were good there was sufficient ground for vacating it, he may have thought it right to remove the doubt by his order of the 28th May 1835. The question, however, now is, whether it be necessary to dispose of this appeal upon the ground of this irregularity, and after all the expense and delay which has been experienced to send the parties back to [521] commence their proceedings *de novo*, so far as to make it necessary for the present respondent to appeal against the decree of the 12th February 1835, instead of deciding any of the questions between the parties upon the appellants appeal against the decree of the 13th July 1835.

A court of appeal is always unwilling to adopt such a course when it is possible to reach any of the merits of the case. In questions respecting the enrolment of decrees, the court exercises a discretionary power, and although such discretion ought to be regulated by precedent and authority, yet the circumstances of this case were very peculiar, and I think that your Lordships will not consider it to be your duty upon this question of form to refuse to entertain the other points in the cause.

If then your Lordships feel at liberty to consider the merits of the decree of dismissal of the 12th February 1835, it is material to consider that the decree contains in its recitals the grounds upon which it was founded. It recites that the plaintiff had by his counsel in open court waived insisting on any relief in respect to the final decree in the exchequer and the sale made in pursuance thereof, and that it appeared that the lands had been sold subject to the leases. It proceeds then



to dismiss the bill against the lessees with costs. It is unnecessary to consider whether, if these recitals in the decree of the plaintiff having waived insisting on any relief in respect to the decree of the exchequer, and the sale made in pursuance thereof, were consistent with the fact, it would necessarily lead to a dismissal of the bill against the lessees, because it appears to me evident from the proceedings independently of the affidavits, [522] that the recital must have been inserted from a misapprehension. It is indeed stated in one of the affidavits that it was introduced after the hearing, and this is not contradicted, but upon a rehearing there can be no reason for binding the plaintiff by this evident mistake by the officer of the court. The whole transaction proves that the plaintiff's counsel could not have done what the decree recites, because the arrangement with the Chinnerys was to be carried into effect by a decree. The proposal was, that the defendant should submit to a decree, and a reference had been obtained to inquire on behalf of one of them, who was a lunatic, whether it would be for the benefit of such lunatic to submit to the proposed decree. Now, from the terms of the recital, it would be inferred that the plaintiff had waived all relief against the decree and sale in the exchequer. Whereas in fact the defendant had at the time agreed, subject to the inquiry, to submit to a decree in the plaintiff's favour. This having been so arranged the counsel might naturally have informed the court that the plaintiff had not to trouble the court to adjudicate as against the Chinnerys, but not because the relief against them had been abandoned, but because the terms of it had been arranged, and this no doubt led to the mistake.

If this had been rightly understood at the time, I cannot think there would have been a decree of dismissal without any decision upon the merits. A decree so arranged with the Chinnerys must have had the same effect as if the Court had pronounced it, with this difference only, that the lessees might themselves have disputed the plaintiff's title to any interest in the estate. It was not competent for any of the defendants at the [523] hearing to insist that the relief prayed against the Chinnerys and against the lessees had been improperly joined in one suit; and if not, and if the plaintiffs had shown a good title to relief against the Chinnerys, and had so established an interest sufficient to entitle him to dispute the validity of the leases, the Court could not have declined to adjudicate upon the subject.

It was indeed contended, that independently of this title to question the leases, there was sufficient interest left in the plaintiff, notwithstanding the sale in the exchequer, to entitle him to ask a decree to set aside the leases, the sale having been subject to the leases, so that nothing more was disposed of than what remained of the estate, after deducting the interests comprised in the leases; so that so much of such interest as had not been effectually given to the lessees, not belonging to the lessees and not having been sold, remained undisposed of in the original decree, that it is not necessary to give any opinion upon that point, because if the plaintiff had an equity to set aside the decree in the exchequer and the sale had in pursuance thereof, or if these proceedings were in themselves defective, his title to raise the question respecting the leases cannot be disputed, and I have the satisfaction to find from the printed report that Sir Edward Sugden entirely concurs in this view of the case, and gives it as his decided opinion that the suit was not in its original joinder multifarious, but that the plaintiff, disputing the title of the mortgages under the decree in the exchequer and the sale, was clearly entitled in the same suit to raise his objection to the leases. If then he was so entitled to assert in one suit his equity as against the decree and sale, and also [524] against the lessee, he must have been entitled in that suit to relief as to both, if he succeeded in making out his case. Suppose at the hearing he had made out his case so far as to set aside the decree and sale in the exchequer, or to prove that they were defective and void, and that he was, therefore, still entitled to the equity of redemption, he would, no doubt, in that case have been entitled to ask of the court a decision as to the leases, and this right could not properly depend upon the greater or less degree of resistance which the mortgagees might make to the plaintiff's title to relief as against them. If, at the hearing, they had by their counsel said that they could not resist the plaintiff's title to redeem, the hearing, as against them, would have been closed, and the title as to the lessees would alone have remained for decision; but this is, in fact, what was done,—the terms upon which the plaintiff was to have his decree against the mortgagees had been the subject of negotiation, but the groundwork of the whole was

that the plaintiff should have a decree for redemption against them, nor could the defendants, the lessees, be in any degree prejudiced by this, for, notwithstanding this arrangement, it was quite competent for them, and it necessarily formed part of their case, that the plaintiff had no title to question the leases, not having in him sufficient estate and interest to enable him to do so. For this purpose it was part of their case to insist that by the decree in the exchequer, and the sale had in pursuance of it, the plaintiff had lost that estate and interest which was necessary to enable him to question the leases, and this was as much open to them after the arrangement with the mortgagees as before it took place, for if the lessees could show that before that arrangement [525] the plaintiff had not any such estate and interest, his acquiring the estate and interest of the mortgagees, even before the hearing, would not have improved his situation, but, in fact, he had it not at that time. If, as seems to have been understood at the time, the plaintiff had consented to the mortgagees keeping the estate under the sale, the plaintiff's position as between himself and the lessees would, no doubt, have been materially altered; but as the arrangement was that he should redeem the mortgages, I think that he was as much entitled to a judgment against the lessees, according to the merits, as if he had proved his title to redeem adversely against the mortgagees.

Possibly the lessees may have relied upon the mortgagees fighting that part of the case which turned upon the want of title in the plaintiff, but as it was undoubtedly competent for the lessees to have done that themselves, they cannot complain if a decree has passed against them from their having omitted to insist upon a point in the case which was open to them.

It appears to me, therefore, that your Lordships must come to the conclusion that the grounds for the dismissal in February 1835 cannot be maintained; if that be so, it appears to me that there is the greatest difficulty in your Lordships proceeding any further in adjudicating upon the question between the parties,—I mean so as to pronounce any judgment upon the leases,—as to which the case stands thus: there has been no adjudication below upon that subject; there is the certificate of the Common Pleas against the leases; there was an argument in February 1835 before the Lord Chancellor of Ireland, assisted by the Chief Justice of the Common Pleas and the Chief Baron, but no judgment was [526] pronounced upon it, the Lord Chancellor having been of opinion that the suit must be dismissed upon the point of form already observed upon. He, indeed, expressed a strong opinion in favour of the leases, but carefully guarded against any inference that he was deciding upon their validity. When the cause came on again before Lord Plunket the lessee declined taking any other case for the opinion of the Court of King's Bench, and Lord Plunket made his decree setting the leases aside.

After the opinion of one court of law has been obtained upon a case, if the equity judge entertains doubts as to the opinion returned, or thinks the case of so much difficulty and importance as to require further consideration, it is almost of course to send it for the opinion of another court; it is certainly not necessary so to do, as the judge in equity may take upon himself to decide against the opinion of the court of law, but clearly the parties cannot require him so to do, or complain of his declining to decide the question without further assistance. If, therefore, the parties against whose case the judges have certified decline the offer of the court to have another case sent to another court, they cannot complain of the judge acting upon the opinion already obtained, and in an ordinary case I should not think your Lordships would be exercising a sound discretion if you were to open the door to further litigation on behalf of a party who had declined to accept the offer of the court below, to put the case in the ordinary course for final adjudication.

But there certainly are great peculiarities in the present case; what had taken place in the cause may naturally have led the lessees to think they had a good [527] ground for getting rid of the suit, without referring their title to further question, which ground they must have abandoned had they accepted the offer of a second case. I do, therefore, think, that it would be hard and might lead to injustice if we were to bind them by their refusal to accept that offer, particularly in a case in which there has been such a conflict of opinions upon the point of law, and I am the more inclined to think so because I do not see in the last decree any such inquiries and reservations of right, as it would seem the lessees would be entitled to before their leases could be taken away; for instance, I find that in the decree of 1802 they are ordered to account from

1784 to the party entitled to the arrears of the annuity, without reference to the amount which has been given upon the leases. Now, before that can constitute a part of the claim of the Chinnerys, the lessees have a right to reserve those payments against the estate, and to stand in the place of that party for what excess of rent they might so pay or what they might themselves advance. What was done upon this does not appear from the appeal papers, but it is obvious that a considerable demand may have arisen in favour of the lessees from the provisions of that decree, but the decree of July 1835 simply declares the leases void, and proceeds to put the plaintiff into possession.

Now, it is very possible that these and other points may have been overlooked in the contest which was going on as to the principal matters in issue, and this affords another reason to induce this House not to attempt finally to settle the decree between the parties. It is, however, quite sufficient, that as to the question as to the validity of the leases there has been no judgment [528] below, except the last decree, which proceeds upon the lessees refusal to accept the offer of another case, and which, for the reasons I have given, I think ought not to bind them. I think, therefore, that for the purpose of obtaining such an adjudication the case must be sent back to the Court of Chancery in Ireland; that court will of course use its own discretion as to the manner of disposing of that question, that is, whether by deciding it itself or calling for further assistance from another court of law. My object is, that this question should come before the court relieved from the difficulties with which it has hitherto been embarrassed, and this, I think, will be attained by this House declaring that it was competent for the Lord Chancellor of Ireland, at the time of making the decree of the 12th February 1835, to adjudicate between the plaintiff and the defendants the lessees as to the validity of the leases, and, therefore, to remit the case to that court to be heard upon that question, and to make such decree between the plaintiff and such lessees as shall be just.

It is true, that if the lessees should adhere to the course they followed below of declining another case, and if they require no inquiries as to advances made by the lessees, expense might be saved by your now dealing with the case upon that ground; but unless I am so informed I shall not suppose that to be the case. I therefore move your Lordships that the case be remitted to the Court of Chancery in Ireland with the declaration and direction proposed.

The House of Lords declared, That it was competent for the Lord Chancellor of Ireland, at the time of making the decree of 12th of February 1835, to adjudicate between the plaintiff and the defendants, the lessees, in the said suit in the [529] Court below, as to the validity of the said leases: And it is ordered, That with this declaration the cause be remitted back to the Court of Chancery in Ireland, to be heard upon that question, and to make such decree between the said plaintiff and the said defendants the lessees as shall be just, and consistent with this judgment.

D. S. BOCKETT—J. P. BEAVAN, Solicitors.

[530] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

JOHN BOYLE GRAY,\* *Appellant*.—Knight Bruce—Hill; The Rev. JOHN FORBES and Others (Outer Kirk Session of the High Church of Glasgow), *Respondents*.—Tinney—John Stuart [13th June 1839].

[Mews' Dig. i. 335, 354, 364; iii. 254. See 5 Cl. and F. 356.]

*Trust—Contract—Burgh*.—(1) Where funds were vested in the magistrates and council of a burgh as trustees, to apply the yearly produce in the support and maintenance from time to time of "schools" taught on the Madras system, and the town council entered into an agreement with the several kirk sessions in the burgh, binding themselves and their successors to pay over the dividends equally among the kirk sessions, each of the latter becoming bound to lodge annually with the council a vidimus, "showing definitely that the dividend was to be strictly applied in the promotion of the system of education proposed by the donor, and accompanied by an obligation by the kirk session to apply the same accordingly," and so long as each kirk session did so, "and

\* 15 D., B., and M., 628.

satisfied the town council " that the contract was duly performed, it should have right to its share of the dividend, and not otherwise, provision being made for admitting members of the town council to the annual examination of the schools " to satisfy themselves of the *bonâ fide* and legitimate application of the dividend," [531] and the contract bearing that this was done strictly in terms of the deed of donation ; The town council of a subsequent year having refused to implement the contract,—Held (affirming the judgment of the Court of Session) that the contract was strictly within the competency of the magistrates and town council as trustees, and that the performance of such contract was binding on all parties.

- (2.) It having been determined by the House of Lords (3 Sh. and M'Lean, 381), that one member of the town council might competently appeal against the judgment of the Court of Session, the appellant was allowed to plead every objection to the performance of the contract urged in that Court, although the council as a body had acquiesced in the judgment appealed against, and had, by a farther agreement with the kirk sessions, arranged the details preparatory to the execution of the trust.

*Costs.*—Costs, including those incurred by respondent in unsuccessfully opposing, on the ground of incompetency, an appeal, which was afterwards dismissed on the merits, awarded against the appellant.

The late Rev. Dr. Andrew Bell of Egmore, prebendary of the collegiate church of St. Peter Westminster, by deed of indenture, executed between him and the provost and certain clergymen and professors of St. Andrew's, dated the 14th day of July 1831, gave and transferred to these parties the two several sums of £60,000 three per centum consolidated bank annuities, and £60,000 three per centum reduced bank annuities, on the recital, " that the said Dr. Andrew Bell, the author of the system of education called the Madras System, considering that the progress of the said system in his native country of Scotland had hitherto been slow [532] and imperfect, and that the greatest boon he could confer upon that country would be by taking measures for the more effectual diffusion of the said system therein ;" and, therefore, the trustees were taken bound to divide the stocks or sums into twelve equal parts, and, *inter alia*, to transfer one twelfth part thereof to the provost, magistrates, and town council of Glasgow ; but upon condition, " that the sum so to be transferred to them should be by them, and their successors, employed for the founding or maintenance of a school or schools in that city for the instruction of children, whether male or female or both, in the ordinary branches of education, but so that the tuition at every one of the schools be upon the system of mutual instruction and moral discipline exemplified in the Madras school ;" and that the magistrates and council " should stand possessed of the said stock, so to be transferred to it as aforesaid, upon trust for ever, to apply the interest and dividends thereof in the support and maintenance, from time to time, of schools already founded or hereafter to be founded on the principles of the said Madras system, such funds either to remain as invested, or to be invested on any government, heritable, or other sufficient securities, as might from time to time be thought fitting ;" and that, before any appropriation or application of the said stock, they should execute a declaration and acknowledgment of acceptance by them of the several trusts declared in the said indenture. The provost, magistrates, and council of Glasgow having accepted the shares of stock upon the terms mentioned in his said deed, amounting to £9791 13s. 4d., which was transferred to them upon the 18th day of [533] November 1831, executed a declaration of trust, binding themselves and their successors in office, in all time to come, upon or for the trust following ; viz. " That we and our successors in office shall for ever apply the dividends and interest of the foresaid sums, or of the proceeds thereof, in the support and maintenance, from time to time, of a school or schools already founded, or to be founded, in the city of Glasgow, on the principle of the system of mutual instruction and moral discipline, as exemplified in the Madras school, or in what is known by the name of the Madras System." In October 1833 ten contracts or agreements were executed between a committee representing the magistrates and town council of Glasgow on the one part, and the committees of the ten kirk sessions of Glasgow, as authorized by the said kirk sessions respectively, on the other part, the contract with the pursuers bearing that

"it had been agreed between the said first party and the several kirk sessions of Glasgow that, in order more extensively and effectually to promote the system of education contemplated and prescribed by the Reverend Dr. Bell, the annual interest or proceeds of the foresaid two sums now vested in government securities should be equally divided among and paid over, half yearly, to the different kirk sessions, upon their severally executing the said contracts; therefore the said second party, as representing one of the kirk sessions, and, in particular, the pursuers, or some of their number, as representing the kirk session of the foresaid Outer High Church and parish of Glasgow, and as taking burden on them for the same, bound and obliged themselves, and their successors in office, to [534] lodge in writing with the secretary of the said first party, a distinct vidimus or statement of the proposed application of the proportion of the annual interest or proceeds of the said two sums falling to be paid to the said second party, showing definitely that the same is to be strictly applied in the promotion of the system of education proposed by the donor, the Reverend Dr. Bell, and accompanied by an obligation, binding the said kirk session to apply the same accordingly; declaring, that so long as the said second party shall continue to furnish an annual statement or vidimus and obligation, to the effect before mentioned, and shall, from year to year, satisfy the said first party that the same has been followed out and carried into execution, the said second party, and their successors in office, shall be entitled to draw the proportion before mentioned of the foresaid annual interest or proceeds from the said first party; but in the event of the said second party failing to lodge the said annual statement or vidimus and obligation, or failing to satisfy the said first party of the same having been carried into effect, they shall forfeit their right to the proportion of the said interest or annual proceeds falling to be paid to the said kirk session, and the said first party shall be entitled to apply the same as fully and freely as if the said contracts had never been executed. And, farther, the said second party bind and oblige themselves, and their successors in office, to hold annual examinations of the schools to be established or maintained, either partially or totally, by the proportion of the interest or annual proceeds payable to them as before mentioned, and to give to the secre-[535]-tary of the said first party at least six days previous notice of the time fixed for that purpose, so that the said first party, one or more of them, may have an opportunity of attending the said examination, and becoming satisfied with the *bonâ fide* and legitimate application of the foresaid annual interest or proceeds; and, particularly, that the same are applied agreeably to the said contracts, and strictly in terms of the deed of donation executed in favour of the said first party by the said Reverend Dr. Bell." Within a few days after the execution of the several contracts above mentioned a vidimus or statement was lodged by each of the said ten kirk sessions, and particularly by the respondents, to the following effect:—"In terms of the contract entered into between the lord provost, magistrates, and town council of Glasgow on the one hand, and the session of the outer high church on the other hand, of date the 16th and 28th days of October 1833, the said session hereby undertake that there shall be conducted, under their inspection, a school or schools for teaching English reading, grammar, and religious knowledge, with such other branches of education as may be required, said school or schools to be divided into classes, over each of which a monitor shall preside, and under the charge of a master or masters appointed by the kirk session, and for whom they shall be responsible, and that the sum of at least £50 shall be expended in instituting and carrying on said school or schools, during the period of twelve months from this date." These contracts were approved and ratified by Dr. Bell's trustees.

The new town council, elected under a recent muni-[536]-cipal act (3 and 4 W. 4. c. 76) for Scotland, refused performance of contracts thus duly executed, alleging that the same were not in accordance with the trusts under which the funds had come into the hands of their predecessors in office. An action was brought by the respondents, as representing the kirk session of the Outer High Church of Glasgow, founding upon the contracts, and concluding "that although the pursuers have fulfilled their part of the said contract in every respect, and are still willing to do so, and although, upon the faith thereof, they have expended considerable sums of money, and entered into various engagements, and matters are not now entire, yet the said magistrates and council refuse to comply with their part of said contract, and to pay over to the pursuers the share of the said dividends or interest,

payable to them in terms thereof; and although the pursuers have frequently desired and required the said lord provost, magistrates, and town council of the city of Glasgow to fulfil their part of the said contract, by making payment to the pursuers of their said share of the said dividends, in terms of the said contract, yet they refuse or delay so to do; therefore the said lord provost, magistrates, and council of the city of Glasgow, and the Hon. William Mills, lord provost, William Gilmour, James Lumsden, John Fleming, William Craig, and John Small, esqrs., bailies; James Martin, esq., dean of guild; Archibald M'Lellan, esq., deacon convener; and Messrs. Hugh Tennent, John Boyle Gray, etc., as councillors, for themselves and as representing the burgh and community of [537] Glasgow, ought and should be decerned and ordained, by decree of the lords of our council and session, to make payment to the pursuers of their proportion, being one tenth part or share of the annual interest, proceeds, or dividends which have already accrued or may hereafter accrue on the foresaid two sums of £4895 16s. 8d., making together £9791 13s. 4d., transferred to the said defenders as above mentioned, and that half-yearly, agreeably to and in terms of the contract between them and the said pursuers before narrated, in all time coming, so long as the pursuers shall fulfil and observe their part of the said contract," together with interest, penalty, and expenses.

In defence it was pleaded, 1st, that the pursuers had no title to pursue; 2d, that the contract sought to be enforced was invalid and illegal, contained no proper operative obligations capable of being specifically enforced against either party, and *ultra vires* of the defenders' predecessors, as trustees under Dr. Bell's trust, and still more of any committee of their number, to enter into, or at all events to enter into so as to tie up the hands of the successors. The sound construction and the true intent and meaning of the trust was, that "the corporation of the provost, magistrates, and town council" should, from time to time, and according to what they might themselves deem expedient and proper under every change of circumstances, at their own discretion, in their own judgment, and on their own responsibility, direct the application of the trust funds, and conduct the whole administration and management of the trust, so as might best answer for the time the ends and purposes of the truster; [538] whereas the arrangement in dispute implies a surrender of all their most important rights and functions as trustees, and a delegation of these functions to others, permanently, and without the least control on their part, so far as regards the whole essential details connected with a proper discharge of the trust; 3d, in the circumstances the defenders, who are not satisfied that the arrangement in question is at all calculated to carry into effect the purposes of the truster, or even that it has been duly implemented in its own terms on the other side, were not bound by the contract libelled.

The Lord Ordinary, having advised cases for the parties, pronounced this interlocutor (29th November 1836): "The Lord Ordinary, having considered the revised cases for the parties, repels the objection to the title of the pursuers; and on the merits finds that the agreement libelled between the magistrates and town council of Glasgow on the one hand, and the pursuers on the other, cannot be held as a valid execution of the trust created in them by the deed of the late Dr. Bell, but truly imports a devolution of that trust on the pursuers, for such time as the pursuers choose to undertake it: Finds, that such agreement on the part of the magistrates and town council for the time was *ultra vires*, and cannot bind their successors in office. Therefore assoilzies the defenders from the general conclusion, that in all time coming, the part or share of the annual interest or dividend libelled shall be paid over to the pursuers; but appoints the case to be enrolled, that parties may be farther heard on the pursuers' claims for reimbursement, out of the annual interest or dividends [539] falling due since the date of the agreement, of any expense that may have been incurred by them in the maintenance or establishment of a school or schools conducted in terms of that agreement, and decerns.

(Signed) JOHN FULLERTON."

"Note.—Whatever may be the peculiarity of the constitution of the kirk session of the Outer High Church of Glasgow, and of the other kirk sessions of that city, the Lord Ordinary has no doubt that the members of that kirk session, being the parties with whom the alleged contract was entered into, have a title to insist in

the present action, seeking to enforce it. But, upon the merits, the Lord Ordinary thinks the action cannot be sustained.

"By the deed of indenture entered into between the late Dr. Bell and the persons who may be called his general trustees, the magistrates and town council were appointed trustees for the special purpose of establishing or maintaining schools on the Madras system in the city of Glasgow. The words of the trust are very general, and the Lord Ordinary thinks that these trustees had full power to bind themselves and their successors in office, in all contracts entered into in the execution or furtherance of the objects of the trust; accordingly, it rather appears to him that a contract, binding themselves to pay annually the whole, or any part of the dividends or interest, under their management, to the pursuers, or any public body or individual having the power to undertake, and absolutely undertaking, for the permanent establishment or maintenance of a school, taught on the Madras system, would have been a valid exercise of their power as trustees. If, by a transaction with [540] parties invested with the management of an existing school, they could, at a comparatively small annual expense, have permanently secured the conducting of that school on the Madras system, such transaction would have evidently been a fair and most advantageous act of administration. But the agreement libelled is one of a very different kind; the kirk session of the Outer High Church and the other kirk sessions have no powers to undertake such an obligation, nor do they profess to undertake it by the alleged contract forming the ground of the present action; while, on the one hand, the magistrates and town council irrevocably bind themselves to make over, all time coming, the whole dividends and interests, in certain proportions, to the kirk sessions of the city of Glasgow, the pursuers, and those other kirk sessions, only undertake to furnish annually a 'vidimus,' showing that those shares of the dividends or interests are to be 'applied in the promotion of the system of education proposed by the donor, Dr. Bell,' which *vidimus* shall contain an obligation binding them to apply such annual payments accordingly. And the only consequence of their failure to furnish that 'vidimus,' and to satisfy the other party of the same having been carried into effect is, that the kirk sessions or kirk session that fails shall forfeit their right under the contract, and that the magistrates and council shall be entitled to apply the funds so forfeited as if the said contract never had been entered into.

"The Lord Ordinary cannot hold this to be a contract; the only obligation on the pursuers and the other kirk sessions is to apply funds, to be [541] annually placed in their hands, 'in the promotion of the system of education proposed by the donor,' being just the general obligation imposed by the trust; and, in this particular, the pursuers do not disguise that they claim a very considerable latitude, for they fairly state in their condescendence, that it is neither required in the contract or the vidimus that a school or schools should be established in each parish; in short, they assert under the transaction a permanent right to a certain share of the trust revenue, under the single obligation of applying it to the purposes of the trust, and that only so long as they choose to undertake the duty. It appears to the Lord Ordinary that this is not a contract, in the proper sense of the term, but truly a delegation of the powers of the corporation, a substitution of ten trusts, to be vested in the ten kirk sessions of the city of Glasgow, for that single trust established by Dr. Bell. Whether or not the attempted transaction might not secure a more beneficial employment of the fund is a different question, but that question has been determined by the truster himself, whose will must, in this particular, be the law.

"Holding this opinion, the Lord Ordinary thinks the general conclusion to the action, that a particular proportion of the annual dividends shall be paid to the pursuers in all time coming, cannot be sustained. But there may be a question, whether the pursuers, if they have maintained a school on the Madras system since the agreement was entered into, may not be entitled to some reimbursement for any expense thence incurred, out of the annual interests or dividends fallen due since the date of the agree-[542]-ment, and now in the hands of the defenders; and as that question has been hitherto little if at all touched upon by the parties, the Lord Ordinary has directed the case to be enrolled for further argument on that point, before finally disposing of the cause."

The respondents reclaimed on the merits, as did also the appellant and the other trustees, in so far as the interlocutor repelled the objection to the title of the respondents to pursue. The Lords of the First Division pronounced the following interlocutor (21st Feb. 1837): "The Lords having advised this reclaiming note, and the reclaiming note for the defenders, refuse the reclaiming note for the defenders, and adhere to the interlocutor reclaimed against in so far as it repels the objection to the title of the pursuers; *quoad ultra*, alter the said interlocutors, and find the agreement libelled between the pursuers and defenders is in due conformity with the trust deed of the late Dr. Bell, and a valid and effectual agreement, and therefore decern against the defenders in terms of the conclusions of the libel: Find the defenders liable to the pursuers in expenses, and remit the account thereof, when lodged, to the auditor of court to tax the same and report, with this declaration, that no part of the expense of this litigation shall form a charge on the trust funds of Dr. Bell."

The details of the future arrangement of the funds were in consequence of this decision arranged, and a compromise was effected to the satisfaction of the members of the magistracy and town council, with the exception of Mr. John Boyle Gray, who appealed.

The petition of appeal having been presented and intimated in common form, an application was made by [543] petition, on the part of the respondents, praying that the appeal should be dismissed. The reasons relied upon were in substance that the appellant being only an individual trustee was not entitled to act against the vote of the council, or appeal against proceedings which it was alleged had been taken against the council in their corporate capacity only. The House of Lords ordered that the question of competency should be argued in cases; such pleadings were accordingly prepared and laid before their Lordships. After having considered these cases, and heard counsel, the House of Lords pronounced the following order:—"Die Jovis, 16o Augusti 1838.—*Gray v. Forbes*.—Respondent's petition to dismiss appeal as incompetent considered, and respondent's petition dismissed, and the appeal sustained. Costs to be reserved until the hearing of the appeal" (3 Sh. and M'Lean, 381).

The cause having come on for hearing on the merits:—

*Appellant*.—The former argument on the competency was resumed, to the effect of showing the title as well as interest of Mr. Gray to resist the performance of a contract which he deemed illegal, and in the illegality of which he, as a councillor, would be implicated.

On the merits it was contended, that in terms of the trust deed, and deed of acceptance thereof, the trustees are themselves bound to exercise the whole powers, rights, and duties entrusted to them; therefore, they could not legally and validly devolve upon or delegate [544] to others those rights, powers, and duties, in anywise to restrain or fetter themselves; and, consequently, any such devolution, delegation, or restraint in the exercise of them was invalid and illegal.

In no case had the appellant discovered even an approach to that construction of discretionary powers for which the respondents contend. In the case of *Hill and others v. Burns and others* (2 Shaw and Wilson's Appeal Cases, p. 80), decided by the House of Lords on the 4th of April 1826, the doctrine of discretionary power and the relative authorities were fully considered. Where powers of distribution amongst a certain class of persons not precisely described are conferred upon trustees, they have a discretionary power of distributing among such persons and in such a manner as they shall deem most in accordance with the implied will of the truster. This was held to be the import of the case of *Dick v. Fergusson* (Mor. 7446), 22d January 1758; of that of *J. Wharrie v. the distant relations of Edward Wharrie* (Mor. 6599), 16th July 1760; and of that of *the trustees of John Burn v. his relations* (Mor. 2318), 3d August 1762; and was rendered effective in the case of *Hill and others v. Burns and others*. In those cases discretionary powers to that extent were held to have been conferred; and the principle was sound, because necessary for explicating the will of the granter. But neither in those cases nor in any other were discretionary powers in the management of details held to confer a right to devolve or delegate the trust. A trust can no more be delegated in Scotland than it can in England; and this is not a trust the execution of [545] which can be per-



formed by any parties except those expressly appointed by the deed. It is no answer that the court can control the trustees, for that is but an imperfect remedy. The true question is, what the donor intended; and in the consideration of that question it is to be borne in mind that the larger the powers it is less likely he meant that they should be devolved on others.

Assuming the contract to have been executed by parties invested with sufficient powers, the rights, powers, and duties of the trustees were devolved upon and delegated by them to the kirk sessions, whereby they ceased to be the administrators; or by the alleged contract, if valid and binding, they did so fetter and restrain themselves as to cease to have the rights, powers, and duties confided to them by the granter.

Farther, the magistracy presumed to act as a body corporate; if they are not so, then they have no power to bind their successors (*Pollock v. Turnbull*, 5 Sh. 195. 199). The respondents counsel were not called on.

The Lord Chancellor moved, That the interlocutor be affirmed, with costs; stating, that if the appellant be right, that he has such an interest in the fund as to dispute the judgment, he cannot object to being made a party; and if properly a party he is properly made liable with the others. Upon the merits it was clear that the judgment of the Court was well founded. Although the appellant's right to appeal had been sustained, yet he had been recommended to consider of the propriety of pressing his appeal further on the merits; [546] and he was clearly wrong on the merits of his appeal. The interlocutor appealed from ought to be affirmed, with costs, including the respondents costs of discussing the competency of this appeal.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal (which costs are to include the costs incurred by the said respondents in the matter of their petition touching the competency of the appeal, which last-mentioned petition was heard at the bar by one counsel of a side on the 12th day of March 1838, and considered on the 16th day of August 1838, and was dismissed, but the question of costs thereupon was reserved until the hearing of the said appeal), the amount of the said costs to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

ARCHIBALD GRAHAME—SPOTTISWOODE and ROBERTSON, Solicitors.

#### [547] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

JOHN FLEMING,—*Appellant*.\*—Lord Advocate (Rutherford)—Hill; HENRY DUNLOP, *Respondent*.—Knight Bruce—Pemberton—James Anderson.

[13th June, 1839.]

[*Mews* Dig. i. 360; S.C. 7 Cl. and F. 43; and, in Court of Session, 16 Shaw and Dunlop 254, Fac. Coll. 16th Dec., 1837. On point as to not interfering with practice of the Courts below, see *Cowan v. Buccleugh (Duke of)*, 1876, 2 A.C. 344. On point as to Scotch Municipal Reform Act (3 and 4 Will. iv. c. 76), discussed in *Whyte v. Scott*, 1851, 14 Dunlop, 108.]

*Burgh*—Stat. 3 and 4 W. 4. c. 76 (*Scotch Municipal Act*)—*Process*.—An application for suspension and interdict having been made by a party alleging that he had been duly elected provost of a burgh, and founding upon the minutes of election as his title to the possession of the office, and stating that he was molested by a party also claiming to have been elected provost, and who alone was called as a respondent, or was sought to be interdicted; and the bill of

\* Fac. Coll. 16th Dec. 1837; 16 D., B., and M., 254.

suspension having been passed by the Inner House on report of the Lord Ordinary on the bills,—Held (reversing the interlocutor of the Inner House deciding in the Bill Chamber), That, as the validity of the election of the provost could not, under the statute 3 and 4 W. 4, c. 76, be tried by summary application in which the two claimants were alone made parties, the suspension and interdict was incompetent.

Question raised, but not determined, as to the party who (under certain circumstances) was entitled to preside at the election of a provost, and, in case of an equality of votes, to exercise the right of giving a casting vote.

*Appeal*—Stat. 48 G. 3. c. 151.—Held, that an interlocutor, passing a bill for letters of suspension pronounced by the Inner House upon report of the Lord Ordinary on the bills, is not an interim order, and may be competently appealed against, even although the suspender has expedited the letters of suspension before intimation of such appeal.

[548] By the statute 3 and 4 W. 4, c. 76, intituled “An act to alter and amend the laws for the election of the magistrates and councils of the royal burghs in Scotland,” it is enacted, by section 1, that thenceforth the right of electing the town council in such burghs shall be vested in a certain class of the inhabitants possessing a particular qualification, being the same which entitles inhabitants in burghs to vote for a member of parliament under the statute 2 and 3 W. 4, c. 65.

By section 15 it is enacted, “that upon the first Tuesday of November in every year the electors in such burghs shall in like manner, viz. the burghs contained in the said schedule C.” (which includes Glasgow), “in their several wards or districts, and the other burghs, at their general meetings, assemble and elect, in manner herein-before prescribed, in relation to the first election under this act, one third part, or nearly as may be one third part, of the council of such burghs, in the place of the third thereof who shall, as herein-after directed, go annually out of office.”

By section 16 it is enacted, “that upon the first Tuesday in November in the year 1834, and in every succeeding year, one third, or a number as near as may be to one third, of the whole council of each such burgh shall go out of office; and in the said year 1834, the third who shall go out shall consist of the councillors who had the smallest number of votes at the election of councillors in this present year; and in the succeeding year, 1835, the third of the councillors first elected under this act who shall go out shall consist of the councillors who, at such first election under this act, had the next smallest number [549] of votes (the majority of the council always determining, where the votes for any such persons shall have been equal, who shall be the persons to retire); and thereafter the third of the councillors so annually going out of office shall always consist of the councillors who have been longest in office; provided always, that any councillors so going out of office shall be capable of being immediately re-elected.”

By section 17, which relates to the election of magistrates upon the first election of councillors under the statute, viz. in November 1833, it is enacted, “that the councillors of all such burghs not contained in schedule F. to this act annexed,” (which schedule contains only some small burghs, and not the city of Glasgow,) “respectively so elected, and accepting, shall, upon the third lawful day after the election of the whole number of such councillors in the present year, assemble in the town hall, or other usual public place of meeting within such burgh, and shall there, by a plurality of voices, (the councillor who had the greatest number of votes at the election of councillors having a casting or double vote in case of equality,) elect from among their own number a provost or chief magistrate, the number of bailies fixed by the set or usage of such burgh, a treasurer or other usual and ordinary office-bearers now existing in the council, by the set or usage of each such burgh; and shall also elect the managers of any charitable or public institution existing in or connected with such burghs,” etc.

By section 18 it is enacted, “that (with and under the exception herein-after enacted, viz. of certain [550] small burghs,) upon the completion of the first elections of councillors, magistrates, and office-bearers to be made in all the royal burghs of Scotland under the provisions of this act, and not sooner, the provost, magistrates, and office-bearers, and other councillors now in office, shall go out, and their whole

powers, duties, and functions shall cease and determine, except only where any of the said persons shall have been again elected under the provisions of this act."

By section 24 it is enacted, "that when any magistrate or office-bearer (other than the provost or chief magistrate and treasurer) shall be in the third of the council going out of office, the place of such magistrate or office-bearer shall be supplied by election by the council as soon as the full number thereof shall have been completed by the annual election of the third then hereby directed to take place; the said election to be made by plurality of voices, and the chief or senior attending magistrate to have a double or casting voting vote in case of equality: provided always, that the provost or chief magistrate and the treasurer shall always remain in office for the period of three years, and that they, as well as all the other magistrates or office-bearers, shall at all times be capable of being re-elected."

By section 25 it is provided, "that if any vacancy shall in the course of the year occur in the council or magistracy or office-bearers of any such burgh, by death, disability, or resignation, the same shall be filled up, *ad interim*, by the remaining members of the council, by election, as herein-before provided, [551] at a meeting to be called on five days' notice by the town clerk, by intimation in writing to each of such remaining members of council." But this interim election is only to last till the end of the current year in which it is made.

By section 31 it is enacted, "that the magistrates and council and office-bearers to be elected under the provisions of this act shall in all respects stand in relation to the administration of the affairs and property of such burghs, or of property under the care and management of such burghs, in the same situation in which the magistrates and council and office-bearers of such burghs did stand previous to the passing of this act; and the magistrates and council and office-bearers to be elected under the provisions of this act shall have such and the like jurisdiction, and the same rights and powers of administration of the property and affairs of the burgh, and of making all usual and necessary appointments, as heretofore lawfully belonged to and was exercised by their predecessors in office, any thing in the set, usage, or custom of any burgh to the contrary notwithstanding."

By section 36 it was declared, "that all laws, statutes, and usages now in force respecting the royal burghs in that part of Great Britain called Scotland shall be and the same are hereby repealed, in so far as they are inconsistent or at variance with the provisions of this act, but in all other respects the same shall remain in full force and effect." Under its former constitution the town council of Glasgow consisted of thirty-two members, and now consists of that number, [552] including the dean of guild and deacon convener *ex officio*, the two last being elected by the merchants house and trades house.

At the first municipal election under the statute, in November 1833, Mr. Robert Graham was elected provost by the council then chosen. In consequence of his resignation in the following year, Mr. William Mills was chosen provost on 7th of November 1834, an office which by virtue of the statute, sec. 24, he continued to hold for the period of three years. Upon the first Tuesday of November 1837, that is to say, on the 7th of November of that year, the election of councillors for the different wards to supply the places of the ten members or third of the council going out of office as councillors, of whom Mr. Mills was one, took place; and Mr. Mills having been put in nomination, though for a different ward from what he had formerly sat in council for, was again elected.

On the 8th of November a meeting of the town council was held, at which the poll books were opened, and the result of the elections of new councillors declared. At this meeting Mr. Mills attended, and claimed right to preside and act in the declaration of the election of the new councillors, in virtue of his continuing to hold the office of provost till his successor in that office should be appointed. The right to preside at the same meeting was also claimed by Mr. Henry Paul, who held the office of first bailie (being the office next in seniority in the magistracy to that of provost), and who was not of the third of the council who had that year gone out of office. The parties acted, however, by the following opinion of Mr. Reddie, legal assessor for Glasgow:—

[553] "OPINION as to the person who is to cast up the votes, and declare upon whom the election has fallen, on Wednesday the 8th November 1837.

"I am of opinion that, by the 16th section of the burgh reform act, Mr. Mills goes

out of office as councillor this year, as being one of the third of the councillors who have been longest in office. But I am of opinion that the election of councillors is not completed till the declaration on Wednesday; and that by the 24th section Mr. Mills is authorized on Wednesday to cast up the votes, and declare upon whom the election has fallen. As Mr. Mills, however, is a candidate this year for the office of councillor, I am of opinion he is not legally entitled to ascertain and declare the election where he himself is a party, namely for the third ward, and, in these circumstances, I would recommend that Mr. Mills and Mr. Paul should both be present at the casting up of the votes and the declaration of the councillors elected. This is the course which I originally advised, and I still think it the best calculated to prevent all ground of objection to the validity of the proceeding. (Signed) J.A. REDDIE."

" 7th November 1837."

Accordingly Mills and Paul mutually presided, a protest being taken against the former acting.

On the 9th of November 1837 another meeting of council took place for the induction of the new councillors, at which Bailie Paul presided and administered the oaths to the new members, of whom Mr. Mills was one.

[554] On the 10th of November 1837 the council met for the purpose of electing from among their own number a provost and other office-bearers. The minutes of this meeting of council, as authenticated and recorded in the books of council, bear that Mr. Mills stated, that being advised that he was entitled to take the chair, he would occupy it at the present meeting.

Mr. Paul stated that it was his right to preside at the present meeting, and that as Mr. Reddie's opinion was taken on the subject, he moved that it should now be read and engrossed in the minutes, which was accordingly done, and is in these terms:

" OPINION with regard to the proceedings at the election of the lord provost and magistrates on Friday, 10th November 1837.

" I am of opinion that, although the 24th section of the burgh reform act may authorize the individual elected provost to remain a third year in office without any new election as councillor, and after he must otherwise have retired from the council, this clause does not authorize such individual to preside at and vote in the election of his successor at the meeting of council directed to be held for that purpose. For such a construction of this clause would increase, by one, the number of electors of the provost and magistrates, namely, the number of the members of council entitled to vote at this meeting, from thirty-two to thirty-three, and would thus be inconsistent with and contrary to the fundamental law of the constitution of the burgh, which limits the number of councillors to thirty-two.

" By the 17th section the election of the provost and magistrates is vested solely in the members of council; and by the 4th section provision is made for the [555] retirement of the provost who has been three years in office and ceased to be a member of council, by the direction that the election is to be made by plurality of voices, and the chief or senior attending magistrate to have a double or casting vote in case of equality.

" A certain curriculum in office is fixed by the enactment that a third of the council shall retire every year; and the clause providing that the provost and treasurer shall always continue three years in office must have reference, for the due extrication of the other provisions of the act, to this statutory curriculum, which, according to the opinion I have already given, I conceive terminates at latest with the act of declaration of the election of the new councillors.

" Nor does the circumstance of the individual who has been provost for three years being again elected a member of council make any difference; for such a re-election is merely an accidental event, which may or may not happen, and cannot, consistently with sound legal principle, be held to affect the general and permanent construction of the statute.

" Upon these grounds I am of opinion that Bailie Paul, as senior magistrate, is legally entitled to preside at the meeting on Friday first for the election of provost and magistrates. (Signed) JAMES REDDIE."

" 8th November 1837."

The foregoing opinion having been read, Mr. Mills stated that he would, notwithstanding, occupy the chair, and protested that he had a right to do so. Mr. Paul likewise insisted upon his right to occupy the chair, and protested that he had the only legal right to do so. [556] Both parties continued in the chairs originally occupied by them.

Bailie Paul moved that Bailie Dunlop should be elected provost; Mr. Johnston moved that Bailie Fleming should be elected lord provost; and the vote being put upon the two candidates, who had been duly seconded, fifteen members of council voted for Bailie Dunlop, and fifteen voted for Bailie Fleming, and Bailie Dunlop and Bailie Fleming both declined to vote. There being thus an equality of votes, Mr. Mills declared that he gave his casting vote for Bailie Fleming, and Bailie Paul declared he gave his casting vote for Bailie Dunlop. Thereupon Mr. Mills declared that Bailie Fleming was duly elected lord provost, and Bailie Paul declared that Bailie Dunlop was duly elected lord provost. Whereupon (after protests by the supporters of both candidates) Mr. Mills administered to Bailie Fleming the oaths of allegiance and abjuration, and Bailie Fleming subscribed the same, with the assurance. Mr. Mills also administered to Bailie Fleming the oath *de fidei administratione officii*. Bailie Paul administered to Bailie Dunlop the oaths of allegiance and abjuration, and Bailie Dunlop subscribed the same, with the assurance. Bailie Paul also administered to Bailie Dunlop the oath *de fidei administratione officii*; and the minutes of the meeting for election were respectively signed by Wm. Mills and Henry Paul. The other magistrates and office-bearers were thereupon appointed. The minutes also bear that Mills hung the chain and badge of office round Fleming's shoulders, and presented him with the seal usually worn by the provost. A meeting of council was held on the 16th November, at which both Dunlop and Fleming claimed [557] the office of provost, and both signed the minutes of the meeting.

On the 17th November 1837 Dunlop presented a bill of suspension and interdict to the Lord Ordinary on the bills, wherein, after stating that he had in virtue of the statute been duly elected provost, and was in the actual exercise of the duties of the office, he set forth, that "notwithstanding of the election having thus fallen upon the complainer, he is nevertheless molested, and threatened to be molested, by the interference of Mr. Fleming claiming the office of lord provost for himself in respect of the pretended casting vote attempted to be given by Mr. Mills at the meeting in question, and this, it will be observed, in the face of a clear opinion to the contrary, delivered by the legal assessor for the city, and read at the meeting of council. It is manifest that this state of things may be productive of the greatest inconvenience and prejudice to the affairs of the city of Glasgow, as well as to the administration of justice in that burgh: and the complainer now applies to your Lordships in the present summary form, as one which is undoubtedly competent, for protecting him in his rights;" and concluding, "Herefore, and for other reasons to be proponed at discussing hereof, the said attempted or threatened molestation of the complainer in his office of lord provost aforesaid, on the part of the said John Fleming, and the said attempted or threatened usurpation of the said office of lord provost by the said John Fleming, ought and should be *simpliciter* suspended; and the said John Fleming ought and should be prohibited, interdicted, and discharged from molesting the complainer in the dignity and [558] functions of the said office, and from usurping or claiming and pretending to the same on his own behalf.

"Herefore I beseech your Lordships for letters of suspension and interdict in the premises, with or without caution, in common form; and your Lordships are craved to grant interim interdict until the case be finally disposed of. According to justice," etc.

The Lord Ordinary granted a sist, and appointed answers to be lodged with a view to reporting the case for the opinion of the Inner House, reserving consideration of the interdict till the bill and answers should be advised. The sist was held as intimated on the same day to the agent of Fleming, the only party complained against.

Fleming lodged answers to the bill of suspension, in which he pleaded, (1st,) that the summary application was incompetent, and that the proceedings complained of which affected the validity of the election of magistracy for that year could only be challenged by declarator and reduction, in which the other members of council ought to be made parties defenders; and (2dly,) that even on the minutes of election, as

they stood, he, Fleming, had been duly elected provost by means of the casting vote of Mills, who was then provost, and therefore senior magistrate until his successor was appointed.

The Lords of the Second Division sitting in the Bill Chamber having considered the pleadings, and heard argument *viva voce*, pronounced the following interlocutor (16th December 1837): "The Lords having advised this bill, with the answers and productions, and heard parties' procurators, on report of Lord [559] Cuninghame, Ordinary, pass the bill, and grant the interdict as craved."

On the 20th of December 1837 Dunlop expedite his letters of suspension and interdict; and on the 21st of December 1837 he caused the same to be served on Fleming.

Fleming, immediately after the interlocutor of the 16th of December was pronounced, presented a petition of appeal. That petition was presented on the 20th December 1837, when an order was made by the House of Lords on the respondent to lodge an answer to the petition. Notice of that order was, on the 23d December 1837, served on the respondent Dunlop.

In the appeal committee Dunlop objected to the competency of this appeal against an interlocutor in the Bill Chamber passing the bill, which objection was reserved till the hearing.

*Appellant*.—1. (In answer to respondent's objection to the competency of appeal.) Before the stat. 48 Geo. 3, c. 151, every interlocutor might be appealed, which was productive of inconvenience, and was remedied by that act; and although interim interlocutors cannot now be appealed, is this interlocutor to be held as an interim or interlocutory judgment? It certainly cannot. If the interlocutor had been a refusal of the bill of suspension it would have been final, and *ex concessis* appealable; and why not equally so where the right of the adverse party was as conclusively determined by that judgment? In this process of suspension in the Bill Chamber the suspender asks for letters of suspension, and the passing of the bill is a judicial authority to the granting of letters of suspension, which form the [560] commencement of a new process in the Court of Session distinct from the process which depended in the Bill Chamber in regard to the passing of the bill. The judgment pronounced by the Court assisting the Lord Ordinary in the Bill Chamber cannot, in the process upon the bill praying for letters, be reviewed by the Court; so in that respect it is final. The suspender may then commence a new process upon expediting the letters. This appeal does not bring up the process ensuing upon the letters, but only the process on the bill upon which every step has been taken that could competently have been taken. See *Young v. Dewar*, 17th Nov. 1814 (Fac. Coll.), Lord Meadowbank's opinion in that case, referring to *Scott v. Brodie*, 2d March 1803 (Fac. Coll.); so that the House of Lords is in a sufficient condition to decide upon the merits.

2. (As to the incompetency of suspension and interdict.) The incompetency of suspension in trying the validity of the election of a town councillor since the late statute took effect had been all but decided by the House of Lords in the case of *Monteith v. M'Gavin* (3 Shaw and Maclean, 290), where the Lord Chancellor had expressed (p. 313) doubts which the appellant now adopted as satisfactory grounds for a reversal.

In the election of a provost the whole merits and validity of the election of the magistracy for the year was involved. Previous to the statute 3 and 4 Will. 4, c. 76, a summary mode of trying all such questions affecting the election of magistrates and councillors individually or collectively had existed under authority of the statute 7 Geo. 2, c. 16, which, in the absence of [561] any common law remedy introduced the form of petition and complaint, which accordingly had been acted on where an action of reduction or declarator had not been necessary. It had been determined by the Court of Session (*Thomson v. Magistrates of Wick* (14 D., B., and M., 1118), 8th July 1836), that since the late act the summary process of petition and complaint was incompetent; hence there being no other summary mode of application at common law, parties were necessarily driven to the mode of determining such questions by an ordinary action of declarator or reduction in the Court of Session. The cases quoted establish this distinction, that where a question of right to an office is in dispute a declarator is necessary, and that suspension and interdict is the proper form for complaining of any interference or molestation in the exercise of an office, the right to which does not require to be declared (*Buckney and others*

*v. Ferrier*, 10th March 1753, Mor. 1854; *Donaldson v. Magistrates of Kinghorn*, 29th July 1789, Mor. 1892; *Orr v. Vallance*, 2d Dec. 1831, 10 S. and D. 93; *Watson v. Commissioners of Police of Glasgow*, 10th March 1832, Fac. Coll.; *Drysdale v. Magistrates of Kirkcaldy*, 10th June 1825, 4 S. and D. 658; *Abbey*, 3d Dec. 1825, 4 S. and D. 266). There is no case on which the respondent can found. He cannot now found on that of M'Gavin. He cannot maintain that there has been induction into office, to the effect of holding that the merits of the election of a provost are not in dispute. There being two candidates in the field, both eligible, both on the face of the minutes appearing to have been, and both claiming to have been, elected, while the point of law on which the election turns remains to be determined, clearly there is a controverted election, or at least no such election [562] as to warrant the respondent in claiming summary protection against molestation in an office of which he is indisputably the legal holder. But the question of right cannot now be tried summarily; and certainly not without the other councillors as proper parties to defend their own acts, and see the validity of the election determined on.

3. (Assuming that suspension and interdict is competent, the appellant was duly elected). Each of the two candidates had fifteen votes, including Mills, who voted for Fleming, and Paul who voted for Dunlop. Either Mills or Paul was entitled to preside, and in that character to have a double or casting vote. Mills was clearly the party so entitled under the 18th and other sections of the act as holding the office of provost till his successor in that office was appointed. His councillorship ended on the 7th; but that was not decisive of the question, as a provost once elected continued so for three years, even although the period of his councillorship might have terminated a year before (as was Mill's own case). The sound view of the *terminus ad quem* was the official year, terminating with the appointment of the provost's successor, and thus perpetuity of succession instead of discontinuance would be in that office upheld, but which would not be the case upon either of the two more uncertain theories of the respondent; viz., that the year consisting of twelve calendar months, and concluding in this instance upon the 7th of November, or the year terminating always upon the first Tuesday of November, was to be the rule in demitting office. The principle of perpetuity is recognized in England in corporations, and so churchwardens continue in office till their successors are [563] appointed. At all rates Bailie Paul could not have the casting vote, because, the bailies being elected yearly, his career of office had closed.

*Respondent*.—1. (As to incompetency of appeal.) A mere question of interim possession had been decided. The proceedings in the suspension take place in the bill chamber; and all that was then obtained by the judgment appealed from was a warrant for letters which enabled the respondent to bring the other party into court to try the question at issue. A mere interim order like this ought not to be the subject of appeal; the proceedings might in the meantime have been going on in court where a different order from that now appealed from might have been pronounced, but till parties be duly heard upon a closed record in the suspension when brought into court, this order remains an interim one, which it was the object of the sections 17 and 18 of 48 Geo. 3, c. 151, to prevent being disturbed (*Ersk. b. iv. tit. 3, s. 18*; *Jurid. Styles*, "Bill of Suspension," A. S., 14th June 1799; 6 G. 4, c. 120; A. S., 19th Dec. 1778; *Agnew v. Grierson*, 2 Shaw, 377; *Macaulay v. Brown*, 16th Feb. 1833; 11 S., D., and B., 411). It is not a judgment that could be pleaded as *res judicata*; *Wood v. M'Caul*, (12 D., B., and M., 50); *Binny v. Smith*, 26th Jan. 1836, (14 D., B., and M., 355). The advantage of the statute in putting an end to appeals against interim orders is apparent from the circumstance that by this time the question upon the merits might have been finally decided upon the expedite letters.

2. (Suspension and interdict competent.) The minutes show that Dunlop was appointed to that office, and he was in the full exercise of it except in so far as [564] molested by the appellant. Suspension and interdict is the proceeding recognized in Scotland as the protective remedy against all wrongful encroachment upon the possession or rights of a party having *primâ facie* a good title to the property or office held by him (*Ersk. b. iv. tit. 3, s. 20*; *M'Kenzie*, 4 Sh. 1002; *Manners and Miller v. King's Printer*, 2 Sh. 275, 4 Sh. and D. 559, 3 Wilson and Sh. 268; *Siddons v. Ryder*, 3 S. and D. 576). Independently of all remedies from the election statutes, this was the subsisting remedy at common law, to which a party, whether

complaining of official or any other molestation, could always have recourse, yet it was seriously maintained that because petition and complaint was no longer competent, the remedial process of suspension was to be excluded. No doubt this remedy is incompetent where applied for at too late a stage of the proceedings, 1 Darling, Prac. 283, and cases there cited. Although the statutes 7 Geo. 2, c. 16, and 16 Geo. 2, c. 11, authorized a process of summary reduction and of petition and complaint against proceedings at elections, no argument is thence deducible either that suspension was superseded or that it had not previously been competent. The introduction of a new legal remedy for specific wrongs does not, unless the statute so provides, extinguish the ancient common law remedies; and so subsequent practice in this particular showed; see *Buckney v. Ferrier*, 10th March 1753, Mor. 1854; *Chalmers v. Magistrates of Edinburgh*, 24th July 1782, Mor. 1863; *Gray v. Magistrates of Anstruther*, 29th June 1819.—*Orr v. Vallance*, 10 S., D., B., 93, is not adverse, for (1.) the object there was to set aside, at the instance of a minority, a formal election as informal and challengeable, an attempt not [565] merely to stop, but to rescind; (2) it was admitted in that case that the party whose place was improperly filled up would have been entitled to this mode of application, and the observations of the judges there ought to be read in reference to the actual circumstances only, and even in *Drysdale v. Magistrates of Kirkcaldy* suspension was held to be a proper form of complaining of molestation in the exercise of an office the right to which does not require to be declared; and the same remedy was again acted on, as betwixt two councillors, in *Scott v. Magistrates of Edinburgh*, 21st Dec. 1838 (1 D., B., and M., N.S., 347). The appellant was the only necessary party, as he alone claimed the office, and against him alone was any interim order required. The other members of council might if they had chosen have sisted themselves in the course of the after proceedings, which could however have been had between the two contending parties for the office in dispute.

3. (The respondent was duly elected to the office in which he is now molested). The difference betwixt the respective claimants for the casting vote consisted in this, that Paul was the senior magistrate present, whereas Mills was not a magistrate, but was then in council as a new councillor, into which office he had *de recenti* been inducted, Paul also there officiating as senior magistrate. Mills could not have applied to a different ward for re-election except on the footing of his no longer having a seat in the council, and his election for that ward and subsequent induction was the only character in which he could now sit in the council. The argument drawn from the fact that in some burghs parties had been advised to hold fast to [566] the office of provost, even after they had ceased to be councillors through the lapse of the elective period or of disqualification, did not solve the difficulty upon the act of parliament, because in the instances last referred to there had been no actual demission of office by such councillor being provost, and no new election for the ward for which such councillor had sat. Here, however, the continuity of office had ceased; and a new election, and qualification, by taking oaths, enabled Mills to exercise the duties of the office into which he had been so inducted, but could not operate a restoration of an office of which he was *functus*. After the 7th of November, therefore, Mills was a candidate for election, but no longer a member of the council-board in any capacity. The notion of the official year was adopted as a remedy to the supposed inconvenience of a vacancy in the provostship, which in any view was for a short period at least inevitable. But there was no inconvenience in the respondent's view of the case, inasmuch as Bailie Paul (who is admitted on the minutes to be the senior magistrate) is by law vested with the powers of provost or chief magistrate.

Lord Chancellor.—My Lords, this case, which was argued before your Lordships not long since, raises a question of the utmost possible importance, not so much as affecting the interests of the parties in contest in this litigation, but as respecting the general rule, which, if not properly laid down, may be extremely prejudicial in the present state of the corporation law in Scotland.

It has been considered that the statutory provisions by the two statutes, the 7th and 16th of George the Second, giving a summary remedy by application to the [567] Court of Session in questions arising out of municipal elections, does not



apply to the system of corporations as now established under the municipal corporation reform act. I think your Lordships will find, that from that circumstance a course is likely to be adopted, which, if not properly regulated, may lead to very serious consequences as affecting these corporations.

The facts of the case which gave rise to the present litigation were simply these:—Upon the election in November 1837, in the corporation of Glasgow, two persons were candidates for the office of Lord Provost; the votes of the council being equal for each, it came to be decided by the casting vote of the presiding officer. It was made a matter of question, whether the Lord Provost who had been in office the three preceding years was the presiding officer; that is, whether he continued Lord Provost up to the 10th November, when the election took place, or whether he had ceased to be Lord Provost upon the 7th of November. If he had ceased to be Lord Provost on the 7th of November, a certain other person would be the senior magistrate. The question therefore was, whether the one or the other had the casting vote; the one voted for the one side, and the other voted for the other; so that the question, who had been elected Lord Provost, turned upon the question, who was the presiding officer at that election. My Lords, there was no possession of the office by either party; each claimed the right of having been properly elected, and there was nothing done upon either side which could be said to put either party in possession of the office. Under these circumstances, one of the parties applied in the bill chamber for an interdict. The Lord Ordinary reported it to the Inner [568] House, and the Inner House, upon an application for a suspension and interdict, granted an interdict against one party; and that is the subject of the appeal to your Lordships House. The first question, therefore, raised, independently of the merits of the election, is, whether this be a proper course of proceeding to decide upon the merits of the election under the circumstances which occurred in this case.

Now, in looking back to the authorities upon this subject, it seems to be a statement common to both sides, that there is a very great paucity of authority to be found in the records of proceedings in the Court of Session; and that may be accounted for, no doubt, during the period anterior to the 3 and 4 W. 4, c. 76, when the statutes of George the Second were in force. I find, however, that although there may be but few cases to be found, there seems to be no question as to certain propositions that may be laid down; namely, that a proceeding by suspension and interdict cannot apply against a party in possession of an office; it is equally clear that it is not applicable to proceedings prior to the election, so that, in point of fact, if it be competent at all, it is not necessary to discuss that question. In the present case it can hardly be supposed to apply to any case, except where, from the proceedings at the election, it is a matter of doubt who has been elected, neither party being in possession of the office which is the subject of the election.

But there is ample authority that this mode of proceeding is not the mode of proceeding to decide the question of election in a burgh election at all.

There is another class of cases, indeed, with regard to which the authorities seem consistent, namely, that where there is an undisputed right to an office, and the [569] party is in possession of the office, it is not incompetent to apply this mode of proceeding for the purpose of protecting the person in possession of the office against an unauthorized intrusion by a mere stranger; but your Lordships, I think, will find that it is confined to cases where the title to the office is so clear and so free from doubt that there is no question to be adjudicated upon as to the title to the office.

I find almost all these propositions laid down, and by all the judges, who all seem to concur in that opinion, in the case of *Orr v. Vallance* (10 S., D., and B., 93), decided in the year 1831. The Lord Justice Clerk in that case says: "I have a clear opinion that this application is incompetent" (viz., an application for suspension and interdict). "I apprehend that there is no point more thoroughly fixed, than that there is no process for reviewing proceedings of town councils, filling up a vacancy, real or supposed, other than by petition and complaint or reduction;" petition and complaint not applying now to the corporations in Scotland. "Then what is the nature of this? It is in form, no doubt, a complaint against the actings of this person, Vallance, as chief magistrate; but what is put in issue is the merits of the election by the town council, and we have the regular minutes of the election

as an appendix to the bill. If we could sustain such applications under the miserable cover that they are only against the actings of the man, there would be no case in which the same sort of argument might not be used to sanction a bill of this kind instead of a complaint or reduction, in which it is a fundamental [570] principle that the council, one and all, must be called. I can listen to no such flimsy pretext, and it is not necessary to enter into the question whether all the parties are called, for on the incompetency alone I think the bill must be refused."

Lord Glenlee (10 S., D., and B., 95) says: "I am of the same opinion; if Dods had applied,"—Dods was the party who was unquestionably in possession of the office. Lord Glenlee says, "if Dods had applied, it would have been a different case; but the complainants have no title in them, and we must first of all enter into the consideration of the merits of the election, which is incompetent in the present shape."

Lord Cringletie says: "A bill of suspension would do against a party having no title or election at all; but here there is a formal election, which must be complained of by complaint or reduction."

Lord Meadowbank says: "In the case of Dods applying there would be no need to inquire into the merits of the election, and so a bill by him would have been competent."

Now, it is impossible that any doctrine can be laid down more distinct, or more directly applicable to the present case. They say that that court cannot try the merits of an election in a proceeding by suspension and interdict.

Now, that is supposed to have been interfered with by the case of Watson against the commissioners of police of Glasgow (Rep. in Fac. Coll. 10th March 1832), which took place in the following year; but the circumstances of the case are by no means similar. It was not a burgh election, to begin [571] with. The learned judges took a distinction between the two, recognizing to the full extent the doctrine laid down in the case of *Orr v. Vallance*: The Lord Justice Clerk says, "The case of Vallance is in no respect parallel to the present, the former referring to a burgh election, as to which there must be either a petition and complaint, or a reduction."

At an earlier date than those cases, namely, the year 1825, was the case of Drysdale against the magistrates of Kirkcaldy (4 S. and D. 128, new ed.). The facts of that case are not similar to the present; it is only valuable for the doctrine laid down. The report there states, "That where a question of right to an office is in dispute, a declarator is necessary, and that a suspension and interdict is the proper form for complaining of any interference or molestation in the exercise of an office, the right to which does not require to be declared." Up to the time at which it was declared that the summary proceedings under the statutes of George the Second (7 Geo. 2, c. 16; 16 Geo. 2, c. 11) were not applicable to the present state of Scotch burghs, there does not appear to have been any difference of opinion amongst the learned judges that the question of an election in burghs could not be tried by suspension and interdict.

After it was found that that mode of proceeding was not applicable, it does appear to me that an attempt has been made, or rather a disposition has been manifested, to introduce a mode of proceeding, which was not considered as competent before that time. Now, upon all the cases to which I have referred, nothing can [572] be more clear than this proposition at least, that where a party was in possession of an office, his title to that office could not be questioned by proceedings of suspension and interdict; that it was necessary to proceed by process of reduction or declarator. There are obvious reasons, to which I shall presently advert, which shew how utterly incompetent a proceeding of suspension and interdict would be to effect the object in view. But I am now referring to it only for the purpose of shewing that, up to the year 1831, no doubt was entertained that suspension and interdict was not applicable to that state of things.

Now, previous to this very election, one of the circumstances which gave rise to the election of Lord Provost was the election of one of the councillors of the name of M'Gavin; and your Lordships will find, by referring to the report of that case, which was argued during the last session, in the third volume of Shaw and Maclean's Reports (p. 290), that M'Gavin was actually elected. He was actually then in possession of his office. Those who questioned his right to be a councilman, depending upon a supposed defect in the list

of electors, applied for a process of suspension and interdict. The judges did not act upon that: they thought, under the circumstances, it was not a case in which they ought to grant an interdict, but they sustained the competency of the proceedings; so that in M'Gavin's case they sustained the competency, although the proceeding by suspension and interdict applied to a party actually in possession of his office, which in the three cases I have mentioned was considered by all the judges as a totally [573] incompetent proceeding for the purpose of questioning the title of a person in possession of an office.

Such is the state of the authorities; now for one moment I call your Lordships' attention to the effect of proceeding by the process of suspension and interdict. The result and the only result of it can be to prohibit one party, the party against whom it is directed, from exercising the functions of an office which he either is in possession of, or which he claims the right to exercise; it decides nothing as to the right of election. It may prevent one man from exercising the duties of the office, but it does nothing towards putting any other person in his place: an observation which occurred to me when your Lordships were considering the case of *Monteith v. M'Gavin*, in July last, and was strongly exemplified by what had then taken place, but had not then been brought under your Lordships' consideration.

Now, the only means of trying the right of parties to any office in a corporation must be first of all to try the right of the party in possession, and then by some process to try the right of the party who claims to stand in his place. The proceeding by suspension and interdict may do the one,—it may undoubtedly displace the party in possession, not by depriving him of the office, but by prohibiting him from exercising the functions of the office. It does not declare that any other person ought to be elected in his place, but prohibits the individual from exercising the functions of the office. One, therefore, is not surprized that the learned judges, up to the time when the difficulty arose with respect to the statute (7 Geo. 2, c. 16) of George the Second, [574] considered that the proceeding of suspension and interdict was wholly inapplicable for the purpose of trying the right to an office.

In the present case it is true that the party against whom the process was addressed cannot be considered as in possession of the office; because, a question having arisen as to the mode of election, both parties having claimed to be in possession of the office, in point of law it may be considered that neither of them is actually so. Now, if the learned judges adopted this course of proceeding with the intention of deciding which of the two was really the Lord Provost of Glasgow, then they did that which in the case of *Orr v. Vallance*, and in the case of *Drysdale v. The Magistrates of Kirkcaldy*, and in the other case of *Watson v. The Police Commissioners of Glasgow*, to which I have referred, the judges themselves stated distinctly that it was not competent for them to do, upon that proceeding, because it would then be a proceeding to adjudicate upon the merits of an election in a case of suspension and interdict.

But if they proceed upon the ground that this is a mere intrusion by a stranger upon the office of a party properly elected, they could never come to that conclusion without adjudicating that the other party had been first properly elected, and then to treat the other as a stranger intruding. They could not so treat him without considering the merits of the election. It is perfectly clear that they would have first to adjudicate on the merits of the election, and then to treat the other party as a mere intruder. But that applies only where the party is actually in possession; and if one party is not in possession, no more is the other party in possession. I apprehend it is extremely difficult to explain the course that has been adopted [575] upon the supposition that they were acting upon that which is recognized as a competent mode of proceeding for protecting a party actually in possession of an office against the unauthorized intrusion of a stranger. But if, on the other hand, they exercised a discretion as to the merits of an election, it must have been, in their opinion, a matter free from all doubt that the party upon whose account they allowed the suspension and interdict was the party duly elected.

Now, it is not my intention in the view I take of this case to give any opinion as to the merits of the election; but to this extent I think your Lordships are bound to attend to what took place. It cannot be considered a matter free from doubt and difficulty, which of the parties should be held to have been duly elected, the point turning upon the construction of the act; the construction of the act, as it is con-

tended for by the present appellant, being that the Lord Provost for the time being, who by the act is to remain in possession of his office three years, is, according to his construction, to go out of his office at the anniversary of the day of his election; whereas the argument on the other side is, that he is to remain three municipal years in the office, and that he shall retain his office till his successor is appointed. There appear difficulties enough on either side upon considering the different clauses of the act,—difficulties, certainly, which the Court of Session can hardly have considered before they came to the conclusion that there was no question at all to discuss between the parties; but if there was any question to be discussed between the parties, then they were adjudicating upon the right of election, and were in a cause of suspension and interdict deciding [576] which of these two parties had been properly elected Lord Provost, contrary to all preceding authorities, and contrary to the doctrine which has been acted upon in all the cases to which I have referred.

That is the state of the contest between these parties. The Court of Session have, by an interlocutor upon a bill of suspension and interdict, prohibited the one party from exercising the duties of the office, and put no other party in possession of the office, leaving the town of Glasgow just as much without a Lord Provost by any adjudication of right as it was before.

It was urged at your Lordships' bar that great inconvenience would arise from interfering with the interlocutor that has been pronounced, inasmuch as it would leave the parties, and all those interested in the affairs of the corporation, in a state of uncertainty as to who was the Lord Provost. My Lords, it is perfectly true that great inconvenience must arise from this state of things. But in a question which affects all the corporations of Scotland,—in a question, therefore, which it is of the utmost importance to have rightly understood at an early period after the question has arisen,—no inconvenience that may arise to any particular corporation ought to induce your Lordships to take a course that might be productive of mischief to the general administration of the affairs of corporations. My Lords, would no inconvenience arise from sustaining the interdict that has been pronounced? It is admitted that it is no adjudication upon the right to the office; but it is said that if the party had not appealed, and therefore if the process had gone on in the usual course, it was essentially necessary, according to the rules laid down for that purpose, that within [577] a certain number of days a suit should be instituted. But that suit would only have been a more formal way of calling for the same species of interference by interdict which had been already made by the Lord Ordinary in the Bill Chamber; that would leave the matter just where it was. It is said that the judges might have called upon the parties to adopt proper proceedings, by which a proper adjudication might have been obtained. If your Lordships think that this interdict ought not to stand, it will be competent to either party to adopt those proceedings which may lead to an adjudication upon the question of right; nor am I aware that any time will be saved in coming to a final conclusion as to who is Lord Provost of Glasgow by your Lordships adopting either the one course or the other. I have referred to the principal authorities which have been referred to as impeaching the competency of the proceedings by suspension and interdict. But if this had been a recognized course of proceeding, that is, if the Court had, by means of this summary process of suspension and interdict, the means of deciding questions upon controverted elections without the delay of a regular suit for that purpose, one would be inclined to ask, why was that summary proceeding given by the statute of George the Second? If any summary process already existed, why give that summary process in addition by petition and complaint? Nothing can be more rapid than the proceeding by suspension and interdict; and if it is competent for the judges by that proceeding to adjudicate upon the merits of an election, it could not, in point of rapidity, be improved upon by any other mode of proceeding. It is evident, therefore, that it was not known at that time that there were [578] already existing in the Court of Session means of deciding by summary process, and therefore the statute gave a mode of proceeding by petition and complaint.

My Lords, two cases, and two only, have been referred to as interfering with the doctrine laid down by the learned judges in the cases I have referred to, one is the case of *Chalmers v. The Magistrates of Edinburgh* (Mor. 1863); but upon examining the case, it does not appear to be a case which can have any influence upon your Lordships'

judgment in the present case. In the first place, it was not a burgh election at all which, according to the doctrine to which I have adverted of the learned judges, makes a distinction between that and the other cases; nor was it an original application to the Court of Session to interfere with the existing right by suspension and interdict. It was a process of suspension and interdict, it is true; but it was an appeal to the Court of Session from the adjudication of the magistrates of Edinburgh, who had decided upon an election matter subject to their jurisdiction. Therefore, although the proceeding was undoubtedly by suspension and interdict, it is a proceeding of such a nature as prevents it from being an authority in favour of the present proceeding. One cannot but observe even in that case, it was contrary to what is laid down generally as applicable to all cases of proceeding by suspension and interdict, namely, that it was a proceeding against the party actually possessed of the office. It may, therefore, well be a question, if the case was material to the [579] present purpose, whether that decision would not be liable to be impeached upon the ground of its being a proceeding by interdict against the party actually in possession of the office.

The other case referred to is the case of *Gray v. The Magistrates of Anstruther Wester* (Fac. Coll. 29th June 1819). Now, that is a case which, so far from being applicable to the present, was a case where the proceedings was by petition and complaint; it was not a case of suspension and interdict at all, but by petition and complaint under the statute of George the Second.

My Lords, it may perhaps be found necessary, if the Court of Session has lost the jurisdiction given to it by the statute of George the Second (7 Geo. 2, c. 16), and is incapable of administering justice in the case of controverted elections in burghs in Scotland by summary proceeding,—it may be necessary that the legislature should interfere; it may be necessary that they should have the summary power given to them which they had under the statute of George the Second, and which it appears they have lost, with reference to the existing corporations of Scotland. Whether that ought or ought not to be done is not now the matter for consideration; but the circumstance of their having lost the power under that statute can be no reason why the power should be exercised under a jurisdiction which it appears at the time when the municipal corporation reform act was passed was found incompetent, and over and over again declared to be incompetent, for the purpose of trying elections in burghs in Scotland. My Lords, it would obviously be productive of [580] the greatest possible inconvenience. It is impossible that justice can be done by this course. It is wholly incompetent to carry into effect that which must be the object of every court in interfering with questions as to the validity of these elections. But then another strong reason against your Lordships sanctioning a proceeding of that character is this:—that there are already modes of proceeding which, although not summary modes of proceeding, are calculated to meet every possible case that can arise. If the party is improperly in possession of an office it is not a matter of dispute that the Court of Session has jurisdiction, by process of reduction, to displace him from that office. If the party be not actually in possession of that office, then there is nothing to reduce. If a question arises, which of two parties is properly elected, then the proceeding by process of declarator is beyond all question competent and suited to the purpose of enabling the Court of Session to adjudicate between the parties, and to say which of the two is to be considered as properly exercising the duties and functions of the office. It is very true that these are not summary proceedings; but it is equally true, as I apprehend, and not disputed on either side at the bar, that, coupled with these proceedings, the proceeding by suspension and interdict might very well be applied; so that, pending the proceeding in which ultimate adjudication was to take place, the court might in the meantime, by virtue of this process of suspension and interdict, regulate as to the party who should happen to be in possession of the office. Whether that be or be not a course of proceeding consistent with the practice of the Court of Session, it is not necessary at present to [581] consider; it was so represented at the bar, and I find it referred to as the recognized practice in some of the cases to which I have adverted. The present question is, whether it is a wholesome practice that in the present case the Court of Session should proceed by suspension and interdict only.

My Lords, there is another point to which I shall have to call your Lordships' attention; but upon the merits of the case, considering that this is a question at least difficult to be decided which of these two parties is properly elected, and therefore a

question in which the proceeding by interdict cannot be supported, upon the ground of its being a mere intrusion upon an office, of which some other person is clearly and legally in possession, I should advise your Lordships not to sanction a proceeding which, if acted upon by the Court of Session in Scotland, must obviously lead to very serious consequences.

It has been objected that this appeal is incompetent, because this is not a final adjudication between the parties; and under the statute no appeal lies from the interlocutory order. My Lords, the very general terms used in the statute prohibiting appeals against interlocutory orders no doubt have created considerable difficulty in several cases which have occurred, and it is often matter of difficulty to ascertain whether within the meaning of that act a particular proceeding is to be considered as interlocutory or not. From the best information I have been able to obtain as to the nature of this proceeding, it cannot be considered an interlocutory proceeding. It is a preliminary proceeding, it is true, but it is final as far as that proceeding itself is concerned, the proceeding being by an application [582] made *ex parte* in the first instance to the Lord Ordinary in the Bill Chamber, stating the case and praying for an interdict; it prays that the Lord Ordinary may pass the bill and grant the interdict. If he passes the bill and grants the interdict, as far as the passing the bill is concerned it is merely an authority for a more regular proceeding being commenced; but it is final. He may refuse the bill; and if he refuses the bill nothing further can be done in that proceeding; but the party may apply again to the same or to another Lord Ordinary for letters of suspension and interdict.

In considering whether this is final or not, and whether it is a subject of appeal or not, you must suppose the Lord Ordinary either to decide the one way or the other. Now, suppose he refuses the bill, that may be productive of the greatest possible evil to the parties. But the opinion of the Lord Ordinary is final; that is, he refuses the interdict, because that is the effect of his refusing the bill; and he denies to the party the opportunity of pursuing that remedy at least, though he may adopt some other, or may again apply to the Court for a similar remedy.

It seems hardly necessary to consider this any further, because I find by reference to a case which I believe was referred to in the argument that your Lordships have entertained appeals upon proceedings of this kind. I find in the case of *Scott v. Brodie* in the year 1803, reported in the Faculty Collection of Decisions, that the Lord Ordinary had passed the bill and granted the interdict. That was the subject of an application to the Court of Session, who sustained the bill, but varied the terms of the interdict; so that there was [583] the order of the Lord Ordinary confirmed, as to the principal part, by the judges of the Court of Session. The interdict was in some degree altered; that was made the subject of appeal to your Lordships' house. Now, that was in precisely the same terms as the present, for all material purposes; for, though here the Lord Ordinary did not himself originally exercise a jurisdiction, but reported the case to the Inner House, and the bill was in the first instance passed and the interdict granted by them, yet, it was in that case the order of the Court of Session passing the bill and granting an interdict that was made the subject of an appeal to your Lordships' house. I do not apprehend, therefore, that your Lordships will feel any difficulty in exercising your jurisdiction in this case, and that you will not consider that it is taken away by the act of parliament, inasmuch as the proceeding, though preliminary, is a proceeding complete in itself, and therefore it is to all intents and purposes within the meaning of the act a final adjudication, upon which an appeal will lie to this House upon the provisions of the act.

I by no means wish to be understood as giving any opinion as to whether a jurisdiction exists by suspension and interdict in other cases; it is a question of practice which is much better left to those who are familiar with the practice of the Court of Session. But looking at the authorities which are to be found in the books, and finding this to be a question in which an interdict could not be granted without an adjudication upon the merits of the election, and finding that all the judges have laid down, in the cases to which I have referred, that it is not competent in proceeding by [584] suspension and interdict to adjudicate upon the merits of the election. I think your Lordships will adopt the safest course by not sanctioning a proceeding which may lead to dangerous consequences, and which is contrary to all the authorities to be found in the books; but that your Lordships will adopt a much safer course, by remitting

it to the Court of Session to consider what is the best course to be taken in these cases, but not permitting them to interfere with the merits of an election upon a proceeding by suspension and interdict. The best way to effect that object, I submit to your Lordships, will be to reverse the interlocutor passing the bill and granting the interdict which has been pronounced in the Court below.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, with instructions to refuse the bill of suspension, and to do otherwise therein as may be just, and consistent with this judgment.

ARCHIBALD GRAHAME—DEANS and DUNLOP, Solicitors.

[585] WRIT OF ERROR FROM THE COURT OF EXCHEQUER, SCOTLAND.

THOMAS SPEARS (representing Robert Spears deceased), THOMAS SPEARS, and WILLIAM MITCHELL (representing George Douglas Mitchell deceased), *Plaintiffs in Error*.—Dr. Lushington.—Miller; Sir JOHN ARCHIBALD MURRAY, Her Majesty's Advocate General of Scotland, on behalf of Her Majesty, *Defendant in Error*.—Attorney General (Campbell)—Lord Advocate (Murray)—Kaye [18th June 1839].

[Mews' Dig. v. 34. S.C. 6 Cl. and F., 180.]

*Extent—Assignment in Security*.—Two partners of a trading firm executed a trust conveyance of part of their shares in the partnership stock to certain co-obligants in bonds of credit at the bank; under the conditions, first, that before any sale or transfer of the said stock should take place, the trustees should be bound to give three months' intimation of their intention to the assignors, and secondly, that the trustees should be bound to apply the proceeds of the stock in paying whatever should be due on the bonds of credit at the time of the sale of the stock. The assignors intimated said assignment, by having the stock transferred in the books of their firm to the names of the assignees. A writ of extent was afterwards issued against the assignors as crown debtors, at which time the value of the stock so assigned was £960 4s. 8d., and the debt due on the bonds of credit was £1200. Upon *scire facias* by the Crown against the trust assignees, Held (reversing on error the judgment of the Court of Exchequer in Scotland), That the assignees [586] had, by virtue of the intimated assignment, a special property in said stock, available against the Crown seizing the stock under an extent against the assignors for a debt due to the Crown.

George M'Lagan and Frederick M'Lagan carried on in partnership, under the firm of George M'Lagan and Co., the business of distillers in Scotland. They were also partners in another distillery company, under the firm of Spears, Mitchell, and Co.

A balance was struck on the company books of Spears, Mitchell, and Co. on the 1st of September 1813, when the amount of stock then at the credit of Frederick and George M'Lagan respectively, in the concern of Spears, Mitchell, and Company, was £1529 13s. 10 3-12d.

On the 7th of April 1814 the M'Lagans executed a trust assignment, setting forth "that for certain good causes and considerations it is proper and expedient that we should grant the trust right underwritten;" and therefore they assigned, conveyed, and made over to and in favour of certain other partners in the firm of Spears and Co., "but in trust always for behoof of us and our heirs and successors, and under the conditions and provisions herein-after specified, a part of our stock belonging to us in the concern of Spears and Co., to the extent of £1200 sterling each, together with the whole interests, dividends, profits, etc. that shall arise upon the said share of the stock of the said company of Spears and Co., to the extent fore-

said, from and after the date hereof, turning and transferring the whole right of the premises from us, our heirs, executors, and successors, to and in favour of the said R., T., and [587] H. Spears, and assignees, whom we hereby surrogate and substitute in our full right and place of the premises," with full power to them to sell and dispose of the whole or any part of the said shares of the capital stock of the company of Spears and Co., to the extent foresaid, with all right competent, to the assignors, but under the conditions, "(1.) that before any sale or transfer of such stock shall take place the trustees shall be bound to give three months' intimation of their intention so to do to the M'Lagans: (2.) declaring always, that the trustees shall be bound to apply the proceeds of the stock so conveyed in paying and discharging whatever sums shall be due at the time of the sale of the said stock on two bonds of credit for £1000 sterling each, granted and subscribed by the said Robert, Thomas, and Henry Spears, and David Millie, binding themselves along with us the said F. and G. M'Lagan, one thereof to the Bank of Scotland, and the other to the Falkirk Banking Company, to be operated upon by the said company of George M'Lagan and Co.: (3.) during the subsistence of the trust to pay the profits to the M'Lagans."

On the 11th and 12th of April 1814 the M'Lagans wrote to the managing partner of Spears and Co., desiring him to "transfer £1200 of their stock in the concern of Spears, Mitchell, and Co. to Robert, Henry, and Thomas Spears, jointly to be held by them in terms of trust deed."

On the 16th of May an entry was made in each of the accounts in company of the M'Lagans in the books of Spears, Mitchell, and Co. thus:—"1814, 10th May. [588] To Robert, Henry, and Thomas Spears joint account. fo. 23. £1200;" and a joint account was opened in the books of Spears and Co. in the names of Robert, Henry, and Thomas Spears, in which account were the following entries:—"1814, 10th May. By Frederick M'Lagan's account in company, fo. 5. £1200.—1814, 10th May. By George M'Lagan's account in company, fo. 6. £1200."

On the 27th March 1816 a writ of extent issued against G. and F. M'Lagan, for excise duties due to the Crown.

By an inquisition under that extent it was found that the firm of Spears and Co. were indebted in the sum of £509 15s. 9d. to G. and F. M'Lagan, in respect of their share in the company funds of Spears and Co., which was seized by the sheriff, and claimed by Messrs. Spears. At the trial in the Court of Exchequer it was agreed that the M'Lagans interest in the company funds of Spears and Co. at the time of taking the inquisition was £960 4s. 8d., instead of £509 15s. 9d. On the 2d of June 1832 a writ of *scire facias* was brought by the Advocate General of Scotland on behalf of the Crown, in the Court of Exchequer, to recover this sum. To this writ Messrs. Spears pleaded, that they were not at the time of the teste of the writ of extent, nor at the time of taking the inquisition under the extent, indebted to the M'Lagans in the said sum, and issue was joined. The case came on to be tried before the Court of Exchequer in Scotland, on the 23d May 1834, when the jury returned a special verdict, setting out the foregoing facts; the question thereby raised being whether the Crown was entitled to the £960 4s. 8d. as a debt due from Spears, Mitchell, and Co. to the M'Lagans, the [589] Crown debtors, or whether Messrs. Spears were not in full right of that sum, by virtue of their assignation of 7th April 1814, duly intimated.

This special verdict was argued on the 27th June 1834, when Baron Sir P. Murray directed judgment to be entered for the Crown.

Spears and others brought a writ of error.

*Plaintiffs in error.*—The stock was duly assigned by the M'Lagans, who were divested of all right in the same. The assignation was expressly granted to secure those now represented by the plaintiffs in error against the consequences to which they might be subjected by their having become bound as obligants in two bonds of credit granted by them for the use and benefit of the assignors; and according to the law of Scotland an assignation in trust or in security, followed by intimation, is equally available as an absolute assignation for the purpose for which it may have been granted; and such assignation, from and after the intimation thereof, completely divests the assignors of the property or subject conveyed, and transfers the full right thereof to the assignees. The assignation was not only intimated, but the amount of stock assigned was set apart and transferred and appropriated to the



assignees in a separate account entered in their names in the books of the company, part of whose stock held by the assignors was conveyed to those represented by the plaintiffs in error, by such assignation, so that the stock ceased to be the property of the M'Lagans, or attachable for their debts, until the claims of the assignees thereupon were fully satisfied. The Crown upon an extent in aid is entitled only to the rights of the Crown debtor in so far [590] as available against his debtor, and here, after assignation intimated, the assignors have no right against the assignees.

*Defendant in error.*—The trust assignation of the 7th of April 1814, set out in this special verdict, and upon which the decision of this question depends, was, under the circumstances of this case, inoperative. For one of its conditions was, that no sale or transfer by the trustees of the subjects assigned could take place till three months' notice had been given by the trustees to the assignors. At the time when the extent issued no such notice had been given, so that the trustees then had no power to sell, and might never have acquired that power, as the assignors might have discharged their liability to the banks out of their private funds, or have made some other arrangement, without allowing the trustees to resort to their property in the house of Spears and Co.

Lord Chancellor.—My Lords, in this case Frederick and George M'Lagan, the Crown debtors, carried on the business of distillers, in partnership together, under the firm of M'Lagan and Co., and they were also partners in the firm of Spears, Mitchell, and Co.

By a balance struck in the books of Spears and Co. in September 1813, the amount of stock to the credit of Frederick and George M'Lagan was £1529. On 7th April 1814, Frederick and George M'Lagan by deed assigned to the other partners in the firm of Spears and Co., part of the stock belonging to them in the firm of Spears, Mitchell, and Co. to the extent of £1200, with all the dividends and profits which [591] should arise therefrom, to the extent aforesaid, upon trust, first, to give three months' notice before selling; second, to apply the proceeds in discharge of what should at the time be due upon two bonds, in which Messrs. Spears, partners in the firm of Spears and Co., had joined the M'Lagans as securities for advances made to them by two banks; thirdly, during the subsistence of the trust to pay the profits to the M'Lagans.

On the 11th April the M'Lagans wrote to Spears and Co., desiring that £1200 of their stock in the firm of Spears, Mitchell, and Co. might be transferred to the account of Messrs. Spears, their co-obligors, which was done, and which was dated on the 10th May 1814. On the 27th March 1816 the writ of extent issued, at which time the share or stock of the M'Lagans in the house of Spears, Mitchell, and Co. was £960, and at the same time the debt due from the M'Lagans to the banks exceeded the £1200. These facts were found by the special verdict; and the question upon the writ of error was, whether the Crown was entitled to the £960 as a debt due from Spears, Mitchell, and Co. to the M'Lagans, the Crown debtors, or whether the Spears, the co-obligors, were entitled to that sum under the deed of the 7th April 1814.

The learned baron, Sir Patrick Murray, was of opinion that the Crown was entitled, not upon the ground of any invalidity, under the law of Scotland, of the assignation in trust, but because it was not an absolute but only a conditional assignation, which had not been rendered absolute before the teste of the extent, by notice and actual sale under the provisions of the deed.

I cannot concur in this opinion; the deed was an [592] assignment of what was due from the firm of Spears, Mitchell, and Co. to the M'Lagans, or of their interest in the stock of that firm. Due intimation was given, and no question is made as to this having been a valid assignation of the property in question according to the law of Scotland. The £1200 was actually transferred into the names of the assignees in the books of the firm.

The M'Lagans, therefore, could not have compelled payment of the amount of their share of the stock in that firm without satisfying the terms of the trust of the deed. They had ceased to be creditors for or owners of the full amount of their share in such stock, and had become creditors for or owners of so much only of such stock as might remain after satisfying the trusts of the deed, and that by a valid

assignment according to the law of Scotland, two years before the issuing of the extent.

Could the Crown, claiming title to receive what was due to or was the property of the M'Lagans, be entitled to more than they could themselves have demanded! Could the Crown, so claiming, be entitled to seize what had two years before become the property of the plaintiff under the deed, to the extent of their lien thereon! If such were the law it would be most unjust, and it would make it impossible to deal with any one liable to become debtor to the Crown for any assignment of property upon trust, or subject to conditions or otherwise than for an absolute interest. The authorities show that such is not the rule of law as applicable to extents.

In West on Extents, page 116, the rule, as extracted from the authorities quoted, is thus stated: "Goods, [593] pawned or pledged before the teste of an extent cannot be taken, because the pawnee or bailee has a special property in them. Nor for the same reason goods demised or lent to another for a term certain during the term. But it seems that goods pawned before the teste of the extent may be taken as against the pawnee, on satisfaction of the pledge, or taken and sold subject to the pawnee's right." In the *King v. Sanderson*, (reported in Wightwick, page 53,) the Chief Baron says, the preference of the Crown can only operate upon what the partner himself had.

In the *King v. Lee*, (reported in 6 Price, page 369,) the goods of the Crown debtor were in the hands of a factor, who had paid bills accepted upon the credit of the goods before the issuing of the extent, and had accepted other bills not due at the time of issuing the extent, judgment was given for the factor, the Chief Baron (Richards), in delivering the judgment of the Court, saying: "The Crown debtor himself could not have compelled the factors to give up the goods to him without first paying them what was due. Therefore we think that the Crown could not compel the factors to give up their lien without paying them what money they had advanced on the faith of the consignment to their principal." The rule upon this subject must be the same in Scotland as in this country; indeed the learned Baron so considers it. The case of *Redfearn v. Somervail*, in 1 Dow. page 50, shows the title, according to the law of Scotland, of the assignee under an intimated assignment; and the authorities referred to show that the Crown can only claim that which its debtor was entitled to.

[594] I therefore move your Lordships to give judgment for the plaintiffs in error.

The House of Lords ordered and adjudged, That the judgment given in the said Court of Exchequer in Scotland for the defendant in error be and the same is hereby reversed.

ALEXANDER MUNDELL.—BOWYER, Solicitors.

# [595] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

JOHN HART and WILLIAM HODGE, *Appellants*.\*—Sir William Follett—A. McNeill; JOHN FRAME and COMPANY, *Respondents*.—Dr. Lushington [18th June 1839].

[Mews' Dig. xiii. 1467, 1470. S.C., 6 Cl. and F., 193; 3 Jur., 547; 7 Scots, R.R., 241. Distinguished in *Smith v. Grant*, 1838, 20 Dunlop, 1078. Commented on in *Purves v. Landell*, 1845, 12 Cl. and F., 100.]

*Agent and Client—Reparation*.—A country agent was employed by a manufacturing company to prepare petitions, at their instance, to the justices of peace against two apprentices, for having deserted their work, and other misconduct. The agent accordingly prepared and presented petitions, founded on the 4th Geo. 4. c. 34., but libelling the third section, instead of the first which related to apprentices in the situation of those complained of; the apprentices were convicted and imprisoned, but subsequently liberated by the Court of Justiciary in respect of the wrong section having been founded

\* 14 D., B., and M., 914. 922; Fac. Coll. 9th June 1836.

on, and they thereafter sued the company for damages and expenses: Held (affirming the judgment of the Court of Session) that as the terms of the act were clear, the agent was liable in relief, although there was no established course of practice under the statute, and although neither the opposite agents in the inferior court nor the sheriff-substitute of the county considered the petitions to have been erroneously libelled.

The appellants are in partnership as writers in the town of Paisley, and the respondents were calico manufacturers in Glasgow and at Locherbank in the county of [596] Renfrew, where their works are situated, having in their employment a great number of apprentices. By the first section of the 4th Geo. 4. c. 34., intitled "An act to enlarge the power of justices in determining complaints between masters and servants, and between masters, apprentices, artificers, and others," it is enacted, "that it shall and may be lawful not only for any master or mistress, but also for his or her steward, manager, or agent, to make complaint upon oath against any apprentice within the meaning of the said before recited acts (viz. 20 Geo. 2. c. 19. and 6 Geo. 3. c. 25.) to any justice of the peace of the county or place where such apprentice shall be employed, or for any misdemeanor, misconduct, or ill-behaviour of any such apprentice; or if such apprentice shall have absconded, it shall be lawful for any justice of the peace of the county or place where such apprentice shall be found, or where such apprentice shall have been employed, and any such justice is hereby empowered, upon complaint thereof made upon oath by such master, mistress, steward, manager, or agent, which oath the said justice is hereby empowered to administer, to issue his warrant for apprehending every such apprentice; and further that it shall be lawful for any such justice to hear and determine the same complaint, and to punish the offender by abating the whole or any part of his or her wages, or otherwise by commitment to the house of correction, there to remain and be held to hard labour for a reasonable time not exceeding three months."

By the third section of the statute it is enacted, "that if any servant in husbandry, or any artificer, [597] calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, shall contract with any person or persons whomsoever, to serve him, her, or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing, and signed by the contracting parties,) or having entered into such service, shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, then and in every such case it shall and may be lawful for any such justice of the peace of the county or place where such servant in husbandry, artificer, etc., or other person, shall have so contracted, or be employed, or be found; and such justice is hereby authorized and empowered, upon complaint thereof made upon oath to him by the person or persons, or any of them, with whom such servant in husbandry, artificer, etc., or other person, shall have so contracted, or by his, her, or their steward, manager, or agent, which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending every such servant in husbandry, artificer, etc., or other person, and to examine into the nature of the complaint; and if it shall appear to such justice that any such servant in husbandry, artificer, etc., or other person, shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid, it shall and may be lawful [598] for such justice to commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a portionable part of his or her wages, for and during such period as he or she shall be so confined in the house of correction, or in lieu thereof, to punish the offender by abating the whole or any part of his or her wages; or to discharge such servant in husbandry, artificer, etc., or other person, from his or her contract, service, or employment, which discharge shall be given under the hand and seal of such justice gratis."

The respondents having deemed it necessary, for the safety and protection of themselves and their business, to take proceedings against some of their apprentices,

under the above act, employed the appellants to prepare petitions to the justices of the peace for Renfrewshire against two apprentices belonging to the manufactory, of the names of Houston and Crookshanks, for having deserted their work, and other misconduct.

These petitions were presented to the justices, and after certain procedure and proof Houston and Crookshanks were convicted, and committed to the house of correction.

Bills of suspension and liberation having been presented to the high court of justiciary by Houston and Crookshanks and two other apprentices named Hunter and Gilmour, who had been convicted and committed to the house of correction upon petitions, at the instance of the respondents, prepared by Mr. James Campbell, writer in Johnston, these convictions were quashed, and the prisoners ordered to be liberated. The petitions which had been prepared and presented by [599] Mr. Campbell specially libelled on the third section, and the appellants, seeing that a conviction had followed, prepared the petitions against Houston and Crookshanks in similar terms, specially libelling on the same section.

In the course of the proceedings against Hunter and Gilmour, no objection to the petitions, as founded on a wrong section of the statute, had been taken by the agents who appeared on behalf of the apprentices; but in the case of petitions presented against Houston and Crookshanks, in answer to an objection taken, that the petition had been founded on the third section instead of upon the first, the sheriff substitute of Renfrew, acting as a justice of the peace, delivered the following decision:—"As to this objection I should not be disposed to sustain it, at any rate, considering that the provisions of the third section are of general application; but any doubt on that score seems removed by the subsequent statute 10 Geo. 4. c. 52., which has the effect of making all the provisions of the act founded on applicable to apprentices."

Houston and Crookshanks raised separate actions of damages against the respondents on account of the proceedings at their instance, which actions were duly intimated by the respondents to the appellants. After an arrangement the respondents agreed to pay to each of the parties, Houston and Crookshanks, £25, in the name of damages, and also to pay the taxed expenses of their actions, and these sums were accordingly paid by the respondents, who then brought actions of relief against the appellants.

A special case, comprising the above facts, having been agreed to, the Lord Ordinary, on the 1st of March [600] 1836, pronounced the following interlocutor and note:—"Finds, that the defenders are bound to relieve the pursuers of the damages and expenses to which they have been or may be subjected in consequence of the illegal and incompetent proceedings which they instituted and carried on in their names against the apprentices named in the libel, the illegality and incompetency of the said proceedings having been wholly occasioned by the negligence or want of professional skill of the said defenders while acting in the employment of the pursuers, and repels the defences, and decerns accordingly; but before answer as to the specific sum for which decret for execution should pass against the said defenders, appoints the cause to be enrolled, that the parties may be farther heard."—"Note. The grounds of this judgment are substantially the same as explained in a note \* to an interlocutor of this date, in the action by the same [601]

\* Note.—"It is certainly with regret, and not without some hesitation, that the Lord Ordinary gives this judgment. Where there is no suspicion of fraud, or reckless disregard of the client's interest, cases of this kind are always distressing. But, on attending to the whole circumstances, he has not found it possible to come to any other conclusion. In the first place, he must say, that he thinks the blunder, in libelling on the third section of the statute, instead of the first, was a very palpable and gross blunder. The one section dealt professedly with apprentices, and with them only; the other with servants, and other persons hired or engaged to work on special contracts; and being almost identical with the former in the substance of its enactments, could not be supposed also to relate to apprentices, without imputing to the legislature the most absurd and preposterous repetition. But the whole style and substance of the two sections points out the distinction in the

parties against James Campbell. The only difference between the cases is, that Campbell says he [602] deliberately considered the statutes, and came to the conclusion on which he acted, after using all possible [603] diligence to be right; while the present defenders say they did not deliberate at all; but having been employed after Campbell's petition had been received and acted upon, merely followed that precedent, and judged of its propriety by its success. Of the two, the Lord Ordinary rather thinks this last defence the worst. Even *communis error*, and a long course of local irregularity, has been found to afford no protection to one *qui spondet peritiam artis*. But here there had been nothing like a course of practice, or any series of precedents which had received the tacit sanction of the proper authorities. The defenders were in no way bound to submit their judgment to Campbell's, and had no right to deprive their employers of the benefit of their own skill and sagacity

clearest and plainest manner. The section about apprentices gives its remedies to the masters or mistresses of such apprentices, and uses this and no other phraseology throughout. But the section about servants and persons employed to work never once uses these expressions, and gives its remedies only to 'the person or persons with whom such servant, etc. may have contracted, etc. ;' and in the fourth section, which contains regulations common to both classes, the distinction is still most anxiously and carefully preserved; that section setting forth, that as such masters, mistresses, or employers may sometimes reside at a distance, by which the said apprentices or servants, artificers, etc. may be put to inconvenience in recovering their wages, certain facilities should be provided, etc. But the very substance of the third section might have shown any attentive (even though unprofessional) reader, that it could not relate to apprentices, since it speaks exclusively of persons whose only contract with their employers is a contract to work for hire, and who are contemplated as persons *sui juris*, and completely capable of binding themselves by such a contract. Now, the contract with an apprentice, though it may include a contract to work for hire, is primarily a contract to teach and to learn a certain trade or handicraft; and being generally entered into with persons under age, is almost invariably concluded, not only with them, but with their parents or other guardians, expressly taking burden for them, as is the case with the indentures referred to, and produced with the original petitions by the defender; and yet libelling only on the third section relating to independent contractors, not with a master or mistress, but with an employer for him. In these circumstances it is quite idle in the defender to say that the first section related only to apprentices of a particular description, and that he, conceiving that the third was intended to reach all descriptions, was therefore induced to select it as the safest for his purpose. In the first place, it is manifest that the apprentices excluded from the operation of the first section were not intended to be affected by the statute at all, as belonging, like apprentices to surgeons, attorneys, etc., to a higher class of persons, for whose misconduct it was not thought necessary to provide such summary remedies. But, second, whoever might be without the provisions of the first section, the defender could not possibly doubt that the persons he was to prosecute were within it. It extended, in express terms, to all who had not paid an apprentice fee of £25 or upwards. But, first, it is a matter of notoriety to every one in Paisley that no such fee was ever paid in the trade of calico printing, and, second, the defender had the indentures before him, which showed there was no such fee. But strong as this ground is, the Lord Ordinary would have had great difficulty in subjecting the defender on it alone, considering the apparent novelty of the proceeding, the acquiescence not only of the justices, but of the legal advisers of the apprentices, and above all, the deliberate opinion of the respectable sheriff substitute (given, no doubt, after the defender was committed to the course he had taken) in favour of all that had been done. The sanction of still higher opinions proved insufficient indeed to protect a law agent from the consequences of professional error, in the cases of Mathie, 17th May 1826, and Stevenson, 6th July 1827. But still the Lord Ordinary could not have perfectly satisfied himself with a judgment resting merely on his own conviction, that a great, and, in his view, an inconceivable blunder had been committed. He thinks it right to state, therefore, that he has proceeded chiefly on a different view,—a view very nearly corresponding with that on which Lord Lyndhurst appears to have placed his judgment, in affirming the interlocutor of this Court

by leaning indolently on his example. If the blind will follow the blind they must both lie in the same ditch."

The court (9th June 1836) having adhered to the above interlocutor, the present appeal was brought.

[604] *Appellants*.—In the ground of action, as set forth in the special case, upon which the judgment of the Court of Session is founded, there are no facts stated by the respondents relevant to infer a liability against the appellants; it is not alleged that there was any professional negligence in conducting the proceedings, nor is it averred that the petitions were informal, or that there was any neglect, in matter of form, by the appellants, in doing their duty as practitioners before the court; on the contrary, except for the alleged error in law, the proceedings were regular and competent. Neither is it relevant to infer a liability by a law agent or attorney

in the case of Stevenson, (4 W. and S. App. 182.) already referred to. He there said, that if the agent had been necessarily constrained to grapple with a nice and difficult point of law or practice, he might not have been answerable for the consequences; but that the case was very different, when it appeared that he had a safe and plain course before him, which he chose to desert, in order to embark on a doubtful one; and that if he needlessly raised a nice question, when he might have avoided it, he must answer the consequence of resolving it wrong. Now, in this case, if the defender really was at a loss which of the two sections to proceed on, was it not open to him to proceed upon both? If he actually believed that apprentices (though not once mentioned) were, or might be included in the third section, and that it was only a repetition, in more comprehensive terms, of the first, why not make sure of reaching the parties accused, by referring to both conjunctly, as merely explicatory and supplementary of each other? Or, if he was aware that both could not be intended for the same class of persons, and was doubtful under which his parties were included, what was to hinder him from founding upon both alternatively, and seeking a conviction upon the same state of facts against them, as certainly comprehended under the one or the other description? There is no doubt, it is humbly conceived, that a libel, in either of these forms, would have been perfectly relevant, and a conviction obtained under either, liable to no objection. If the last or alternative form was adopted it would probably have been necessary for the Court to decide under which section the parties were to be held as arraigned; and if they, with both before them, should have fallen into the alleged error of the defender, (which it is not easy to imagine,) it is, no doubt, possible that the consequences might have been the same to the pursuers. But the defender would, at all events, have been saved from responsibility, and been entitled to say, what he cannot now say, that in a matter of supposed difficulty he had run upon no needless risks, but followed a course perfectly unexceptionable, and safe for all parties. Nay, if this very plain statute had appeared to him absolutely inextricable and obscure in all its sections, there was still a plain and a safe way by which he might have escaped all possible embarrassment. It is settled by the special case that he had no instructions to proceed upon that statute at all. His employment was quite general, 'to prepare petitions to the justices against certain apprentices who had deserted their work, and otherwise misconducted themselves.' Now, by the original acts of 1617 and 1661, as interpreted by immemorial usage, the justices had undoubted power of enforcing all such contracts, without the aid of any recent enactment; and the defender might have discharged himself of the task he had undertaken without referring to the 4th of Geo. IV. at all. In this view it appears to the Lord Ordinary that he stands very much in the situation of Stevenson in the question with Rowand; and that, even supposing that there could have been any material difficulty in fixing upon the proper section, it was a difficulty which the defender created by his own act, and met, consequently, at his own peril, there being a plain and safe course open to him, by which, without injury to any one, all peril might have been avoided. No man of common judgment, professional or unprofessional, can be listened to, who would say, that after reading the statute, he thought there was no sort of risk or difficulty in entirely passing over, or neglecting the first section,—or if there was a plain or palpable difficulty, the defender must be answerable for the consequences of not taking a plain way to avoid it."

for a debt which he is instructed to recover, or a liability to pay damage arising out of proceedings which he has been instructed to institute, to say that he has been negligent, or has shown want of skill; it must be averred that there was *crassa negligentia*, that there was gross ignorance, or that there was gross want of skill; and in the present case there are no facts averred which amount to *crassa negligentia* or gross want of skill. (*Pitt v. Yalden*, 4 Bur. Rep. 2060; *Laidler v. Elliot*, 3 Barn. and Cress. 738; *Baillie v. Chandless*, 3 Camp. 16; *Godefroy v. Dalton*, 4 Bingham 460; see also *M'Lean v. Grant*, 15th Nov. 1805, Mor. No. 2, App. voce Reparation.)

Although the petitions recite particularly the third section of the statute referred to, yet the statute itself, which is a public statute, was also founded on, as appears from the conclusion of the petition, which bears,—“That in these circumstances it is clear that the said Thomas Houston junior has contravened the statute before narrated and founded on; and in order that he may be brought to punishment for [606] so doing, the present application is made to your honours for the usual warrant in such cases.”

The statute, therefore, is expressly founded on, and being a public statute, the judge was bound to take notice of and give effect to such of the provisions as, on considering the facts proved, he thought applicable; but in the judgment actually pronounced it does not appear that the Lord Ordinary placed his decision on any particular part of the act.

It is correctly stated in his lordship's note, “That there had been nothing like a course of practice, or any series of precedents, which had received the tacit sanction of the proper authorities,” and this principle ought to have led his Lordship to acquit the appellants, in place of deciding against them; for even in the more mechanical branch of the profession of a law agent, viz., that of conveyancing, it was laid down in the House of Lords (*Stevenson v. Rowand*, 4 Wilson and Shaw's Rep. 182),—“That a solicitor, called upon to perform duties in his character as a solicitor, is not to be held responsible for every mistake in point of law which he may commit. Every person is liable to mistakes in difficult and doubtful points of law; and if the question had turned solely on the construction of this instrument, I should be of opinion that Mr. Stevenson was not liable. But, my Lords, the true distinction is this:—In this particular case it appears that Mr. Stevenson, without any sufficient reason, departed from the ordinary and beaten course, from the usual and established forms of conveyancing.”

But the appellants had no such beaten track,—no [606] guide to light their path in construing this recent and complex act. The Lord Ordinary, from the note of his opinion in the relative case of Campbell, seems himself to have been uncertain as to what would have been the safest road. He admits the competency of founding on the first section, but says it might have been founded on jointly with the third; or that the petitions and sections might have been founded on alternatively; or that the statute might have been avoided altogether, and the petition placed on the Scottish statutes 1617 and 1661. The Judges of the Inner House distinctly announced that they did not concur in these views. Indeed there can be no doubt, that if the appellants had followed any of the courses suggested by the Lord Ordinary, the proceedings must have been quashed for uncertainty and inapplicability.

The appellants are country practitioners, who have not immediate access to the best advice, and the offence committed by the apprentices being one requiring an immediate check, and the proceedings very summary in their nature, they are necessarily called on to exercise their judgment under the pressure of obtaining instant redress.

Both the judge to whom the execution of this act is entrusted and the sheriff substitute of the county, and other practitioners engaged in precisely similar cases, and the agents of the parties accused, either directly sanctioned the petitions as being correctly and accurately laid, or acted on the footing that they were so.

In such circumstances it is impossible to maintain that there was, on the part of the appellants, *crassa negligentia*, or gross ignorance and want of skill.

[607] *Respondents*.—The appellants, as the paid agents of the respondents, were responsible for the skill and art necessary to accomplish safely the business which, as professional men, they undertook. The general rule as to the party employed in such cases is *spondet peritiam artis*, and *imperitia culpe annumeratur*.

The nature and extent of their employment is distinctly set forth in the special case as follows, viz. that the appellants were employed by the respondents "to prepare petitions to the justices of the peace for Renfrewshire, at their instance, against two apprentices of the names of Houston and Crookshanks, belonging to their manufactory, for having deserted their work, and other misconduct."

As to the form of proceeding no instructions were given; but the respondents trusted entirely to the appellants, as their legal advisers, and it was to secure the benefit of such advice that they resorted to the appellants at all, but having so resorted to them, and paying, of course, the usual professional charges in the matter, they trusted themselves implicitly in the appellants hands. The object was, that their refractory apprentices should be brought back to a state of subordination, and the respondents knew that the law afforded means to this effect; but whether the remedy was a remedy at common law, or whether it was to be found in the statute book, and if so, in what part of the statute book, the respondents did not know, and gave themselves no concern.

The Lord Ordinary very justly observed, that there was, independently of that statute, "a plain and a safe way by which they (the appellants) might have [608] escaped all possible embarrassment. By the original acts of 1617 and 1661, as interpreted by immemorial usage, the justices had undoubted power of enforcing all such contracts, without the aid of any recent enactment, and the defender might have discharged himself of the task he had undertaken without referring to 4 Geo. 4 at all."

The jurisdiction and powers of the justices independently altogether of the stat. 4 Geo. 4 are undeniable (Anderson, 24th Jan. 1837, 15 D., B., and M., 412; M'Lellan, 9th July 1825, 4 Shaw and Dunlop, 165; Jack, 11th March 1837, 15 D., B., and M., 833; Dinwoodie, 22d Nov. 1748, Mor. 7638; Bisset, 15th May 1810; Raeburn, 4th June 1824, 3 S. and D. 69; Wright, 9th Feb. 1826, 4 S. and D. 440; Stewart, 21st June 1832 and 21st May 1833, 11 S., D., and B., 628; M'Dougall, 27th June 1833, 11 S., D., and B., 795; *Stevenson v. Rowand*, 4 W. and S. Appeal Cases, 177; see to the same effect, 2 W. and S. 563; *Frame and Son v. Campbell*, 14 S. and D. 914).

It is not doubted that the appellants acted with the most perfect *bona fides*. But the question here is, whether as between two parties, one of them a professional man, and taking money for his professional aid and assistance, and the other an unprofessional man, resorting to the first, and paying him his utmost charge for a piece of professional business to be performed, and the result having been that matters were not merely blundered to the extent of making the business performed inoperative, but blundered to such an extreme degree as to involve the client in penal damages, as having been guilty of the *quasi* delict of wrongous imprisonment,—is it the paid agent, or the employer who pays him, upon whom the loss is to fall? Surely it is not asking too much at the hands of a professional man, that he shall at least have sufficient skill not to bring his client into the disgrace and the dangers of a false [609] imprisonment; and if he have not such skill, surely where both are equally *certantes de damno vitando*, it is upon the former, and not upon the latter, that any loss which thence accrues shall be laid.

Lord Chancellor.—My Lords, this was an action in the Court of Session in Scotland by the respondents against the appellants, who are provincial writers or attornies, for damages sustained by the alleged negligence or want of skill of the appellants in the transaction in which they were employed by the respondents. The parties had the good sense to avoid the expense of going into evidence, by agreeing to a statement upon a special case; as to the facts, therefore, there is no question. It is to be observed, that this special case assumes the employment of the appellants by the respondents, and that their instructions were generally to prepare petitions to the justices of the peace against the two apprentices Houston and Crookshanks, no special instructions being stated; that these two apprentices and another, Hunter, who had been convicted upon a similar petition, having disputed the legality of the convictions by bills of suspension and liberation, the present appellants acted for the respondents in maintaining the legality of the conviction, but the conviction in Hunter's case having been held illegal, and he having consequently been liberated, no opposition was made to the application by Houston and Crookshanks, and that they were consequently liberated, and having afterwards brought actions for false imprisonment, the re-



spondents, with the concurrence of the appellants, settled those actions by paying to each £25 and their costs. This arrangement, it was agreed, should not prejudice the [610] present action, but was to be considered as if the sums had been found due by the verdict of a jury or final judgment. No objection to the form of the proceeding was taken in Houstoun's case, but the objection was taken in Crookshank's case, and over-ruled. Although these proceedings may not be conclusive in this action of the illegality of the imprisonment of the apprentices, yet it is, I think, very difficult for the appellants, in the face of these admissions, to contend that the convictions were legal, and, consequently, that the adjudication of their illegality and the order for the discharge of the apprentices were not well founded, as they admit that it was by their advice, or that of the agent employed by them, that no opposition was made to this adjudication and order; but there is, I think, no doubt of the illegality of the proceedings against the apprentices.

The question, therefore, is reduced to this: Was there such a degree of negligence or ignorance in the conduct of the appellants, in conducting the proceedings against the apprentices, as to subject them to the liability of indemnifying their employers against the injury which has arisen from it? Their instructions were general,—to prepare petitions to the justices of the peace against the apprentices, for having deserted their work, and other misconduct.

It is, I think, unnecessary to inquire what course the appellants, acting under these instructions, ought to have adopted if any serious doubt or difficulty had existed as to the construction of the act of 4 Geo. 4, c. 34, because the recent statute was naturally the authority to be resorted to. It has, however, been well observed, that had the construction been thought doubtful, all danger [611] of miscarriage might have been avoided by founding upon the statutes generally, without specifying the particular section; but I cannot discover any ambiguity or doubt as to the construction of the act. It recites the 20 Geo. 2, c. 19, 6 Geo. 3, c. 25, and 4 Geo. 4, c. 29. In the two first of these statutes, the distinctions between servants and apprentices is very distinctly marked; the title of 6 Geo. 3, c. 25, indeed, is "An act for better regulating apprentices and persons working under contract," and the 4 Geo. 4, c. 29, extends the provisions of the two former acts to apprentices upon whose binding-out no larger sum than £25 had been or should be paid. The 4 Geo. 4, c. 34, reciting this act, in which this distinction is so clearly marked, itself maintains it in the clearest possible terms: the first section provides for complaints by a master or mistress against any apprentice within the meaning of the said before-recited act; the second section also relates to apprentices, giving to them a summary remedy for their wages not exceeding £10; the third section takes up the case of servants working under contract, and describes them in this way, "That if any servant in husbandry, or any artificer, calico printer," and then it enumerates a great variety of other trades, "or other person shall contract with any person or persons whomsoever to serve him, her, or them for any time or times whatsoever, or in any other manner;" and then it gives summary jurisdiction to the magistrates to punish such servants breaking such contract, or being guilty of any misconduct in the execution thereof; the fourth section providing a remedy for wages unpaid, when the party to pay is absent, applies to both classes, and, therefore, in describing the parties to be paid, [612] it repeats the description in the third section, but adds to it "and apprentices," and in describing the parties liable to pay it describes them as "masters, mistresses, or employers;" the first evidently applying to the master of apprentices, and the latter to the employer of servants.

The appellants, however, receiving instructions to proceed against two apprentices, wholly neglected the first section, and founded the petition exclusively upon the third section, which they set out in the petition, and then stating the indentures of apprenticeship and that the apprentice had absented himself, and had neglected his service and duty as an apprentice and servant as aforesaid, concludes that he had contravened the statute before narrated and founded on, that is, section third, which did not relate to apprentices at all. From this error, in founding upon the third section instead of the first, the whole evil has arisen; and, as I have before observed, the appellants cannot now dispute that such evil has been the necessary and legal consequence of such error, and that the respondents have thereby been exposed to the damages and expenses which they have paid to the apprentices. Looking, therefore,

to the case against the apprentices, which the appellants were directed to conduct, and to the act under which they proceeded, it appears to me to be a case of very great negligence, which term I think more applicable than ignorance; the appellants' case being that they were led into the error by following the example of another professional agent of the respondent, who had adopted the same course, and thereby involved his employer in the same difficulty, and exposed himself to the same responsibility. It is obvious that this can be no defence. [613] It was the duty of the appellants to look with their own eyes, and judge with their own understanding; and if, instead of doing so, they have blindly followed the erroneous course of another they cannot complain at being made responsible for the consequences of the error into which their guide has led them. Their employer had a right to their diligence, their knowledge, and their skill; and whether they had not so much of these qualities as they were bound to have, or, having it, neglected to employ it, the law properly makes them liable for the loss which has arisen to their employer. Another ground of defence is, that the point having been raised in the case of Crookshanks, the justice who heard the case was of opinion that section third was the one applicable to the case. This circumstance, if there had been any real doubt upon the construction of the act, might possibly have induced the court to consider whether there was sufficient opening for the construction adopted to operate as an excuse for the appellants; but the case appears to me to be too clear for any such construction; besides, as was observed by some of the judges below, the cause of action by the apprentices had already arisen, as they had been apprehended and were in custody. I cannot, however, but express my surprise at the opinion imputed to the sheriff-substitute, that the 10 Geo. 4, c. 52, has the effect of making all the provisions of the act founded on applicable to apprentices; whereas the obvious intention and construction of the act is only to extend the provisions of the 4 Geo. 4, c. 34, to persons engaged in certain other descriptions of business, as if such other description had been particularly mentioned in it, leaving the distinction untouched [614] between such of those provisions as related to apprentices and such as related to servants, and, *applicando singula singulis*, applying the separate provisions as to apprentices and as to servants, to apprentices and servants in the additional description of trades.

Professional men, possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be liable for errors in judgment, whether in matters of law or of discretion. Every case, therefore, must depend upon its own peculiar circumstances; and when an injury has been sustained, which could not have arisen except from the want of such reasonable information and skill, or the absence of such reasonable skill and diligence, the law holds the attorney liable. In undertaking the client's business he undertakes for the existence and employment of these qualities, and receives the price of them.

Such is the principle of the law of England, and that of Scotland does not vary from it. I think this case clearly within the principle; but I must observe that this is a case in which your Lordships would not be disposed to disturb the judgment of the court below, without a clear case of miscarriage in the court. There is no principle of law in dispute; the only question was as to its application to the facts of the case; that is the degree of information and skill, diligence and care, to be expected from a particular class of professional men in Scotland, a subject upon which the judges of the Court of Session have much better means of information than your Lordships can possess. If there were doubt upon this point in the present case your Lordships would be disposed to give great weight to the opinion of the judges of the Court of Session; but that is not the ground upon which the advice I shall give your Lordships is founded,—being of opinion that there was clearly a want of that reasonable degree of information, skill, care, and diligence which is required to protect professional men from the liability to indemnify their employers against the consequences of any error they may commit.

It is much to be regretted that the appellants did not see their liability, and discharge the obligations they had incurred, when that might have been done at the small expense of the two sums of £25, which the apprentices have received. Great

expenses have since been incurred in the court below, which have been necessarily added to the charge upon the appellants, and to which I am compelled to add the respondents' costs of this appeal.

I therefore move your Lordships that the interlocutor appealed from be affirmed, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of [616] Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—ARCHIBALD GRAHAM, Solicitors.

# [617]      APPEAL FROM THE COURT OF SESSION, SCOTLAND.

HENRY BROCK and Others, *Appellants*.\*—Knight Bruce—John Stuart; Mrs. MARGARET ISABELLA M'CALLUM or WEBSTER and Others, *Respondents*.  
—Tinney—James Anderson [24th June 1839].

[Commented on in *Stiven v. Reynolds and Co.*, 1891, 18 Rettie, 424, 426, 427.]

*Bonâ fide Payment—Consignation—Bankrupt—Stat. 1696, c. 5.*—A company having been pressed by a creditor, who threatened legal proceedings, but whose title to discharge the admitted debt the company doubted, remitted the amount to their agents, who, with full authority for that purpose, after depositing the sum in bank, lodged the bank receipt in a process of multiple-poining then commenced, in order to be disposed of as the court should appoint; and an order of court having thereafter been pronounced, appointing the said agents to consign the admitted sum in bank, upon a receipt taken payable to such person as should be preferred by the court, and to lodge the receipt with the clerk to the process; the company was sequestrated before this order of court had been complied with:—Held, in a question betwixt the creditor and the trustee on the debtor's estate, (affirming the judgment of the Court of Session,) 1. that the amount had been effectually consigned, and formed no part of the sequestrated estate of the debtor; 2. that as a *bonâ fide* consignation, and equivalent to payment of an admitted debt, which the debtor in the ordinary course of business, and under pressure, agreed to consign, such consignation was not struck at by the act 1696, c. 5.

[618] Messrs. Connell, merchants in Glasgow, had for some years acted as the agents in Great Britain of Neil M'Callum, who was resident in Jamaica, and by whom various remittances had been made to them, as his agents, both on his own account and on account of the Cousins Cove estate, which he managed or held as executor of his-deceased brother Alexander M'Callum, who had also been resident in Jamaica.

In making these remittances to the Connells, Neil M'Callum distinguished the funds or produce which he transmitted on his own account from what he sent home as belonging to the Cousins Cove estate, and in communications with the Connells had expressly desired them to keep the one account distinct from the other.

Acting on the special instructions from Neil M'Callum, the several transactions between him and the Connells were by them kept quite distinct in their books, and, according as they related to his own business or were transactions with him as manager of Cousins Cove, were invariably entered in separate accounts.

\* Fac. Coll. 14th Nov. 1838; 1 D., B., and M., (new series), p. 1.

The funds which belonged to Neil M'Callum himself, in the hands of the Connells, were fully accounted for to his executor, Mr. Gordon.

Of the funds remitted by Neil M'Callum on account of Cousins Cove, there remained in the hands of the Connells an admitted balance of £2564 8s. 3d., with interest from 2d March 1836, amounting, on 26th November 1836, to £2639 14s. 4d. It is exclusively to this fund that the present question relates.

Neil M'Callum died in the year 1835, while the Connells held the above balance. He appointed Mr. Gordon to be his executor, who expedite confirmation [619] before the commissaries of Edinburgh on 5th September 1836. Mr. Gordon required payment from the Connells of the sums due on their accounts with Neil M'Callum, both as an individual and as the manager of Cousins Cove; and the Connells, while they settled the balance due on their account with Neil personally, declined payment of the balance due on the Cousins Cove account, in respect they were advised that Mr. Gordon, *qua* executor simply of Neil, had no valid title to uplift and discharge any part of the estate of Alexander M'Callum which was situated in Scotland, and that an effectual discharge could only be granted by a party obtaining confirmation in this country as in right of Alexander.

A good deal of correspondence took place between the agents in Edinburgh of the parties in regard to this objection, and it was ultimately resolved that the question was one which required to be determined by the Court.

Messrs. Hunter, Campbell, and Co., the agents in Edinburgh of the Connells, wrote to Mr. Bertram, the agent for Mr. Gordon, on 17th October 1836, thus: "With regard to the Cousins Cove balance, we understand you are to exhibit to us the proved will of Alexander M'Callum, and satisfy us that the office of executor passed from Neil M'Callum to Mr. Gordon his executor;" and in answer, Mr. Bertram, on 21st October 1836, wrote: "In reference to your communication of 17th instant, I have written to London for the proved will of Mr. Alexander M'Callum, and I have instructed my correspondent to obtain the opinion of Mr. Burge upon the question, as to whether the office of executor under that will passed from Neil M'Callum to Mr. Gordon, his executor;" [620] adding, "In the meantime it occurs to me that Messrs. Connell ought to consign the admitted balance upon Cousins Cove estate." The suggestion in the latter part of this letter was immediately noticed by Messrs. Hunter, Campbell, and Co., thus:—"You state correctly what passed between us as to the mode of clearing away the difficulty regarding Mr. Gordon's title to discharge the Cousins Cove balance. The Messrs. Connell are ready to pay that balance the moment their professional advisers assure them they are safe to do so. In these circumstances, and as the only impediment is an objection to your client's title, which it is in your power to clear up within a few days, your suggestion as to consignment appears to us unusual; but if you insist on it, we shall communicate what you have stated to the Messrs. Connell."

An opinion was obtained, that Mr. Gordon, as the personal representative of Alexander, had in that character a title to those funds recovered by Neil and remitted to Scotland; but, secondly, that Mr. Gordon "would not be the legal representative of Alexander for the purpose of receiving and giving discharges for that part of Alexander's personal estate which was in Scotland, unless Alexander's will is also proved in Scotland." This opinion and other documents were communicated by Mr. Bertram to Messrs. Hunter, Campbell, and Co. on 11th November 1836, and in reference thereto, in his letter of that date, he says:—"I trust that these documents, joined to what you already have in your possession, will remove all obstacle to the payment of the Cousins Cove estate money to Mr. Gordon's attorney."

Messrs. Connell refused to make payment to Mr. [621] Gordon of the balance due by them. In a letter of 19th November 1836, Mr. Bertram stated to Hunter, Campbell, and Co.:—"I must therefore take my own measures for immediately securing the debt, unless your clients will without further delay consign its amount. This I hope they will agree to, since they admit their liability for the debt, and consignment will save me the necessity of resorting to such steps as may be requisite for securing my clients. Upon its being made, I have no objection to discuss the question of title with you, either judicially or by reference." Thereafter, on 24th November 1836, Mr. Bertram writes:—"In your letter of yesterday, refusing to pay the Cousins Cove balance upon the title of Mr. Gordon, as executor of Neil M'Callum,

you take no notice of my demand for consignment and of my offer, upon that being made, to discuss the question of title by reference. That demand and offer I now repeat, and in the meantime, to prevent delays, I have sent to Glasgow, for service on Messrs. Connell, the summons in the proper action to force consignment, and to bring all parties interested into the field. As the defenders have consented to dispense with the *induciae*, the summons will be ready to call next week, and I beg to intimate that upon its first appearance in the rolls, I shall move for consignment of the admitted balance, unless your clients shall previously comply with my demand. It is a very reasonable demand, as I ask them to do no more than to part with money which they admit to be not their own. Their compliance will prevent the necessity of my resorting to unpleasant measures. Of the validity of Mr. Gordon's title [622] I have not yet seen reason to change my opinion." And again, on 25th November 1836, Mr. Bertram writes:—"Your letter received this morning does not take any notice of the demand for consignment extra-judicially, and the offer in that case of a reference upon the question of title, which I made in my letter of 19th instant, and repeated in my letter of yesterday."

Messrs. Hunter, Campbell, and Co., on 26th November 1836, in a letter to Mr. Bertram, stated:—"We beg to inform you that the Messrs. Connell have remitted to us the sum of £2639 14s. 4d., being the amount of the balance on the Cousins Cove account, with interest at four per cent. to yesterday. We have in the meantime lodged that sum in the British Linen Company, on a deposit-receipt in our name, which, as the Messrs. Connell's sole desire is to obtain a sufficient discharge of what they owe, we are ready to dispose of in any way that is consistent with their safety. From this date they shall be accountable only for bank interest on that sum. We have no objection, on your naming the clerk with whom you mean to lodge the multiplepointing, to place the deposit-receipt in his hands, indorsed by us, and with the following marking:—"This receipt contains the admitted balance on the Messrs. Connell's account for Cousins Cove estate, and is lodged with the clerk to be disposed of as the Lord Ordinary may appoint in multiplepointing *Connell v. the Representatives of Alexander and Neil M'Callum.*"

The remittance to Hunter, Campbell, and Co. was entered in Messrs. Connell's cash-book thus:—

[623] "1836, Nov. 25. Cousins Cove Estate.—Remitted through British Linen Company to Hunter, Campbell, and Co., W.S., Edinburgh, to be disposed of by them in payment or consignment of balance due this estate      £2639 14 4"

And this entry in the cash-book was transferred to the ledger, the account of the Cousins Cove estate being debited with the amount thus:—

"1836, Nov. 25. To cash      £2639 14 4"

Messrs. Hunter, Campbell, and Co. deposited the money in bank, taking a receipt for it in their own name in these terms:—

"British Linen Company's Office, Edinburgh, 26th Nov. 1836.

"£2639 14s. 4d.

"Received from Messrs. Hunter, Campbell, and Co., W.S., Edinburgh, two thousand six hundred and thirty-nine pounds, 14s. 4d., which is this day placed to the credit of their deposit-account with the British Linen Company.

(Signed) *Alex. Goodsir, Sec.*"

Mr. Bertram wrote, on the 29th November 1836,—“I am glad to find that the Messrs. Connell have at last done what I long since requested them to do, by consigning the money admitted by them to be due.”

A marking on the back of the deposit-receipt, as adjusted by Messrs. Hunter, Campbell, and Co. and Mr. Bertram, was in these terms:—"This receipt contains the balance admitted by Messrs. Connell to be due on their account current for Cousins Cove estate, and is lodged in process of multiplepointing at their instance against the representatives of Alex. [624]-ander and Neil M'Callum, in order to be disposed of as the Court shall appoint. (Signed) *Hunter, Campbell, and Co., W.S.*"

The deposit-receipt was placed in the hands of the clerk in Court to the process upon 30th November 1836.

Previous to the case appearing in the rolls of Court, Mr. Bertram, on 15th December 1836, intimated that it occurred to him, "that it will be proper to have the contents of the deposit-receipt which you lodged in the clerk's hands consigned judicially upon a receipt taken payable to the party or parties who may be preferred. I shall accordingly make a motion to that effect, upon the case appearing in the roll." Accordingly, when the cause did appear in the rolls, on the motion of Mr. Gordon's counsel, an interlocutor was pronounced by the Lord Ordinary (Corehouse) on the 21st December 1836: "Farther, appoints the pursuers to consign the admitted sum of £2639 14s. 4d., with bank interest thereon since 26th November last, in the bank of the British Linen Company, and that upon a receipt taken payable to such person or persons as shall be preferred thereto by the Lord Ordinary or the Court in the course of this process, and to lodge the same in the hands of the clerk; and for that purpose authorizes their agents, Messrs. Hunter, Campbell, and Co., to get up from the clerk of process the receipts granted to them for the foresaid sum, of the above dates, and lodged in process, in order that they may obtain payment thereof; reserving to the pursuers to state in this process all objections competent to the title to discharge of the [625] party who may be preferred, with all answers to such objections."

Before the agents of Messrs. Connell could act on the interlocutor of the Lord Ordinary, and within three days after its date, the estates of Messrs. Connell were sequestrated, in virtue of the Bankrupt Statute, 54 Geo. 3., c. 137; the money remaining with the British Linen Company, deposited in name of Messrs. Hunter, Campbell, and Co., and the deposit-receipt was left in the hands of the clerk of court.

Henry Brock, accountant in Glasgow, as trustee on the sequestrated estate, craved leave to sist himself "as a party to the action, for the interest of the creditors of the raisers;" and the Lord Ordinary (Corehouse,) pronounced an interlocutor, (3d Feb. 1837,) holding him "sisted, as trustee foresaid, a party to this action, and allows the same to proceed accordingly."

Thereafter, an order was pronounced by the Lord Ordinary, Cockburn, (before whom the cause then depended, in place of Lord Corehouse, removed to the Inner House,) appointing Mr. Brock "to give in a condescendence of the fund *in medio* by Tuesday next, with certification," to which answers were lodged for Mr. Gordon; and on those pleadings, as subsequently revised, the record was closed.

The Lord Ordinary (Cockburn) having heard parties upon the closed record, pronounced the following interlocutor, accompanied with the note thereto annexed, which explains the nature of the pleas of the parties respectively (31st May 1838):—"The Lord Ordinary having heard the counsel for the parties, and considered the record, prefers the claim of Henry Brock, as trustee on the sequestrated estate of Arthur and James Connell, to [626] the fund *in medio*, and decerns: Finds him entitled to expenses, appoints an account thereof to be given in, and when lodged remits to the auditor to tax and report. (Signed) H. COCKBURN."

"Note.—Whatever difficulty there may be in this case, it is much more in the construction to be put upon the facts than in the legal rule.

"The general view of the facts, as the Lord Ordinary sees them, is this:—Messrs. Connell owed £2639 14s. 4d. to the estate of the deceased Alexander M'Callum. Payment of this was demanded by the claimant William Gordon, as his executor. The Connells did not dispute the debt, but they denied Gordon's right to receive, and consequently his power to discharge it. This point is not yet settled. In this situation, Gordon wished the money to be extra-judicially consigned, for this process of multiplepounding had not then been instituted. This proposal gave rise to a correspondence between the agents of these parties, the result of which was, that the Connells sent the money to their own agents in Edinburgh, and made an entry in their books, stating that the sum was to be disposed of by them (their agents) in payment 'or consignment of the balance due to this estate.' There are other entries made in order to square the books, and to account for the cash being no longer in the Connells hands, but nothing which alters the purpose for which they parted with it. The summons in this action being soon afterwards executed, the agents placed the bank receipt for the money in the hands of the clerk to the process, with a marking on its back, bearing:—'This receipt contains the balance admitted by the Messrs. [627] Connell to be due on their account current for Cousins Cove estate, and is lodged

in process of multiplepointing at their instance against Alexander and Neil M'Callum, in order to be disposed of as the Court shall appoint.' In about three weeks after this, judicial consignment was ordered by the Lord Ordinary to be made by the Connells, the receipt to be taken, 'payable to such person or persons as shall be preferred by the Lord Ordinary or the Court; and reserving to the pursuers all objections to the title to discharge of the party who may be preferred.' Nothing was done in implement of this order, and three days thereafter the Messrs. Connell were sequestrated. The whole of these proceedings took place within sixty days of their bankruptcy.

"The money is now claimed by the trustee for the creditors, and he is opposed by Gordon, who claims it for the estate of Alexander M'Callum.

"The Lord Ordinary has preferred the trustee, and on one or other of these two grounds,—

"First, he is of opinion that the bankrupts were never divested of the money, and that, it being theirs when they were sequestrated, it belongs to their creditors. The true import of the arrangement, he thinks, was, that Gordon was distrustful of the safety of the money while in the bankrupts hands,—that they were distrustful of his title to receive it, and that in these circumstances it was put into a situation of safety for both, but that the voluntary consignment did not transfer the property, and was not meant to do so.

"The receipt (not the property or the right to it, but the mere receipt) was for a time in the hands of [628] the Connells agents, but for Connells behoof partly, and then went into the hands of the clerk, not as a completed conveyance to Gordon, or to any one, but for the security of the party who should ultimately be found to have right to it. There was no assignation intimated or unintimated; and, supposing that an indorsation would have been effectual, there was no indorsation. If there was a trust created in the persons of the agents or of the clerk, it was a trust, partly for the protection of what was understood to be still the truster's property, though subject to a claim, and rather than interpose a trustee to be a mere holder for that claimant, if it had been intended to complete his right as proprietor, payment would have been made to him at once in the ordinary way. In short, there is nothing here but what occurs in most cases of consignment, where the consignor, instead of being divested, rather marks, by the very act of only consigning, that though he may have quitted the possession, and fettered his power of administration, he has not ceased to have the property. Accordingly, on the one hand, some act remained to be performed by the bankrupts before the transference could be complete. Even the order for judicial consignment, which was given after all the other proceedings on which Gordon founds, was an order on the bankrupts. And, on the other hand, can it be said, that without any such additional act by the bankrupts, Gordon had actually obtained the right? If it had been he who had failed, could his creditors have claimed this money as already their debtors, while the doubt as to his title, on account of which it had been refused to be given him, was still as unsettled as ever? [629] Suppose that there had been no bankruptcy, and that Gordon's title had been found bad, would not the Connells have simply resumed possession of the money as their own? Would they have had to derive a new right to it by a conveyance from Gordon, who the consignment had made the owner, while the validity of his title was under discussion?

"The cases of *Gray v. Ross*, 16th January 1706, and of *Baird*, 4th January 1744, though not identical with this one in the circumstances, proceed on the principle that a deposit with a third party, for behoof of the person who should be ascertained to have the best right, did not divest the depositor.

"Second, If there was a completed transference it was in violation of the act 1696.

"The ground taken by Gordon at the debate was, that this was a payment in money, and in the common course of business, of a debt already due.

"The cases of *Speir*, 30th May 1827, and of *Mitchell*, 26th June 1834, enter deeply into this matter, and seem to furnish the legal rule. In the first it was found, 'that a payment in cash by a bankrupt, within sixty days from his bankruptcy, to an indorser of a bill accepted by him but not then due, as a provision for the said bill when it became due, is reducible under the act 1696, c. 5, independent of fraud at common law.' The case was decided on the distinction between a payment made in the ordi-

nary way, as the immediate extinction of a debt, and as a mere preparation for paying a debt not yet actually exigible. The second went on exactly the same ground. A person, within sixty days of bankruptcy, sold a house and paid the price [630] into a bank where he had a cash credit. This was done by the hand of one of the cautioners, neither of whom, however, knew that the principal was embarrassed, and for the purpose of relieving them. The sale was found good to the purchaser, and the payment good to the bank; but *quoad* the cautioners against whom no claim had been yet made, it was decided that they would take no benefit by the transaction. As to them, it was not a proper payment of a present debt.

"Now, there was no present debt constituted here in favour of Gordon. The money was due, but it was not due to him. Accordingly what took place may have been an ordinary business arrangement, but it was not a payment. Hence it did not extinguish the debt. The Connells had got no discharge. If the money had perished in the hands of their agents, or of the bank, or of the process clerk, it would have perished to them. The arrangement amounted in effect as an intention merely to a provision for paying.

"It was argued for Gordon, that a voluntary consignment is not an infringement of the act 1696, and that this common judicial precaution would be useless if it were. It would not be useless; because its only object being to put disputed property into a position of safety, this end would be attained till the responsibility of a trustee made any other case unnecessary. The Lord Ordinary agrees that it is not struck at by the act, but only because it transfers no property. If, however, it does transfer property, then he thinks that the statute reaches it. He knows no authority or principle for giving one creditor a preference over the [631] rest, merely because, instead of making his demand, like them, extra-judicially, he chooses to do it by an action, and because, in that action, an honest defender is willing, for his own credit, or his adversary's comfort, to throw the money into court, reserving his objections to the adversary's title to receive it."

The respondent having presented a reclaiming note to the First Division of the Court of Session against this interlocutor, their Lordships (14th Nov. 1838) pronounced the following interlocutor:—"The Lords having advised this reclaiming note, and heard counsel for the parties, alter the interlocutor reclaimed against, and find that the sum of £2639 14s. 4d. sterling, in dispute, contained in the deposit-receipt, No. 4 of process, forms no part of the sequestrated estate of the raisers of this process, and is not claimable by the trustee upon that estate in competition with the party in right of the deceased Neil M'Callum or Alexander M'Callum, and repel the claim and pleas maintained by the said trustee: Find that the said sum, as the fund or part of the fund *in medio* in this process, belongs to such of the defenders or others as shall be preferred thereto in the competition; and with these findings, remit to the Lord Ordinary to proceed farther in the cause: Find the compeerer, Henry Brock, the trustee on the said estate, liable in expenses; allow an account thereof to be given in, and remit the same, when lodged, to the auditor, to be taxed."

The trustee, having petitioned the Court to grant authority to present an appeal against this interlocutory judgment, leave was granted in December 1838.

[632] At this stage Mr. Gordon died. The respondent, Mrs. Margaret Isabella M'Callum or Webster, who is the only child of Alexander M'Callum, as well as the residuary legatee of her uncle, Neil M'Callum, obtained a decree-dative as executrix-dative *qua* residuary legatee of the said Neil M'Callum, *ad omnia et quoad non executi*, and thereupon she and her husband, for his interest, lodged, 19th January 1839, in process, a minute craving that they should be sisted as claimants in room of Mr. Gordon. An interlocutor was accordingly pronounced to that effect.

Connells trustee appealed.

*Appellants*.—The interlocutor appealed from was objectionable, while on both grounds the interlocutor of the Lord Ordinary was well founded in the legal conclusions deducible from the facts of the case. (1.) The question whether there was a complete transfer of the fund, so as to be beyond the reach of Messrs. Connell or the trustee, would depend not merely on the terms of the correspondence, but on the views which the parties took of that correspondence at the time. Now Bertram's own misgivings on the subject showed that he did not act as if the money was safely consigned in court beyond the power of the consignors or the diligence of their creditors. His



letter of the 15th December 1836 admits distinctly that there was no consignment at that date, and that the money was not then taken out of the order and disposition of the Connells. If the Connells were divested of the fund by the mere remittance to their own agents in Edinburgh, in whom was the fund vested? Not in the hands of the respondent,—not even [633] in manibus of the court, like a consigned fund awaiting the order of the judge. If the money had been lost on whom would the loss have fallen? Not on the respondent, who had no control over the fund, and who had not even got consignment. There was no transfer of the money; indeed Messrs. Hunter, Campbell, and Co. had no authority to transfer the money. [Lord Chancellor.—It is nowhere made part of the appellants' case that Hunter, Campbell, and Co. had no authority.] It was beyond their authority; and the point is now open under the third plea in law in these words: "There is no ground, in the circumstances of the case, for maintaining that the bankrupts were divested of their right to the sum contained in the deposit-receipt," etc. And on the facts, the legal title would be held, either in Scotch or English law, to be in the Connells. [Lord Chancellor.—But look at Hunter, Campbell, and Co.'s letter of the 26th November 1836.] The money was intercepted however before consignment, by the sequestration of the parties ordered to make consignment, for at the date of the sequestration there had been merely an order to consign; so that there was no consignment, either judicial or extra-judicial. *Gray v. Lord Ross*, 16th January 1706 (Mor. 7724); *Baird v. Murray*, 4th January 1744 (Mor. 7738).

(2.) Supposing that there was a transference of the fund, so as to prevent its acquisition by the appellant for behoof of the general creditors in the same direct manner as if it had been still in bonis of the bankrupts at the date of the sequestration, the transaction by which such transference was effected was reducible under the act 1696, c. 5. On the eve of bankruptcy [634] no act can be done so as to alter the condition of the creditors, who as a body are supposed to be in right of the fund from the time of constructive bankruptcy (2 Bell, Com. 205-208). By the act 1696, c. 5, all voluntary deeds, by which, directly or indirectly, the bankrupt gives over his effects to one creditor preferably to others, within sixty days before his bankruptcy, whether in satisfaction of his debt or merely in farther security, are declared null and void; and according to the construction adopted by the Court the deeds struck at are not those merely for the completion of which written conveyances are necessary, but all acts whatsoever subject to the known exception of payments in cash in the ordinary course of business, although no writing had intervened or been necessary. (See the cases cited in 2 Bell, 211; *Forbes*, 27th January 1715, Mor. 1124, 2 Bell, 212; *M Math v. M'Kellar's Trustees*, 1st March 1791, Bell's Cases, 22; President Campbell's opinion, p. 39; *Moncreiff v. Cockburn's Creditors*, 8th February 1694, 1 Fount., 596.) Regard ought specially to be had to the two recent cases noticed by the Lord Ordinary, *Speir v. Dunlop*, 30th May 1827 (4 S. and D. 92, and 5 S. and D. 680), remitted back by the House of Lords (2 Wils. and Shaw, 253) for reconsideration where the Court (Fac. Coll. 30th May 1827, p. 516) reduced the transaction as falling within the act 1696, the doctrine established being that if an ultroneous payment be made as a security against a debt to become due at a subsequent period, the transaction was reducible, and the case of *Mitchell v. Rodger*, 26th June 1834 (12 S. and D. 802), where the decision in *Speir v. Dunlop* was recognized. Now, in the present case, there had been nothing done by the bankrupts beyond a deposit-[635]-tation in the hands of a third party to provide for payment of a debt in their estimation not yet exigible by the creditor, and there merely had followed a change in the mere depositary of the bank receipt. But there had been no consignment by judicial authority, but merely extra-judicial consignment, and not compulsory, and therefore the transaction was within the statute. The respondents could not show that there had been any pressure on the Connells for payment; there had been therefore no staying-off of pressure. Nothing had been got by hastening the action, as Messrs. Connell merely remitted the money to their agents from propriety and delicacy towards all parties.

*Respondents*.—There were two questions: 1. Whether the fund was subject to the order and disposition of the Connells at the date of the bankruptcy; and, 2. Supposing it was not so whether the payment was struck at by the act 1696, c. 5. The facts as to the situation of parties are not disputed. There had been no refusal to pay on the ground that the money was not due; but merely a delay caused from doubts raised as

to the necessity of confirmation by Neil M'Callum's executor in Scotland; a ground taken, it might be remarked, more than sixty days before the bankruptcy. On that point, it might be observed in passing, there was no necessity for such confirmation as the case of *Frith v. Buchanan, Hamilton, and Co.* (15 D., B., and M., 729), in reference to the statute 4 Geo. 4, c. 98, vesting moveable estate in the next of kin, *ipso jure*, without confirmation, established. But the multiplepounding was necessary, in order to [636] effect a judicial discharge for the party; and the money was remitted to await the decree in that action. It had been said that Hunter, Campbell, and Co. exceeded their powers, and therefore that the money must still be held as not having passed from the Connells; but that point was not raised, as a Noble Lord had remarked, and the third plea did not embrace it. Besides, this new plea was excluded, for it had been assumed by the appellants throughout their case that Hunter, Campbell, and Co. did act with authority; and in any view the authority to pay or consign was clear from the correspondence,—the money having been sent to Edinburgh in answer to a demand of consignment. Then, as to the effect of the receipt by the clerk of the Court;—there was no Accountant General in Scotland; and when money was paid in to await the decree of the Court, the practice was, if there was unwillingness, to take an order of Court on the party to consign, or if there was desire on one part and willingness on the other, then voluntary consignment was equivalent, and so say the Lords Gillies and Corehouse (1 D., B., and M., new series, p. 6). Holding this to have been judicial consignment,—and the appellants admit that the transfer was complete,—if there was judicial consignment, which there certainly was, (there having been consignment by consent, the clearest proof of the fact,) the asking of the order for consignment was a mere additional precaution,—a change in the depository, and dispensing with Hunter, Campbell, and Co. as the interposed party, and merely matter of arrangement. It was to be observed, that the interlocutor ordering consignment of the receipt was by [637] Lord Corehouse, (who held in the Inner House that there was judicial consignment of the fund,) and not by Lord Cockburn, who held an opposite opinion.

In Scotland risk was no criterion of property. Property is not transferred, though it may be at the risk of the buyer. So property sold remains at the risk of the buyer, but is not his till delivery (*Gordon, 4 Bro. Supp.*; *Robertson v. Creditors of Mathieson*, 1st Feb. 1738, Mor. 3077). A sounder criterion of risk is, whether the creditors could have arrested. The Connells could not; neither would an arrestment by their creditors have been effectual (*Gordon v. Hughes and Dunbar*, 11th June 1824, 2 Sh. App. 310; *Sourer v. Smith*, Mor. 744; *Stalker*, Mor. 745). The trustee had no better right to the fund than either the Connells or their creditors; so that upon either criterion the ground taken was untenable.

(2.) The transaction was not reducible under the act 1696, c. 5. The best answer to the remark, that the judges below had not heard this point, was the fact that the report bears that counsel for the trustee of the Connells were heard on both points. 1, This had not been a voluntary act; 2, payment had been demanded before the sixty days; 3, the interlocutor, finding the holder of the fund liable in once and single payment, discharged the Connells; and, 4, the obligation existed before the decree; so that is not a voluntary act which a party is compellable to do in performance of a legal obligation. But whether it was voluntary or not it was the payment of a debt. Payments in cash are not struck at by the act, and consignment is defined by Erskine (B. iii. tit. 4, s. 5) as in the judgment of law equivalent to [638] payment. Again, whatever the transaction be called, whether payment or otherwise, it was a payment in the ordinary course of business, and so not struck at (*Dundas*, 2d June 1808, F. C.). The appellant had rejected the ground on which the Lord Ordinary put the case, which was, that though there was consignment there had not been payment. It was now said, there had neither been consignment nor payment; but merely security till consignment was forced. [Knight Bruce.—Yes.] But then the Court, disagreeing with the Lord Ordinary, held that there had been consignment; and so the Lord Ordinary's view that the fund was *in medio* failed.

Lord Chancellor.—In this case the first division of the Court of Session, by an unanimous judgment, differed from the Lord Ordinary, and altered his interlocutor. From respect for the opinion of the Lord Ordinary I thought it right to examine carefully all the circumstances of the case and all the authorities referred to. Although

I did not upon the argument at the bar entertain any doubt of the correctness of the judgment of the Court, this investigation has only confirmed that opinion.

Messrs. Connell of Glasgow had been employed by Neil M'Callum, in the course of which employment a large sum became due from them to him, which was paid to William Gordon his executor, and is not now in question. But he having directed them to keep separate accounts of the transactions respecting a West India property called Cousins Cove estate, to which it is said that Alexander M'Callum, to whom Neil was [639] executor, had been entitled as mortgagee, they (Messrs. Connell) questioned the authority of Mr. Gordon, as executor of Neil M'Callum, to demand payment of the balance of that account, contending that they could not safely pay to a personal representative of Alexander; and on this the doubt arose, although, as all their dealings had been with Neil M'Callum, it is difficult to understand the ground; but it is not necessary to consider that question. Mr. Gordon demanded payment; Messrs. Connell admitted the debt; but, having raised this objection, Mr. Bertram, Mr. Gordon's agent, in his letter of the 21st October 1836, after informing them that he had written to London on the subject, observes that it occurred to him that Messrs. Connell ought in the meantime to consign the admitted balance upon the Cousins Cove estate. On the 19th November Mr. Bertram again writes that measures will be immediately taken for recovering the debt unless Messrs. Connell consign the amount. On the 21st November Messrs. Hunter, Campbell, and Co., the agents of Messrs. Connell, request Mr. Bertram to pause before taking the steps pointed out; and on the 23d they decline to pay Mr. Gordon, and warn him against any steps of diligence. On the 24th Mr. Bertram informed the agents that he had given directions to commence the proper action to enforce consignment, and that he should proceed unless they complied with his demand of consignment; and on the 25th renewed his demand for consignment extra-judicially. On the 26th Messrs. Hunter, Campbell, and Co. informed Mr. Bertram that Messrs. Connell had remitted the balance to them, and that they had lodged it in the British Linen Company's bank, on a deposit-receipt, in their own names, and that [640] they were ready to dispose of it in any way consistent with the safety of Messrs. Connell, and that they had no objection to place the deposit-receipt in the hands of the clerk to be named in the action of multiplepoinding, with a marking that it would be disposed of as the Lord Ordinary should appoint, and giving notice that bank interest only would be paid from that time.

On the 29th November Mr. Bertram, in answer to that proposal, said that he was glad that Messrs. Connell had at last done what he had so long requested them to do, by consigning the money. The money was placed by the British Linen Company to the credit of Hunter, Campbell, and Co., and a receipt given in their name, which they, according to their undertaking, deposited with the clerk in the action, with this indorsement: "This receipt contains the balance admitted by Messrs. Connell to be due on their account current for Cousins Cove estate, and is lodged in the process of multiplepoinding at their instance against the representatives of Alexander and Neil M'Callum, in order to be disposed of as the court shall appoint."

On the 15th December Mr. Bertram proposed that the contents of the deposit-receipt lodged in the clerk's hands should be consigned judicially upon a receipt taken payable to the parties who might be preferred, and stating that he should make a motion to that effect; and accordingly, on the 21st December, an interlocutor was pronounced appointing the pursuers to consign the admitted balance, with bank interest from the time of the deposit, and that upon a receipt taken payable to such person or persons as should be preferred by the court in the course of the process, and to lodge the [641] same in the hands of the clerk; and for that purpose the Lord Ordinary authorized the agents, Messrs. Hunter, Campbell, and Co., to get up from the clerk to the process the receipt granted to them, and lodged in process, in order that they might change the deposit, reserving to the pursuers to state all objections to the title of Gordon to discharge.

Three days after this, that is on 24th December, the estates of Messrs. Connell were sequestrated. The Lord Ordinary thought that the trustee on their estate was entitled to this sum; but the Inner House were of opinion that it formed no part of the sequestrated estate.

Some question was raised at the bar as to the authority of Hunter, Campbell, and Co. so to deal with this fund, but I find no ground for any such question. In

the appellants' case it is stated that Messrs. Connell entered this remittance in their books in these words:—"25th Nov. Cousins Cove estate. Remitted the British Linen Company to Hunter and Co., to be disposed of by them in payment or consignment of balance due to this estate;" and it is stated that Hunter, Campbell, and Co. were to dispose of the sum in payment or consignment of the balance when they were satisfied that it could be disposed of in a way consistent with the perfect safety of their clients. What Hunter, Campbell, and Co. did was clearly within this authority. The question therefore is, whether by the law of Scotland in a case in which a debtor pressed by one claiming as his creditor, and threatened with legal proceedings, but questioning the title of the claimant to give a discharge for the admitted debt, agrees to consign the amount and actually remits it to his agents, who, with [642] full authority for that purpose, agree with the creditors to pay the amount to whomsoever the court in a suit then commenced shall find it due, and against which agents, before sequestration, an order of court is made directing them to pay to whomsoever the court should find it due, the sum so remitted shall upon a subsequent sequestration against the debtor be held to be part of his estate. The debtors pay the money to their own agents it is true, but with authority to pay or consign in satisfaction or security for the debt in any manner they may think safe. They accordingly do extra-judicially consign it in security of the debt; and before sequestration of the debtor the agents are judicially ordered to part with all control over it by giving the control to the officer of court to abide the adjudication between the parties claiming, in which adjudication the Connells had no interest.

The facts of the case exclude all suspicion of fraud or undue preference. To bring a case within the act 1696 there must be a voluntary payment. The case of *Speir v. Dunlop* (5 S. and D. 680) was relied upon by the appellant, but in that case there was no demand, no pressure, and security was given for a debt not due. As to the case of *Mitchell v. Rodger* (12 S., D., and B., 802), it was a case of fraudulent preference in a failing debtor in favour of a friend, who had become surety for him. Neither of these transactions were in the ordinary course of business, whereas the transaction in question is admitted to have been so. There was pressure by the creditor, and a consignment made upon his proposal, and after it was made he accepts it as a consignment, and deals with the party to [643] whom it was made, after which it would I apprehend have been impossible for him to raise any question as to the consignment being payment, so far as the debtor was concerned; but beyond this, the party to whom the consignment is made, with the full authority of the debtor, enters fresh into a personal obligation to pay to whomsoever might be found entitled, and afterwards submits, and is subjected to a judicial order, to part with all control over the money, for the purpose of placing it under the exclusive control of the Court.

I have not particularly adverted to the position of the money having been, at the time of the arrangement made, in the hands of the British Linen Company under this receipt, because I consider it as put into the hands of Hunter, Campbell, and Co., who, in fact, had the control over it; which is the most favourable view of the case for the appellants. If their instructions had been to pay and not to consign, no question could have arisen; and why is not consignment to be equally protected as payment? The authorities (Ersk. b. 4, tit. 3, sect. 5) in the law of Scotland clearly show that consignment is held equivalent to payment. There is a total absence of all evidence of fraud or undue preference;—so that the only just conclusion to be arrived at is, that this was a payment admitted to be in the ordinary course of business, and in the only mode in which payment could be made when doubts existed as to the legal title of the claimant to recover payment of an admitted debt. If this judgment be not according to the law of Scotland, then, although a debtor may pay a debt within the sixty days, he cannot under any circumstances make consignment to secure [644] it, however pressed by his creditors, and however impossible it may be to make actual payment with safety to himself.

I have no doubt as to the propriety of advising your Lordships to affirm the interlocutory judgment appealed from, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appel-

lants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

G. and T. WEBSTER—RICHARDSON and CONNELL, Solicitors.

[645] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

(*Ex parte.*)

JAMES CHARLES MACRAE, *Appellant*.\*—Sir W. Follett—Sandford; MARIA LE MAISTRE MACRAE or HYNDMAN, and Husband, *Respondent* [27th June 1839].

[*Mews'* Dig. iv. 1135; x. 267. S.C. *sub nom. Macrae v. Hyndman*, 6 Cl. and F. 212, q.v.; 3 Jur. 571.]

*Outlawry—Entail—Trust.*—A party executed a disposition of his heritable property *ex facie* absolute, but which the disponees afterwards declared by a separate deed was held in trust for the grantor, his heirs and disponees. He was afterwards cited to appear before the Court of Justiciary for murder alleged to have been committed previous to the date of said disposition; and, on his not appearing, sentence of fugitation passed, and denunciation followed thereon, which was recorded. Some years afterwards, when still unrelaxed, he executed a deed, directing his said trustees to execute a strict entail of his property in favour of certain parties, which was accordingly done, and after his death recorded by the trustees. In a challenge of the entail by the heir at law,—Held (affirming the judgment of the Court of Session) that the entail, and subsequent registration thereof, were valid and effectual, in respect that a sentence of outlawry does not deprive a party of the right of absolute disposal of the fee of his property.

The late James Macrae, esq., of Holmains, was, on 26th May 1790, cited edictally, on criminal letters raised against him at the instance of his Majesty's [646] advocate, for his Majesty's interest, to appear before the High Court of Justiciary of Scotland on the 26th July then next, to answer for the murder of Sir George Ramsay of Bamff, bart., whom he had shot in a duel upon the 13th of April 1790, and who died in consequence on the 16th of the same month. The will of the criminal letters commanded the messenger to charge the party complained of to come and find caution, "under pain of rebellion and putting him to the horn;" and on his failing to do so, "to denounce him our rebel, and put him to the horn, escheat and inbruing all his moveable goods and gear to our use for his contempt and disobedience." Having failed to appear, the usual sentence of fugitation was pronounced against him on the 26th of July 1790. The sentence was in these terms:—"The Lords Commissioners of Justiciary decern and adjudge the said James Macrae to be an outlaw and fugitive from his Majesty's laws, and ordain him to be put to his Majesty's horn, and all his moveable goods and gear to be escheat and inbrought to his Majesty's use, for his contempt and disobedience in not appearing the day and place, in the hour of cause, to have underlied the law for the crime of murder," etc.

On the day following that on which the aforesaid sentence was pronounced, letters of denunciation were raised against Mr. Macrae. These letters, which bore the signet of the High Court of Justiciary, commanded the messenger to denounce him,

\* Fac. Coll. 22d Nov. 1836; 15 D., B., and M., 54; and App. 1312.

rebel, etc., "for his being an outlaw and fugitive from our laws for the crime aforesaid." These letters were put in execution on the 28th and registered on the 29th of July 1790.

Previously to the citation on the criminal letters, that [647] is to say, on the 8th May 1790, Mr. Macrae had executed an absolute conveyance of his estate of Holmains in favour of Lord Glencairn and Mr. Alexander Young and the survivor of them, and their heirs and assignees, heritably and irredeemably, with an assignation to the rents falling due from and after Whitsunday 1789. Upon the precept contained in the above conveyance base infetment was taken on 15th May 1790, in favour of the disponees, and duly recorded. After the death of Lord Glencairn, Mr. Young, the survivor, executed on 10th April 1793 an absolute conveyance of the same estate in favour of Messrs. Duncombe, Pettwood, and Le Maistre, and the survivors or survivor of them and their assignees. The last-named gentlemen executed in the same year, 1793, a deed of declaration of trust whereby they declared that the said estate was vested in them "in trust only for the use and behoof of the said James Macrae, his heirs and disponees, and for the proper support and maintenance of his family, but in no shape for our own use and benefit or the use and behoof of any of us," etc. "And further, we hereby bind and oblige ourselves to denude of this trust whenever so required by the said James Macrae, esq., and his heirs or disponees, and to dispose and reconvey the said lands, and to the said James Macrae himself, or any other person or persons having right from him to the same." After this trust Mr. Macrae executed several settlements in favour of his son and daughter, which, however, he afterwards revoked (6th May 1807) by a deed or mandate to his trustees, whereby he authorized them to make and execute a strict entail of the estate of Holmains in favour of his son James Charles Macrae (the appellant) and the heirs [648] whomsoever of his body, whom failing, to his only daughter Mrs. Hyndman (the respondent), with other substitutions, and binding himself and his heirs to warrant such deed of entail in the most ample manner. The same deed also contained a nomination of the trustees and one Mr. Jack as tutors and curators to his children failing their mother.

These trustees accordingly, on 7th and 10th March 1809, executed a deed of strict entail of the said estate, in favour of the appellant and the other heirs therein named. An annuity was reserved for Mr. Macrae during his life, and a provision of £5000 which he left to the respondent, and declared to be a real burden affecting the entailed lands. The entail contained a revocation of the previous dispositions; it being declared however, that the same became effectual if the entail should be found ineffectual. On 13th May 1809 infetment on this entail was taken in favour of the appellant.

Mr. Macrae died unrelaxed on 16th January 1820, leaving his son, the appellant, then at the age of twenty-nine years, and the respondent, Mrs. Hyndman, his only daughter, who was born in 1800, then still a minor.

In May 1820 the trustees petitioned the Court for authority to record the entail, which was accordingly done. On his father's death the appellant entered into possession of the estate, which he held for some years, under the entail; but in June 1831 he raised an action of reduction, concluding for reduction of the entail and of the previous deeds as the deeds and warrant on which it proceeded.

Mrs. Hyndman the respondent resisted the reduction.

The pleas maintained by the parties respectively upon [649] the validity of the deed of entail were (as stated on the record) in these terms:—

1. The late Mr. Macrae having been outlawed by sentence of the Court of Justiciary, and this sentence of outlawry and fugitation having been followed up by letters of denunciation at the instance of both the public and private prosecutors, and these letters having been duly executed and recorded, he became *civilius mortuus*, and lost the benefit of the law of the country, to which he was declared a fugitive and a rebel. 2. An outlaw, in the circumstances stated, having lost and forfeited his legal person, can do no act, directly nor indirectly, by which the right of his heirs in his heritable property can be injured or affected; and he can grant no mandate to a third party to execute or subscribe any deed which he had not the legal power of executing himself. 3. The criminal proceedings against the late Mr. Macrae, on account of the murder of Sir George Ramsay of Bamff, deprived him of

all right in and to his heritable estate in Scotland; and the different deeds executed by him were invalid, to the effect of depriving his heirs of the right which had opened to them so long as the sentence of outlawry was unrecalled. 4. The trust deed executed in favour of Lord Glencairn and Mr. Young, being executed subsequent to the crime of which the late Mr. Macrae was accused, and in consequence of which he was declared an outlaw and a fugitive, could not have the effect of preserving to him a right to the estate of Holmains, or of validating the deeds subsequently executed by his directions with regard to the fee of that estate. 5. Where a property is disposed in trust for the benefit of an individual and his heirs, the trustees are merely the representatives of those individuals as their separate rights emerge. 6. The plea of homologation does not apply to this deed of entail now under reduction, in the circumstances of the case (Stat. 1592, c. 109, 128; Ersk. b. ii. tit. 5. s. 57; Stair, b. iv. tit. 47, s. 10, 11; 2 Bank. 257, vol. iii. p. 100; 4 Blackst. Com. 319; *Coutts v. Durie*, 30th Nov. 1791, Mor. 4775; *Davidson v. Kidd*, 20th Dec. 1797; *Birrell v. Birrell*, 14th Dec. 1825, Fac. Coll.; *Angus v. Angus*, 6th Dec. 1825, Fac. Coll.; *Dick v. Gillies*, 4th July 1828, Fac. Coll.; *Gardner v. Gardner*, 3d Dec. 1830, Fac. Coll.; and *Colquhoun v. Colquhoun*, 16th Dec. 1828, Fac. Coll., and cases therein cited).

1. The deed of entail under reduction is *ex facie* a formal and effectual entail. 2. The sentence of outlawry against Mr. Macrae did not in any way affect his right to the fee of the estate. It merely operated as a forfeiture of his moveables, and of his liferent interest in his heritable estate. Besides, Mr. Macrae having, before he was cited on the criminal letters, conveyed his estate to Lord Glencairn and Mr. Young, and having been feudally divested of the fee prior to the outlawry, it would not have been competent at any rate to object to the subsequent deeds which are under reduction, on the ground that they are struck at by the outlawry. 3. The entail has been homologated by the pursuer.—Mackenzie, 4th December 1767 (Dict. 5665). 4. It is *jus tertii* to the pursuer to found upon the supposed infringement of the rights of the Crown.

The Lord Ordinary (9th March 1833) ordered cases; and thereafter (19th Nov. 1833) his Lordship, upon advising the cases, made avizandum to the court, adding the following note:—"It would be proper to report this case to the court, on account of its peculiarity and admitted novelty. But the Lord Ordinary, though he has carefully considered the argument, [651] both in a very full hearing and in the revised cases, thinks it proper to report the cause without at present expressing any opinion; because it will be seen that he was the counsel who was privately consulted by the pursuer in 1820, and that something in the argument turns on the nature and effect of that consultation. The only observation he has to make is, that, when it is ascertained that the sentence of the Justiciary was followed by denunciation of the deceased as an outlaw, duly recorded, if the case of the defenders were to depend entirely on the proposition in law anxiously and confidently maintained by them in this case, that such an outlaw is under no other or different disability for the performance of legal acts, than that which attaches to a person denounced on letters of horning for a civil debt, he should think that it involved a question of very great importance. He is not at present prepared to assent to the doctrine. But the case may not, and probably does not, depend on that point.

"(Signed) J. W. M."

The First Division of the Court, upon advising the cause, intimated an opinion that in the special circumstances no homologation of the entail had taken place; but in regard to the effect of the sentence of outlawry and the recorded denunciation, their Lordships differed equally in opinion, and a hearing in their Lordships' presence was ordered.

Before the cause was disposed of, a supplementary reduction was raised, in order to set aside the registration of the entail and the order on which it proceeded. The record in that action was laid before the court along with the original cause, but the actions were not conjoined.

[652] The Lords of the First Division (4th February 1834) having resumed consideration of the cause, ordered supplementary cases, which were advised on 9th July 1834, at which time Lord Mackenzie had become a judge of that division in room of Lord Craigie deceased. Their Lordships being then again equally divided,

the cause was appointed to be argued by one counsel of a side, after which the whole pleadings were laid before the other judges, under one interlocutor, in these terms: "Remit to the Lords of the Second Division and permanent Lords Ordinary, and request their Lordships' opinions, either severally or collectively, on the question, Whether the deed of entail executed by Mr. Duncombe and others by mandate of 6th May 1807 from the late Mr. Macrae, then under sentence of outlawry and fugitation by the High Court of Justiciary, for failing to appear to answer to an indictment for murder, be liable to reduction at the instance of his son, the pursuer, his heir at law?"

Written opinions by the other judges having been returned,\* the cause was finally advised (22d November 1836) by the Lords of the First Division, who, in both actions, pronounced this interlocutor:—"Sustain the defences, assoilzie the defenders from the whole conclusions of the libel, and decern, and find no expenses due to either party?"

The pursuer appealed.

The cause was heard *ex parte*, no case having been lodged for the defenders.

[653] *Appellant*.—In the original action.—The ground taken by the Court below, that sentence of outlawry did not affect the civil rights of a party to a greater extent, denunciation following, than diligence of horning for not paying a debt, was ill founded. 1. Outlawry for crimes existed prior to denunciation or horning; 2. Denunciation, as introduced by statute, was limited in its effects to the penalties of escheat, and no severe personal disabilities followed; and, 3. The effects of outlawry for crime continued the same as they had always been, while the effects of civil rebellion were at an end. Outlawry, when considered in reference to its origin and consequences, and the authority from which it emanated, clearly avoided the freedom of the outlaw;—an immediate and complete loss of all personal rights and privileges of the law followed. The outlaw *amittit legem terrae*, and could not hold land, nor sue or defend in a civil or criminal action, nor give evidence, or act as a juryman (Reg. Maj., c. 12; Quon. Attach., c. 18; Balfour's Prac. 515; 1 M'Kenzie, 177; 1567, c. 33; Lowthian's Forms, p. 144; 2 Hume, Cr. 262, 2d edit., and p. 280, 3d edit.; Stair, b. ii. tit. 4. s. 61., b. iv. tit. 47. s. 10., and b. iii. tit. 3. s. 26; Instit., lib. i. tit. 1. s. 20; Stair, b. iv. tit. 9. s. 1; Balfour, 483; M'Ken. Observ., p. 131, *Dirleton v. Rebellion*; Ersk. b. ii. tit. 5. s. 66; Bank. ii. 427; Alison's Prac. of Crim. Law, 350). These consequences affect his right to make an entail; for the statute 1685, c. 22, specially declares, that it shall be lawful to his Majesty's "subjects" to tailzie their lands, etc., thus bestowing a special and statutory power to execute a peculiar species of conveyance. The outlaw could not have enforced the obligations in the trust deed. The title on this entail had hitherto been on the precept in the disposition by the trustees. But suppose the title had been to be completed by resignation, could the Crown have been required to grant a charter upon [654] the resignation of the outlaw or his attorney. It had been urged below that the fee of the estate still remained subject to be disposed of by the outlaw; but the authorities show that the fee recognised into the hands of the superior was only reclaimable by the heir upon the outlaw's death. The term "life-rent escheat" is only meant to show that the property remained with the superior merely during the lifetime of the party outlawed. Another argument of the defendant had been that a party outlawed by a sentence of the Criminal Court was not to be considered in a worse situation than a civil debtor under the horn, some of whose deeds were sustained; the answer to which was, that the status of a criminal deprived him of all personal rights and privileges (stat. 1685, c. 22; Elch. Notes on Stair, p. 194; stat. 1612, c. 3.; 2 M'Ken. Works, 225; Ersk. b. ii. tit. 3. c. 16.; Craig, lib. ii. dig. 18. s. 31.; Balfour v. Brieves, p. 429. c. 48).

On the supplementary action, the mandate granted by Mr. Macrae, an outlaw, to make a deed of entail could give no authority to the parties in whose favour it was granted, his nominal trustees, to apply to the Court of Session for the recording of the deed of entail. The outlaw had no right to appear in the Court of Session himself, and could grant no mandate to a third party to appear for him. Besides, the mandate fell by the death of the granter, and so far as it derived efficacy from the

\* See these opinions in the reports of the case in Fac. Coll., 22d Nov. 1836, and in 15 D., B., and M., 64.



granter, it fell by his death. The trust disposition was likewise at an end by the death of Mr. Macrae, and consequently the trustees had no right after his death to appear as such. The trustees were not authorized to apply to the Court by the heirs of entail for the registration of the deed, and having no interest under it, they [655] had no right to apply by petition to the Court of Session for its registration. The question upon this point had been fully discussed in the other case between the appellant and respondent, and he therefore begged leave to refer to that argument.

Lord Chancellor.—This case, which was heard *ex parte*, is one of great importance to the parties, and it raises a new question in the law of Scotland. The circumstance that it was only argued on one side, makes it the duty of the House to be very explicit and careful as to the course which your Lordships should pursue. Your Lordships have no information how it happens that the judgment of the Court below, in which fourteen judges (including Lord Craigie, who died before the final decree) of the Court of Session concurred, is not supported by the party in whose favour that judgment was pronounced. But there are interests to be protected, not confined to those who are the parties to this proceeding, but the interests of parties not yet in being, who may become entitled under the entail now in question. Care is also requisite not to lay down any rule of law which may operate upon other interests in other cases, by giving effect to that which is contended by the appellant to be the rule of law in Scotland in respect to the question here raised.

The facts, in so far as necessary to make my observations intelligible, are shortly these: In July 1790 a party, then fee-simple proprietor of an estate, being charged with the crime of murder, and not appearing, underwent a sentence of fugitation, and was put, according to the expression of the law of Scotland, to the horn, by which he incurred certain penalties, and was denounced [656] as an outlaw and fugitive. Previously, however, to the proceedings which gave rise to that process, and on the 8th of May of the same year, he had executed a disposition of his estate, of which he was absolute owner in fee, to certain persons in trust. He did not at that time execute any declaration of trust, but he parted with his legal title to the estate previous to the time when he incurred the disability arising from the sentence of fugitation by being put to the horn.

In the year 1793, after the criminal sentence of outlawry had been enforced, the trustees executed a declaration of trust, by which they declared that the property had been conveyed to them upon trust, to abide the disposition of the author of the deed of May 1790. At a subsequent period, under a mandate of the original owner of the estate, then labouring under such incapacity as was the consequence of the proceedings taken against him, an entail was executed, under which the defenders, as substitute heirs, claimed. The heir of entail, the eldest son, (the father, maker of the entail, being now dead,) claims the estate unfettered by such entail, in respect of his father's alleged incapacity at the time to exercise such an act of proprietorship.

When the cause was argued in the court below it was thought to involve principles of such importance and novelty that the whole judges gave their opinions upon the case. Thirteen judges gave a final opinion; but there was also Lord Craigie, who had been a judge in the earlier steps of the cause, but who had died before the final decision; and they all concurred, but not for the same reasons, that the pursuer had no title to the relief he prayed for.

Now it is to be observed, that, prior to any process taking place from which the incapacity of the maker of [657] this entail is to be inferred, he had parted with the legal right to the fee of the estate. It is also clear, from the very terms that are used, and from all the authorities cited, that the effect of what did take place was a forfeiture of all his goods and moveables; and, in addition to this, there is, undoubtedly, not properly a forfeiture, but an escheat of the life estate;—the life-rent escheat, as it is called, not going to the Crown as a forfeiture, but going to the superior of the fee, on strictly feudal grounds:—the party fugitate or outlawed being incapable to render the services of a vassal, the overlord is considered entitled to adopt some other person in the outlaw's place during the life of the outlaw.

So far there is no dispute as to the rule of law in Scotland. The appellant, however, contends that beyond this there is a forfeiture of the fee itself, and hence that his father had actually, by force of the sentence, been divested of his fee; and of course, if

he had been divested of his fee, and of all interest therein, then he could not have done that which was the apparent effect of the deed which he executed. After looking into all the authorities cited in the printed papers, and at the bar, in support of the proposition that the effect of these proceedings was a forfeiture of the fee, it appears to me that there is no doubt whatever, that that proposition cannot be maintained. All the authorities cited prove that a life-rent escheat only takes place, and that the fee remains in the outlaw. In this proposition all the judges concur; and there are several admitted incidents to this state of the property in Scotland, which show that that of necessity must be the effect of the operation of the outlawry, [658] and that it does leave the fee in the outlaw. After the death of the outlaw it is admitted that the heir may proceed to complete his title by service to the outlaw. It is also admitted, on the part of the appellant, and cases referred to do establish, that after this life-rent escheat has taken place, which according to the doctrine of the appellant would divest the outlaw of the fee, if that outlaw, being an outlaw only by process of fugitation, afterwards commits treason, he forfeits the fee; that is to say, he forfeits what was left in him notwithstanding the life-rent escheat. If by prior proceedings the fee had gone out of him, there would be no possibility of a subsequent conviction of treason operating as a forfeiture of the fee. But it is not in dispute that that is the effect of a conviction for treason subsequently to the taking effect of the life-rent escheat.

It is also an admitted proposition, supported also by authority, that notwithstanding the life-rent escheat the outlaw is competent to give effect to onerous burdens upon his estate. It is also assumed that the estate remains in him, otherwise, if the estate had gone out of him, whatever might have been the right of the creditors, he the outlaw would not have had it in his power to give effect to any interests that might have operation against the fee itself.

I apprehend therefore, that your Lordships can entertain no doubt as to the correctness of the unanimous opinion of the fourteen judges, that notwithstanding the outlawry and the life-rent escheat, the fee remains in the outlaw.

But then, it was said, that although that be so, yet inasmuch as he is what the law calls *civiliter mortuus*, or in other words *amissit legem*, he has lost all the [659] advantage and privilege which the law could confer upon him, and that therefore, he is not competent to deal with that property which it is clear remained in him. Now Baron Hume and Mr. Alison enumerate the consequences of outlawry and being put to the horn, but neither of these authors on the criminal law of Scotland specify, among these, an incapacity to dispose of what remains vested in the outlaw. It is perfectly true, that the personal incapacity which he has incurred prevents him from appearing in any court of justice, or doing any thing which requires the interposition of a court of justice in his behalf, but there is no authority to show that he cannot execute a valid deed respecting that which by law is left in him.

Now, in this case nothing was necessary towards completing the title, so that no feudal objection exists to the deed subsequently executed. He does not appear in any court or require the assistance of judicial authority. The trustees were legal owners; and the only question is, whether, as between the author of the trust and the heir, the former can, as against the heir, effectually destine the fee. That there is estate sufficient to be so dealt with is beyond all question, and accordingly the power of the trustees is equally clear.

The distinction betwixt the effect of diligence by horning in civil process and outlawry criminally was much discussed; but it is admitted that putting to the horn in civil process does not produce this incapacity; and yet outlawry is not in Scotland as in England in criminal cases equivalent to conviction, but both in civil and in criminal cases it is only a process for the purpose of compelling appearance. To me it seems needless to inquire how far these two processes are now the same. Many alterations [660] have been introduced by the special statute, but no authority has been adduced to show that as to this point the outlawry in criminal cases differs from the same proceeding in civil diligence.

The judges below agree that the entail was good, and that it was not competent to the appellant to get quit of it. Of the thirteen judges who gave their opinions at the last decision of the case all agreed that the fee remained in the outlaw; nine (Lords Justice Clerk, Balgray, Gillies, Meadowbank, M'Kenzie, Medwyn, Corehouse, Fullerton, and Jeffrey) of them being of opinion that the outlaw had full dominion

over the fee; four (Lords President, Glenlee, Moncreiff, and Cockburn) thought that in this case he had properly and effectually exercised that dominion, upon the ground that the property was in trust, and therefore that it did not require the interposition of a court for the purpose of giving effect to the disposition of the property. Nine of the judges were of opinion that there was no difference between the powers in criminal and in civil cases.

What your Lordships have now to consider is not whether the several opinions entertained by the learned judges be correct or not, the sole question being whether the appellant has made out a case showing satisfactorily that the opinion of all the judges in the Court of Session was wrong, because, whatever grounds those learned judges may have had for the conclusion to which they came, the question is whether your Lordships have before you such grounds as will satisfy you that that judgment ought to be reversed. Without going through the nice distinctions which have occupied so much discussion below, there are two grounds on which it appears to me that the judgment of the Court below is [661] right. First of all, I consider it quite clear that notwithstanding what has taken place the fee remains in the outlaw, and that his personal disability has not been proved to apply to directing a trust previously vested in trustees. That exhausts the questions as they exist under the first appeal.

The second case in which an appeal has been presented was a suit for the purpose of reducing and getting rid of that which was done with the estate by the trustees under the mandate from the outlaw. Now if the appellant is wrong on the merits, if the entail be good as against him, he has no interest in the second question, inasmuch as the entail being valid, it is immaterial as between the heir and the maker of it, whether the recording was valid; an unrecorded entail being effectual *inter hæredes*, although not betwixt them, as with third parties, onerous creditors. But it appears to me that there is no ground whatever for the objection to the recording. The trustees are the parties who appear as owners of the estate; the outlaw does not appear; he is no party to the proceedings; the trustees are indeed acting under his mandate executing a duty he requires them to perform; but for all feudal purposes they are the owners of the estate, and so dealing with it. No irregularity is pointed out, and no case has been made to show that any of the proceedings have been illegal so far as the trustees are concerned.

If therefore your Lordships concur in the opinion I have expressed, that the entail itself was good, and that the heir was barred of his right, as fee-simple proprietor, by the entail so carried into effect by the trustees under the mandate of the outlaw, your Lordships will have no difficulty in concurring with the judgment of the Court [662] of Session, that no objection can be made by the heir against the recording of the entail.

If there had been more difficulty in the case, and if, upon the papers before you and the arguments at the bar, real doubt had arisen as to the propriety of the judgment below, no doubt your Lordships would have regretted that you had to come to an adjudication upon the case without the benefit of hearing the argument for the defenders. But from the appellant's own case, as made by himself, and the authorities he has been compelled to refer to, and from that glimmering only of the defenders' case which is to be seen in the papers of the appellant, who refers only to the arguments on the other side with the view of repelling them, I entertain no doubt that the judgment of the Court below ought to be affirmed.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed.

ARCHIBALD GRAHAME, Solicitor.

[663] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

WILLIAM DUNLOP and Company, *Appellants*.\*—Sir William Follett; GEORGE ANTHONY LAMBERT and Others, *Respondents*.—Attorney General (Campbell)—James Anderson [16th July 1839].

[*Mews'* Dig. iii. 197; xiii. 552. Cited in *Colonial Insurance Co. of New Zealand, v. Adelaide M. I. Co.*, 1886, 12 A.C. 139; and see S.C. 6 Cl. and F. 600.]

*Carrier—Contract—Risk*.—In an action by consignors for value of a puncheon of whiskey thrown overboard, and lost, against ship owners, who by bill of lading acknowledged the shipment of the goods in good order and condition, "to be delivered in the like good order at Newcastle," dangers and accidents of the sea excepted, and which bill of lading the consignors transmitted to the consignee, with an invoice of the price, including the amount of freight and of the insurance paid by consignors, and charged against the consignee,—the consignors libelled a contract by the ship owners to deliver the goods at Newcastle, and also an agreement by the consignors to be answerable to the consignee for the safe delivery of the goods. The judge at the trial directed the jury in point of law, "That as it appeared that the pursuers at the time of furnishing the spirits in question had sent an invoice thereof to the purchaser, bearing that the same had been insured, and that the freight thereof and insurance were charged against the said purchaser in the invoice, the pursuers were not entitled in law or interest to recover the value of the said puncheon from the defenders."—Held (reversing interlocutor of the Court of [664] Session, which disallowed an exception to said direction,) that said direction was in point of law not correct in the mode in which it left the case with the jury,—in respect that it withdrew from their consideration the fact whether the goods had been delivered to the carriers on the risk of the consignors or of the consignee, and the question whether there was a special contract between the consignors and consignee sufficient to enable the consignors to recover in the action.

On the 31st August 1833 the appellants, who are wholesale spirit merchants, sent to the agents at Leith of the respondents, who are ship owners, a puncheon of spirits, to be carried to the purchaser, Mathew Robson, near Newcastle, and a bill of lading was granted by the respondents' agents to the appellants in these terms:—

"Mr. Mathew Robson, Collier Row, by Houghton-le-Spring, W.D. No. 1369, 105 gs. care of Mr. Lattimer, Newcastle.

To be taken out in running days after ship's arrival, or to pay guineas per day demurrage.

in Leith, 31st August 1833.

Shipped by William Dunlop & Co., in good order and condition, in and upon the good ship *Ardincaple*, whereof Macleod is master for the present voyage, and now lying in the port of Leith, and bound for Newcastle, one puncheon of spirits, bung-full, with excise permit, being marked and numbered as in the margin, and to be delivered in the like good order, and well conditioned, at the foresaid port of Newcastle, (all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kind, excepted,) unto Mr. Mathew Robson, Collier Row, by Houghton-le-Spring, or to his assigns, freight for the said goods being paid by William Dunlop & Co. at prime and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to two [665] bills of lading, all of this tenor and date, one of which being accomplished, the other to stand void. Dated (Signed) *Laing and Sword, Agents*."

The appellants transmitted to Robson, along with the bill of lading, an invoice, and a letter (in part), in the following words:—

Edinburgh, 31st August 1833.

"Mr. Mathew Robson,

"Bot of William Dunlop &amp; Co.

Rectified British Spirits	One puncheon malt aqua, fine quality, W. D. & J. B.,	
and Compounds.	No. 1369,—105 g. 11 O. P. are 116 ga. p. 12s. 9d.	£73 19 0
To freight paid to Newcastle, 10s.; insurance, $\frac{1}{2}$ per cent.		0 18 0
Puncheon with spirits not to be returned		1 0 0
		£75 17 0

Edinburgh, 31st August 1833.

"Mr. Mat. Robson,

"We hope the above will reach you in time and give satisfaction. We reckon the quality very fine, and we trust this will be the introduction to many good transactions between us both. For amount, we enclose our draft at three months, payable in London, which please return us accepted and domiciled on approval of the shipment. The spirits will be in Newcastle on Monday morning if all is well, and your farther orders will very much oblige yours respectfully,

"WM. DUNLOP &amp; Co."

In the manifest of the cargo of the *Ardincaple*, there was the following entry:—  
"Consignee, Mathew Robson; residence, Newcastle; goods, marks, etc., one puncheon [666] whiskey, freight paid, 10s.; amount total invoice, £75 17s."

The goods having been lost, and not delivered, the appellants brought an action against the respondents for the value thereof; and (by their amended summons) libelled, "that upon the 31st day of August last the pursuers shipped on board the steam ship or vessel called the *Ardincaple* of Newcastle, then lying at the port of Leith, and bound for Newcastle, one puncheon of spirits, bung-full, with excise permit, marked W. D., No. 1369, 105 ga.; addressed to Mr. Mathew Robson, Collier Row, by Houghtoun-le-Spring, care of Mr. Lattimer, Newcastle, to be delivered in good order and well-conditioned, at the aforesaid port of Newcastle, as addressed, conform to memorandum, receipt, or bill of lading granted by Messrs Laing and Sword, agents at Leith for the owners of the said steam ship or vessel, bearing date the said 31st day of August last, and acknowledging that the freight for the said goods was paid, to be produced in process, and here referred to, and held as repeated *brevitatis causa*; the pursuers at the same time having undertaken by their agreement, and being answerable to the said Mathew Robson for the safe delivery of the said puncheon;" and the conclusion was for payment of the value of the goods to the appellants.

The respondents, among other defences, objected to the title or interest of the appellants to sue for and recover the amount (the said defence being designated preliminary). The Lord Ordinary pronounced the following interlocutor, disposing of the preliminary character of the said defence:—

"20th June 1835.—Lord Fullerton. Having heard [667] parties' procurators, finds that the averments of the pursuers are relevant to support their title and interest to insist in the present action, and therefore repels the preliminary defences as urged in bar of further procedure in the action, and appoints issues to be prepared in common form upon the matter in dispute."

The cause then went to trial on the following issues:

"1. Whether on or about the 31st day of August 1833 the pursuers shipped a puncheon of spirits on board the *Ardincaple* of Newcastle, a vessel belonging to the defenders, for the purpose of being conveyed to Newcastle, and delivered to Mathew Robson, Collier Row, Houghton-le-Spring, care of Mr. Lattimer, Newcastle? And 2. Whether the defenders wrongfully failed to deliver the said puncheon to the said Mathew Robson, and are indebted and resting owing to the pursuers in the sum of £75 17s. or any part thereof, with interest thereon, as the value of the said puncheon of spirits."

The case came on for trial before the Lord President and a jury, on 21st March 1837. The appellants, among other evidence, adduced the deposition of Robson, who stated that he believed that the loss of the said puncheon was sustained by Messrs. Dunlop.

The respondents led no proof, and admitted the shipment, the loss and non-delivery, and amount of the claim, as stated.

The judge directed the jury that "the pursuers appeared to be entitled to a verdict upon the first issue, and that the only question in dispute related to the second issue; and did direct the said jury in point of law, that as it appeared that the pursuers, at the time of furnishing the puncheon of spirits in question, [668] has sent an invoice thereof to Mathew Robson, the purchaser, bearing that the same had been insured, and that the freight thereof and insurance were charged against the said Mathew Robson in the said invoice, the pursuers were not entitled in law or interest to recover the value of the said puncheon from the defenders."

The appellants took an exception to this direction. The jury then returned the following verdict:—"We find, on the first issue, that the defenders (respondents) were liable for the loss of the puncheon of whiskey, their servants having placed it on deck, without authority from the shippers.

"We therefore find, on the second issue, that the defenders (respondents) wrongfully failed to deliver the puncheon to Mathew Robson; they not having stowed it in the hold, as they were bound to do, prevented his recourse on the underwriters.

"On the last point of the second issue, we find that the defenders (respondents) are not liable to the pursuers (appellants) for the value of the spirits, because they were not, at the time of the loss, the rightful owners of the goods in question, their invoice shewing that their right in the whiskey ceased at the time of shipment."

The bill of exceptions was afterwards heard before the court, (along with a separate motion by the appellants for a new trial), the pursuers maintaining for argument in support of their exception,—1st, that the respondents' plea was excluded by the previous interlocutor of the Lord Ordinary; and 2d, that the objection was not well founded in itself.

The court pronounced the following interlocutor, [669] disallowing the bill of exceptions, and refusing to grant a new trial:—"Edinburgh, 30th June 1837.—The Lords, after hearing counsel for the parties, disallow the bill of exceptions in this case; refuse the motion for a rule to shew cause why a new trial should not be granted; Find the defenders (respondents) entitled to expenses since the date of trial; appoint an account thereof to be given in, and remit the same to the auditor to be taxed and to report."

The court subsequently pronounced judgment, and awarded expenses, by the following interlocutor:—"Edinburgh, 6th July 1837.—The Lords having heard parties on the motion of the defenders (respondents), apply the verdict, assolkie the defenders, find expenses due, subject to modification, appoint an account thereof to be given in, and remit the same to the auditor to be taxed and to report."

Dunlop and Co. appealed.

It has become unnecessary to repeat the arguments adduced, and authorities founded on, by the appellants and respondents respectively, in so far as they bear upon the judgment, the same having been fully explained by the Lord Chancellor in moving the judgment of the House of Lords.

Lord Chancellor.—My Lords, this case of *Dunlop and Co. v. Lambert* is an appeal from an interlocutor of the Court of Session disallowing a bill of exceptions taken to the direction of the Lord President on the trial of an issue between the parties in the cause. The case arose out of the firm of Dunlop and Co. having sent a [670] puncheon of spirits to their correspondent at Newcastle shipped on board a steam vessel. It appears that the steam vessel in its passage was overtaken by violent storms, and the puncheon of spirits not having been taken below, but left on the deck, it became necessary for the safety of the vessel to throw it overboard. An action was brought by the consignors, Dunlop and Co., against the owners of the vessel, to recover the value of the puncheon of spirits so lost.

The summons stated the case in these terms:—"That upon the 31st day of August the pursuers shipped on board the steam vessel, then lying at Leith, one puncheon of spirits, bung-full, with excise permit, marked W. D., No. 1369, 105 gallons, addressed to Mr. Mathew Robson, Collier Row, by Houghton-le-Spring, care of Mr. Lattimer, Newcastle, to be delivered in good order and well-conditioned at the aforesaid port of Newcastle, as addressed, conform to memorandum, receipt, or bills of lading granted by Messrs. Laing and Sword, agents at Leith for the owners of the said steam ship or vessel, bearing date the said 31st day of August last, and

acknowledging that the freight for the said goods were paid, to be produced in process and here referred to; the pursuers at the same time having undertaken by their agreement, and being answerable to the said Mathew Robson for the safe delivery of the said puncheon."

My Lords, in the progress of the cause certain issues were directed, which issues were in these terms: "First, Whether on or about the 31st day of August 1833 the pursuers shipped a puncheon of spirits on board the *Ardincaple*, a vessel belonging to [671] the defenders, for the purpose of being conveyed to Newcastle, and delivered to Mathew Robson, Collier Row, Houghton-le-Spring, care of Mr. Lattimer, Newcastle? And, secondly, whether the defenders wrongfully failed to deliver the said puncheon to the said Mathew Robson, and are indebted and resting owing to the pursuers in the sum of £75 17s. or any part thereof, with interest thereon, as the value of the said puncheon of spirits?"

One question raised upon the appeal was, how far the liability of the defenders to the pursuers was put in issue by the mode in which these issues were directed, it being stated that it had been made a matter of defence that the pursuers were not the right parties, and that that question was not intended to be included in the trial of the issue; certainly, that point was raised upon the pleadings, and I apprehend it is equally clear that the point was left open upon the issues. The second issue was, "Whether the defenders wrongfully failed to deliver the said puncheon to the said Mathew Robson, and are indebted and resting owing to the pursuers in the sum of £75 17s. or any part thereof." It is quite obvious that if it was not intended to leave that question of the legal liability open it would not have been laid in those terms; it would have been sufficient to direct a trial of the first issue, whether the pursuers had shipped a puncheon of spirits on board the vessel, and whether it was lost by the defenders having wrongfully failed to deliver the said puncheon of spirits; but the latter part of it, whether the defenders were indebted and resting owing to the pursuers in the sum of £75 17s. or any part thereof, with interest thereon, as the value of the said [672] puncheon of spirits, necessarily involves the question, whether the liability belonged to the pursuers or to the person to whom the spirits had been consigned.

My Lords, at the trial the deposition of Robson, the consignee, was adduced; it stated "that he gave a bill for £75 17s., the value of the spirits. The bill was renewed in consequence of another puncheon being sent a month later; that deponent desired Mr. Dunlop to insure the same, and to charge the expenses of that and the freight and the invoice to deponent; that the said puncheon was to be safely delivered on the quay at Newcastle before deponent was to consider it his property; deponent has not received a farthing for the loss." Then he states "that he made an affidavit that the puncheon was ordered from Messrs. Dunlop, and lost at sea; that deponent got a letter from Newcastle from the agents of the *Ardincaple* there, stating that he had to make an affidavit before a magistrate that the puncheon that was lost was his." There is also in evidence the fact that the bill of lading was in these terms: "Shipped by William Dunlop and Co., in good order and condition, in and upon the good ship *Ardincaple*, whereof M'Leod is master for the present voyage, and now lying in the port of Leith and bound for Newcastle, one puncheon of spirits, bung-full, with excise permit, being marked and numbered as in the margin, and to be delivered in the like good order and well-conditioned at the aforesaid port of Newcastle, (all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kind, excepted,) unto Mr. Mathew Robson, Collier Row, by Houghton-le-Spring, or to his assigns, freight for the said goods [673] being paid by William Dunlop and Co. at prime and average accustomed."

The invoice stated the property in these terms: "One puncheon of spirits," giving the description, "£73 19s.; to freight paid to Newcastle, 10s., insurance, half per cent., 18s.; puncheon itself, £1; making £75 17s." That was accompanied by a letter written by Dunlop and Co. to Robson, in these terms: "Owing to our young friend John Dunlop having met with a rather serious accident by a fall from or a crush by a gig, in the country, where he is still, not being in a state to be removed for a day or two, the above has been too long in being forwarded, as your friend's letter was locked up in his desk, and we did not know till last night by a note from him that it was to be forwarded at all; we hope it will reach you in time and give satisfaction; we reckon the quality very fine, and we trust this will be the introduction

to many good transactions between us both ; for amount we enclose our draft at three months payable in London ;" the draft being £75 17s. ; and in the manifest of the cargo entered " Consignee, Mathew Robson ; one puncheon whiskey, freight paid, 10s. ; letter written, 8th October ; £75 17s."

My Lords, on the trial of these issues before the Lord President, Robson's deposition on oath, which had been taken under a commission, was, along with other evidence, submitted to the jury ; after which the Lord President directed the jury in these terms : " The Lord President observed that under the admissions made by the defenders counsel the pursuers appeared to be entitled to a verdict upon the first issue, and that the only question in dispute related to the second issue ; [674] did direct the said jury, in point of law, that as it appeared that the pursuers, at the time of furnishing the puncheon of spirits in question, had sent an invoice thereof to Mathew Robson, the purchaser, bearing that the same had been insured, and that the freight thereof and insurance were charged against the said Mathew Robson in the said invoice, the pursuers were not entitled in law or interest to recover the value of the said puncheon from the defenders." The pursuers excepted to that direction, and it was brought under the consideration of the First Division of the Court of Session ; and the judges in that division, by a majority, (Lords President, Gillies, and M'Kenzie), (one, Lord Corehouse, of the judges being of a different opinion,) approved of the summing up and direction of the Lord President, disallowed the bill of exceptions, and the direction of the Lord President therefore was affirmed, and the new trial refused. From that judgment an appeal has been brought to your Lordships house ; and the question is,—whether, in point of law, that summing up and direction of the Lord President is maintainable, namely, whether it be law in Scotland,—the law of Scotland being in this respect the same as the law of this country,—in a question between a carrier and the person to whom the carrier is responsible, in the event of property being lost, whether it be true in law, that the sending an invoice to the consignee, by which it appeared that the property had been insured and the freight paid by the consignor, and the amount charged by the consignor to the consignee, deprived the consignor of the power of suing, and of an interest or right to recover the value of the property. My Lords, it is [675] perfectly true, generally speaking, without regard to any special circumstances which may arise, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is the risk of the consignee. If a party directs property to be sent by a particular carrier no doubt he becomes his agent, and the decisions go to this,—that if, without designating the particular carrier, he directs that it shall be sent in the ordinary course, the delivery by the consignor to the carrier relieves him from all responsibility, and the delivery to the carrier is considered as a delivery to the consignee.

On reference, however, to the authorities it will be found that although that is the general inference, and where nothing particular passes, that it is universally true, it is capable of variations. If a particular contract be proved between the consignor and the consignee,—and it does not follow that the circumstance of the freight and the insurance being paid by the one or the other is to be considered a conclusive evidence of the ownership,—as notwithstanding the ordinary rule, of course there may be special contracts ;—where the party undertaking to consign undertakes to deliver at a particular place, and if he undertakes to deliver at a particular place, the property, till it reaches that place, and is delivered according to the contract, is at the risk of the person consigning ; so although the consignor may follow the directions of the consignee, and deliver the property to be conveyed, either by a particular carrier or in the ordinary course of business, still the consignor may make such a contract with the carrier as will make the carrier liable to him. There are, therefore, an infinite variety of circumstances which may occur in which the ordinary rule will turn out not to be the rule to regulate [676] the parties. But the Lord President laid down that the jury must take it as a rule, admitting of no exception, that because the consignee was charged with the freight and insurance, that was not only a circumstance to be taken into consideration by the jury, but was, in point of fact, a circumstance that withdrew from the consideration of the jury the question of what was the particular transaction between the parties, for his Lordship says he directed the jury in point of law that the consignor was not, under such



circumstances, entitled to recover. That circumstance, and that circumstance alone, was sufficient to shut out any contract from the case; and the jury did accordingly find a verdict for the defenders on that particular issue, negating the right of the pursuers to recover the value of the property in question.

My Lords, a reference to the authorities cited in the argument shows that no such rule of law exists, and that that circumstance is not conclusive. That is the only circumstance your Lordships have to consider. The Lord President directed the jury that that fact was conclusive,—so conclusive as to withdraw from their consideration other circumstances which might have been material to be considered, for instance, how far Robson's evidence was evidence which they ought to believe. In order to show how utterly impossible it is that that rule should be conclusive, your Lordships will permit me to observe that where a person desirous of having goods sent to him orders them from a distance, he necessarily must have added to the price not only the expense of the carriage but the risk of the carriage, for the owner of the goods will not deliver those goods at Newcastle at the same price at which he would deliver them at Edinburgh; there is the market price or the [677] shop price, the price which the vendor of the goods expects to receive, and which, at all events, he expects to receive; if any person comes to his warehouse at Edinburgh, and purchases goods, he charges the price of course at which he is willing to sell his goods, but if the party buying lives at a distance, there must be, in addition to the price of the goods, the price of the carriage,—that must be paid by somebody,—and there must also be the insurance if the party is to be protected against loss; so that it comes to the same thing, both to the consignor and the consignee, whether the consignor sells at the shop price, leaving the consignee to pay the freight and insurance, or whether the consignor sells at the shop price with the addition of the expense of the freight and insurance. In both cases the same sum will be paid by the party receiving the goods; and the vendor of the goods will have to receive the same sum of money as the price of the article he sells. Now, all that the invoice proves is, that the sum total to be paid by the consignee was the shop price, £73 19s., and the cost of the freight and insurance.

My Lords, this does not rest on general principles only, for it has been the subject of several adjudicated cases. I would again call your Lordships attention to the summons, which states two grounds: first, the special contract with the carrier, by which he agreed to deliver at Newcastle; and then it states the fact, that, as between the consignors and the consignee, the consignors were under an undertaking to deliver the spirits at Newcastle. If the latter fact had been proved there could not have been any question that the consignee had nothing to do with the goods until they arrived at Newcastle, and were actually delivered to him there; and if [678] that contract existed it ought to have been admitted to proof. Possibly it might not have been proved to the satisfaction of the jury, but it appears that the Lord President withdrew that question from the jury, and did not leave it to them to say whether Robson was to be believed or not, but finding on the invoice that the consignors had paid the freight and insurance, and charged them to Robson, the consignee, who no doubt was the person on whom those charges must ultimately fall, as in one way or other they must be added to the price of the goods before he could see what they had cost him, his Lordship directed the jury in point of law that they must find for the defenders.

My Lords, in order to prove that notwithstanding the ordinary right of the consignee to bring an action against the carrier for the loss of the goods he has undertaken to convey,—that notwithstanding that being the general rule, the right of action and the liability may be varied by special contract entered into between the consignor and the consignee, and that the payment of insurance by the one or the other is not conclusive evidence, I would refer to three or four cases in which that doctrine is very clearly established.

The first case in point of date, my Lords, is *Davis and Jordan v. James*, in 5 Burrow, 2680, in which the statement was that the vendors the manufacturers had delivered goods to a carrier, who undertook to carry for a certain price, and to deliver at a certain time. The action was brought, in consequence of the goods being lost, by the consignor, and it was contended that the consignee was the party who ought to bring the action. Lord Mansfield says, "there was neither law nor conscience

in the objection. The vesting of the property may differ according to the circumstances of cases, but it does not enter into the present question. This is an action upon the agreement between the plaintiffs and the carrier; the plaintiffs were to pay him, therefore the action is properly brought by the persons who agreed with him and were to pay him." In this case there is no doubt that the consignors were the persons to pay. The bill of lading itself states that Dunlop and Co., the consignors, had paid, and the contract was that they should deliver the goods at Newcastle.

My Lords, the next case in point of date is the case of *Moore v. Wilson*, 1 Term Reports, 659; the action was by the consignor; the declaration stated, that the defendant undertook to carry the goods "for a certain hire and reward, to be paid by the plaintiff," which the defendant's counsel contended did not prove the declaration. That agreed with the view of Mr. Justice Buller, who nonsuited the plaintiff, whereupon a motion for a new trial was made, and Mr. Justice Buller said he had mistaken the law, for "that whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable."

A case was referred to, *Dawes v. Peck*, in 8 Term Reports, 330, in support of the law as laid down by the Lord President. In that case the consignee had directed the goods to be sent by a particular carrier; and the court, holding that the consignor, by delivering the goods to the carrier so designated, had parted with the property, held that he could not maintain an action.

The same doctrine was laid down in another case, where there was a mere delivery to a carrier without any particular contract between either the consignor and [680] the consignee, or between the consignor and the carrier. In *Dulton v. Solomons*, in 3 Bosanquet and Puller, at page 584, Lord Alvanley, C. J., says, "if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser;—the whole property immediately vests in him, he alone can bring an action for any injury done to the goods," which, no doubt, is the rule in those cases where there are no particular circumstances proved, or any particular contract in evidence between the plaintiff and defendant. In *Sergeant v. Morris*, in 3 Barnewell and Alderson, 277, goods being shipped, under a contract to deliver them in the consignor's name to the consignee, and it appearing that they were at the consignor's risk, it was held that the consignor might sue although the consignee had insured the goods. That is exactly the converse; ordinarily speaking, the consignee would be the person to bring the action; there the consignor brought the action, and it was held that he was right in bringing the action, because he undertook by contract that he would deliver the goods to the consignee at a particular place, but the consignee had insured. Now here, according to the Lord President, that fact would have been put aside, and the party insuring would have been the party to bring the action, but the reverse was held in that case, and though the consignee had insured, it was held that the consignor was the right person to bring the action.

In *Brown v. Hodgson*, in 2 Campbell's Nisi Prius Cases, page 36, the bill of lading stated that the goods were shipped by order and on account of the consignee; Lord Ellenborough held that the consignor could not in [681] that case bring an action, because upon the evidence it appeared that he had nothing to do with them; the bill of lading stated the contract with the carrier to deliver the goods at a certain place to the consignee, and stated that the goods had been shipped for and on account of the consignee. The production of that letter, unexplained by any other evidence, was considered by Lord Ellenborough conclusive that the consignor had parted with all the property in the goods, and that the consignee alone could bring an action.

But in the same volume, 2 Campbell's Nisi Prius Cases, page 639, in *King v. Meredith*, where the action was by the consignor against the consignee, for the price of the goods lost in the carriage, it appeared that the consignor was to pay the carriage, and it was objected that the goods were therefore at his risk, so that he could not maintain an action against the consignee. It was said he could not maintain the action because his paying the carriage was conclusive that the goods were at his risk. Mr. Justice Lawrence says, "The mode in which the carrier was to be paid makes no difference. The moment the spirits were delivered to him the property

vested in the defendant; the plaintiffs, by paying the carrier, did not become insurers of the spirits while in the hands of the carrier." There, again, is a fact which, according to the law as laid down by the Lord President, would have been conclusive, but in that case the court assumed that the right might be in one party, where the other party had paid the freight.

There is a case very strongly applicable to the present, the case of *Joseph v. Knox*, in 3 Campbell's Nisi Prius Cases, 320; that was an action against the owner of a ship, on a bill of lading signed by the master, [682] for not carrying goods from London to Surinam. The bill of lading stated that the goods were shipped by the plaintiffs, that they were to be delivered in Surinam to Levy Davids or his assignees, and that the freight was paid in London. The goods consisted chiefly of butter, which the plaintiffs had received from merchants at Amsterdam to be forwarded to Levy Davids in Surinam, and which, in answer to a bill in equity, they swore they believed to be his property. For the defendant it was insisted that this action could not be maintained by Joseph and Co., who had no interest in the goods; they were merely the conduit through which the goods were to be transmitted from the merchants at Amsterdam to Davids at Surinam. The property being in Davids, the consignee, he alone was injured by the nondelivery of the goods, and he alone could sue to recover their value. It has often been decided that an action against a common carrier for the loss of goods must be brought by the purchaser, who ought to receive them, and not by the vendor, who had delivered them to the carrier. There the vendor delivers them merely as the agent of the purchaser, and on that ground can maintain no action respecting them. Lord Ellenborough laid down this as the law:—"I am of opinion that this action well lies; there is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight of them was paid by the plaintiffs in London; to the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the nondelivery of the goods. After such a bill of lading [683] has been signed by his agent he cannot say to the shippers they have no interest in the goods, and are not demnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner."

The same question arose between other parties in a similar case (*Van Omeron v. Dowick*, 3 Camp. 322), and Lord Ellenborough again laid down the same doctrine.

These authorities, therefore, my Lords, established these propositions: that although, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the consignee is the proper person to bring the action against the carrier if they should be lost; yet the consignor may have a right to sue if he made a special contract with the carrier, and the carrier has agreed to take the goods from the consignor and to deliver them to any particular person at a particular place, which special contract supersedes the necessity of showing ownership in the goods; and by authority of the case of *Davis v. James* (5 Burr. 2680), and the last case of *Joseph v. Knox* (3 Camp. 320), that the consignor is enabled to maintain an action, though the goods may be the goods of the consignee.

But the authorities also go to this: that although ordinarily speaking the consignee would be the party to bring the action, yet that the consignor also is entitled where there is a contract to deliver at a particular place, if the risk is in the consignor; and therefore the circumstance of the paying freight or the paying insurance, though it is a circumstance to be taken into consideration, as it is not conclusive on the question [684] of property, so it is not conclusive of the right to sue. The Lord President laid down that, in his opinion, it was conclusive, and therefore he shut out the proof of the fact. I think, therefore, that there are two objections to the mode in which the Lord President left the case to the jury; namely, that he withdrew from their consideration that which ought to have been submitted to their consideration,—I mean the fact whether the goods had been delivered to the carrier on the risk of the consignor or of the consignee; and the question whether there was a special contract between the consignor and the consignee, which in its circumstances would have been sufficient to enable the pursuers to recover in the action. It is not necessary for your Lordships to inquire in what form that ought to be left to the jury, the questions on the bill of exceptions being whether the direction of the judge was in

point of law correct. I am of opinion that it was not correct in the mode in which it was left to the jury, and that your Lordships ought to reverse the interlocutor disallowing the bill of exceptions, and direct that a new trial be granted.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with directions to allow the bill of exceptions, and to grant a new trial, and to determine all questions of expenses between the parties in the said Court of Session, and to proceed otherwise in the said cause as shall be just, and consistent with this judgment.

DEANS and DUNLOP—JOHNSTON and FARQUHAR, Solicitors.

# [685] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

ALEXANDER PEARSON and WILLIAM ROBERTSON, *Appellants*.\*—Pemberton—John Stuart; Miss JANE CASAMAJOR and others, *Respondents*.—Attorney General (Campbell)—Lord Advocate (Rutherford) [18th July 1839].

[Mews' Dig. i. 319; xv. 981. Same view taken by Lord Campbell in *Wordsworth v. Wordsworth*, 1848, 1 H.L.C., at p. 156. But *per contra* long list of authorities collected in Wms. *Exors.*, 9th ed. vol. 2, 1330; and see *Corneck v. Wadman*, 1868, L.R. 7 Eq. 80; *Marriott v. Abell*, 1869, *ib.* 478].

Et à contra.

*Legacy—Testament—Vesting*.—A testator, by a trust disposition and settlement, directed his trustees, after payment of his debts and the expenses of the trust, 3dly, to pay a legacy of £500 to his sister Mrs. A.; 4thly, to pay annuities of £400, £400, and £200, to his other three sisters, during their respective lives, which several annuities were appointed to be paid half-yearly during the lives of his said sisters respectively; and in the event that after payment of his debts and obligations due at his death, payment of the expenses attendant on the execution of the trust, and of the £500 to his said sister Mrs. A., the residue of the proceeds of his funds and estate should not be sufficient for yielding the foresaid annuities thereby settled on his said sisters, then it was his meaning and intention that the said residue, whatever it might be, should be vested and laid out, and the interests or dividends arising therefrom be paid unto and divided among his said three sisters, Mrs. F., Mrs. P., and Mrs. B., during their respective lives, in the same proportions, and exactly in the same terms, in every respect, as therein pointed out, with respect to the full annuities of £400, £400, and £200; and 5thly, in the event of there being any of the proceeds of his said funds and estate remaining, after setting apart capital sums sufficient to yield the three annuities of £400, £400, and £200, then his said trustee should pay such [686] surplus, together with the capital sums so to be set apart for answering the foresaid annuities, as and when such capital sums should become tangible by the deaths of the said annuitants respectively, or in the event of there being no surplus, then the capital sums, whatever their amount might be, so to be vested and laid out as aforesaid, as and when such capital sums should become tangible as aforesaid, to and among Mary, Helen, Alexander, and Mary Ann, children of Mrs. P., and to three daughters of Mrs. B., equally among them, share and share alike, and the survivors or survivor of them, and that at the first term of Whitsunday or Martinmas after their respectively attaining majority or being married, whichever of these events should first happen, or as soon after the first of these events as the said capital sums so to be set apart should become

\* Rep. 15 D., B., and M., 275; F. C. 16th Dec. 1836.

tangible, by and through the deaths of the said several annuitants respectively, declaring, that until such several shares became payable, the interest or dividends of each share should be payable to the above-named persons respectively, for their maintenance and education, with full power to advance the whole or part of the share of A. P. for his outfit; and in the event of the deaths of any one or more of the said seven residuary legatees, before the term of payment (one or more, as the case might be,) of their shares as aforesaid, but that such deceasers should leave issue in life, and in life at the time that their father or mother would have been entitled to have received payment of their shares had they survived, the share of such deceasing parent should belong and be paid to and among their issue respectively, and that at the periods at which deceasing parent would have received the same had they been in life,—the trustees to regulate themselves accordingly, power being given to them to secure the shares falling to the seven legatees, so as all or any one or more of them shall only be entitled to draw the interest or dividends of their respective shares during their several lives, and the capitals of their shares shall in that case descend to their respective heirs, etc.; and 6thly, in the event that the residue of his funds, after payment of the £500 to his sister Mrs. A., should amount to the sum of [687] £15,000 sterling or upwards, to pay out of such residue £1000 sterling to each of George and Thomas P., sons of Mrs. P.; but if such residue should be under £15,000, and should not be less than the sum of £8000, then the said George and Thomas P. should only be entitled to £500 each; but if such residue should not amount to the said sum of £8000, then the said George and Thomas P. should not be entitled to receive any thing, the above-mentioned eventual legacies being to be payable to the said George and Thomas P. at the first term of Whitsunday or Martinmas after his death, with interest from said term of payment till paid. The testator was survived by his sisters Mrs. F. and Mrs. P., but not by Mrs. B. He was survived also by five of the legatees, including A. P. Mrs. F., one of the annuitants, died, predeceased by A. P. and M. P. A. P. had attained majority, and executed a general settlement in favour of Mrs. F. The free residue of the testator's estate exceeded £15,000, but the payment of the annuities before Mrs. F.'s death exhausted the annual income of it. In an action of multiplepounding for fixing the interests of the several parties,—Held, 1. (affirming the judgment of the Court of Session, which affirmed a finding by the Lord Ordinary,) “that the shares of the residue, so far as the same consisted of capital sums set apart for answering the said annuities, provided to the said A. P. and M. P. by the fifth purpose of the trust, whereby the residue was appointed to be paid to the seven individuals therein named, share and share alike, and the ‘survivors or survivor’ of them, under the conditions farther therein expressed, were not so vested in the said A. P. and M. P. as to enable them effectually to dispose thereof.” *Per* L. C. There is sufficient upon the face of the trust deed to show that the term “survivor” does not refer to the period of the testator's own death, but that it refers to the period at which these sums would become tangible, and that would lead to an affirmance of the said finding. Held, 2. (varying the interlocutor of the Court of Session, and remitting, with a declaration,) that the legacies to G. P. and T. P. by the sixth purpose of the deed declared [688] were payable to them at the first term of Whitsunday or Martinmas after the testator's death; and that the sum applicable to the payment of the aforesaid annuities was the residue of the said trust fund, after deducting as well the testator's debts and obligations, the expenses of the trust, and the legacy of £500 to Mrs. A., as the said two legacies payable to G. P. and T. P.

By a trust disposition and settlement, dated 16th April 1810, Alexander Porterfield esq., of Porterfield, now deceased, disposed to and in favour of Alexander Pearson esq. (the appellant), and of Frederick Fotheringham esq., now deceased, his whole estate, real and personal, in trust, for the following, among other, purposes; after disposing of his whole property and paying his debts: Thirdly, to make payment of a legacy of £500 to his sister Mrs. Camilla Porterfield or Alexander, wife of

Boyd Alexander esq., of Southbar. Fourthly, to pay the following annuities to his sisters after named, during their respective lives, viz. to Mrs. Christian Porterfield or Fotheringham an annuity of £400; to Mrs. Ann Porterfield or Paterson, wife of Lieutenant-Colonel Thomas Paterson, residing in Charlotte Square, Edinburgh, a like annuity of £400; to Mrs. Margaret Porterfield or Buchanan an annuity of £200, and this over and above and in addition to the annuity already settled on the said Mrs. Margaret Porterfield or Buchanan by him, which several annuities thereby provided the said Alexander Porterfield directed and appointed his said trustees to pay to his said sisters, during all the days of their respective lives, and that half-yearly, commencing payment thereof at the second term of Whitsunday or Martinmas which should happen after his death, for the year preceding such first terms of payment, and continuing payment thereafter at two terms in the year, Whitsunday and Martinmas as [689] aforesaid, during the lives of his said sisters respectively; and for the better fulfilment of this purpose, he thereby directed his said trustees to vest and lay out capital sums for answering the foresaid respective annuities on any security or securities which they might think proper, either personal, heritable, or in the public funds, and to take said securities in such terms as they might think best adapted for fulfilling the foresaid purpose; and in the event that after payment of the said Alexander Porterfield's debts, and fulfilment of the obligations in which he might stand bound at the time of his death, payment of the expenses attendant on the execution of the trust and of the £500 to his said sister Mrs. Alexander, the residue of the proceeds of his funds and estate should not be sufficient for yielding the foresaid annuities thereby settled on his said sisters,—then it was his meaning and intention that the said residue, whatever it might be, should be vested and laid out, and the interest or dividends arising therefrom be paid unto and divided among his said three sisters, Mrs. Fotheringham, Mrs. Paterson, and Mrs. Buchanan, during their respective lives, in the same proportions and exactly in the same terms, in every respect, as before pointed out with respect to the full annuities of £400, £400, and £200; and he thereby directed his said trustees to regulate themselves accordingly. The fifth purpose of the trust was:—"In the event of there being any of the proceeds of my said funds and estate remaining, after setting apart capital sums sufficient to yield the three annuities of £400, £400, and £200, as above specified, then I hereby direct my said trustees or trustee to pay such surplus, together with the capital sums so to be set apart for answering the foresaid annuities, as and [690] when such capital sums become tangible by the deaths of the said annuitants respectively, or, in the event of there being no surplus, then the capital sums, whatever their amount may be, so to be vested and laid out as aforesaid, as and when such capital sums shall become tangible, as aforesaid, to and among Mary Paterson, Helen Paterson, Alexander Paterson, and Mary Ann Paterson, all children procreated of the marriage between the said Lieutenant-Colonel Thomas Paterson and Mrs. Ann Porterfield or Paterson,

Buchanan, Buchanan, and Buchanan, all daughters of the said Mrs. Margaret Porterfield or Buchanan, equally among the said Mary, Helen, Alexander, and Mary Ann Patersons,

, and Buchanans, share and share alike, and the survivors or survivor of them, and that at the first term of Whitsunday or Martinmas after their respectively attaining majority or being married, whichever of these events shall first happen, (under the declaration however after mentioned,) or as soon after the first of said events as the said capital sums so to be set apart for answering the foresaid annuities shall become tangible, by and through the deaths of the said several annuitants respectively; hereby declaring, that until such several shares become payable the interest or dividends of each share shall be payable to the above-named persons respectively, for their maintenance and education; but I hereby give full power to my said trustees or trustee to advance the whole or any part of the principal sum falling to the share of the said Alexander Paterson, if they or he shall judge it necessary for his outfit or establishment in the world; hereby further declaring, [691] that in the event of the deaths of any one or more of the said Mary, Helen, Alexander, and Mary Ann Patersons, or

, and Buchanans, before the term of payment (one or more, as the case

may be,) of their shares, as aforesaid, but that such deceasers shall leave lawful issue of their bodies in life, and which issue shall be in life at the time their father or mother would have been entitled to have received payment of their shares had they survived, the share of such deceasing parent shall belong to and be paid to and among their issue respectively, and that at the periods at which such deceasing parents would have received the same had they been in life. But farther, it is hereby expressly provided and declared, and I do hereby direct and appoint my said trustees or trustee to regulate themselves accordingly, that it shall be completely in the power of my said trustees or trustee, if they or he shall think it proper so to do, to settle and secure the shares falling to all or any one or more of the said Mary, Helen, and Mary Ann Patersons, and

, and Buchanans, so as all or any or more of them shall only be entitled to draw the interest or dividends of their respective shares during their several lives, and the capitals of their shares shall, in this case, fall and descend to their respective heirs, executors, or assignees." By the sixth purpose of the trust the trustees are directed, in the event of the residue of his funds and estate, after payment and fulfilment of debts and obligations, and of the legacy of £500 to Mrs. Alexander, amounting to upwards of £15,000, to pay out of such residue the sum of £1000 to each of George and [692] Thomas Patersons, sons of Lieutenant-Colonel Thomas Paterson; but if such residue should be under £15,000, and not less than £8000, these two legacies were to be reduced to £500 each; while, if the said residue should not amount to £8000, the said George and Thomas Patersons were not to be entitled to receive any legacies at all; and which legacies were to be payable at the first term of Whitsunday or Martinmas after the testator's death, and to bear interest from the said term of payment till paid.

The testator died in the year 1815. Two of the three annuitants, Mrs. Fotheringham and Mrs. Paterson, survived him. Of the seven residuary legatees five survived him, of whom Alexander Paterson was one. Alexander Paterson attained majority in 1818, and died in 1820, leaving a settlement of his whole property in favour of Mrs. Fotheringham and husband, and the survivor of them. At that time both the annuitants were alive, but one of them, Mrs. Fotheringham, died in 1834; the other annuitant, Mrs. Paterson, still survives. Upon Mrs. Fotheringham's death Mr. Pearson (one of appellants), as trustee of Mr. Porterfield, raised an action of multiplepoinding and exoneration, in which several parties claimed. But the principal question related to the disposal of the capital sum that was disengaged by the death of Mrs. Fotheringham. Mrs. Fotheringham's trustees (Messrs. Pearson and Robertson the appellants) claimed to be ranked,—1, for arrears of annuity due to that lady at her death, and, 2, for Alexander Paterson's share of the fund, on the plea that his share had vested in him previous to his death, and was bequeathable by will. On the other hand, Miss Casamajor and other legatees (respondents) re-[693]-sisted the second part of that claim on the ground that the legacy to Alexander Paterson had not vested. The respondents objected also to the first part of that claim that Mrs. Fotheringham's trustees had no right to the annuity subsequent to the last term before her death.

Mrs. Fotheringham's trustees and Mrs. Paterson, two of the annuitants, further maintained that in ascertaining the amount of the income of the trust estate falling to the annuitants, the interest of the two legacies to George and Thomas Paterson ought not to be deducted from that income, but that the said two legacies, with interest due at the death of the annuitants, ought to be taken from the capital of the residue.

The questions raised upon the construction of the trust disposition are explained and disposed of in the following interlocutor (3d June 1836) by the Lord Ordinary, and in the relative note:—"The Lord Ordinary having considered the closed record, and heard parties procurators thereon, and made avizandum, Finds, *primo*, that as the trust deed, in the fourth article of the purposes thereof, expressly ordains the trustees to pay the annuities thereby provided to the three parties named, commencing the first payment at the second term of Whitsunday or Martinmas after the testator's death, and as the only event provided for, whereby the amount of those annuities was to be diminished, is expressly the event, that after payment of the testator's debts and obligations, the expenses of the trust, and one legacy of £500

to Mrs. Alexander, 'the residue of the proceeds of my funds and estate shall not be sufficient for yielding the foresaid annuities hereby settled on my foresaid sisters,' the said annuitants were entitled to receive, [694] and the trustees were bound to pay, the full annuities so provided to them during their lives respectively, so far as the residue, after those deductions, were sufficient for the purpose; and finds, that their claim to such annuities cannot be diminished or affected by the subsequent provision of the two legacies to George and Thomas Patersons, by the sixth purpose of the said trust, or by the interests accruing on those provisions: Finds, *secundo*, that the annuitants were entitled to a full year's annuity at the second term after the testator's death, it being expressly provided that the annuities shall then be paid 'for the year preceding such term of payment:' Finds, *tertio*, that it has been sufficiently proved, and is now admitted, that Alexander Paterson, to whom a share of the residue of the estate was provided, survived the years of majority; and finds that Mary Paterson, another of the residuary legatees, was married to the claimant, James Archibald Casamajor, many years ago; but finds it admitted that both these parties predeceased Mrs. Fotheringham, the annuitant, who died on the 31st March 1834: Finds, *quarto*, that the shares of the residue of the estate, so far as the same consisted of capital sums set apart for answering the said annuities, provided to the said Mary and Alexander Patersons by the fifth article of the purposes declared, whereby the said residue was appointed to be paid to the seven individuals therein named, share and share alike, 'and the survivors or survivor of them,' under the conditions farther therein expressed, were not so vested in the said Mary and Alexander Patersons, as to enable them effectually to dispose thereof: Finds that the children of the said Mary Paterson, who were in [695] life at the death of Mrs. Fotheringham, are entitled, as conditional institutes, to succeed to the share appointed in the first instance to be paid to her, according to the express provision to that effect; and finds, that in the event which has occurred, the share provided to Alexander Paterson must fall to 'the survivors' of the seven legatees named, who were in life at Mrs. Fotheringham's death, together with the children of Mary Paterson, surviving, to the extent of one portion thereof, in the place of Mary Paterson herself, as conditional institutes: Therefore ranks and prefers the claimants, the trustees of Mrs. Fotheringham, in terms of the first article of their claim, reserving all questions as to the amount of such arrears of annuities; but repels the second claim made for them: Ranks and prefers the claimant Mr. Casamajor, as administrator-in-law for his children Jane, Mary, and Elizabeth, and their attorney and mandatories, in terms of the second alternative in the second article of his claim; but repels the claim made in his own right; and in respect that the claim made to a share of the legacy left to George Paterson was abandoned at the debate, as it had become known since the record was made up, that George Paterson had left a deed of settlement, repels the first article of Mr. Casamajor's claim: Ranks and prefers the claimant Mr. Rynd, according to the second article of her claim; but supersedes consideration of her first claim, with reference to the Lord Ordinary's interlocutor of the 24th March last: Ranks and prefers Mr. Alexander Pearson, as trustee under the marriage settlement of Mrs. Helen Paterson or Bligh, in terms of his claim: Ranks and prefers Mr. Pearson, in like [696] manner, as trustee in the marriage settlement of Mrs. Ann Paterson or Shephard, in terms of his claim: Ranks and prefers the claimant Mrs. Ann Porterfield or Paterson, and her husband and mandatories, in terms of her claim; reserving all questions as to the amount of such arrears of annuities; finds no expenses due to any party; and appoints the cause to be enrolled, in order that the points remaining for consideration may be disposed of, and the multipole pinding finally extricated, on the principles of this interlocutor.\*

(Signed) JAMES W. MONCREIFF."

\* "Note.—This cause is certainly one of great difficulty, in two points, but especially in that which stands fourth in the findings of the above interlocutor. The first point presents a considerable perplexity, by the apparent contradiction between the fourth and sixth heads of the trust purposes. But after much consideration, the Lord Ordinary is of opinion that the provision of the annuities must take effect according to its terms, which are quite clear, unambiguous, and unqualified, except by the clauses of that provision itself. The sixth provision of the conditional legacies



[697] Against this interlocutor reclaiming notes were presented to the Court by several parties. The appellants [698] reclaimed against the interlocutor in so far as it found that the share of the trust estate, left to the late Alex-[699]-ander Paterson, was not so vested in him previous to his death as to enable him effectually to dispose

to George and Thomas Patersons, however it may seem to interfere with the investment of the funds for securing the annuities, contains no declaration that the annuities shall be at all diminished on account of those legacies. Although, therefore, it may be difficult to explain under what views it was that the testator regulated those legacies by the amounts of residue stated, the Lord Ordinary is satisfied that there is no such distinct expression of will to alter or restrain the provision of the annuities, as can be held legally to produce that effect. The ultimate question here is not at all between the annuitants and the legatees, George and Thomas, but solely between the residuary legatees and the annuitants. There is no doubt that the special legacies must be paid, because the free residue did exceed £15,000, and they must, of course, bear interest from the term of payment. The real question is, whether the interest of those legacies is to be held as a burden diminishing the annuities, or as a burden diminishing the ultimate residue to remain for the residuary legatees. The Lord Ordinary is of opinion that neither by the terms of the deed, nor by any presumption as to the probable intention of the testator, can it be held that the burden was meant to affect the annuities which were made a primary purpose of the trust. It is entirely a question of intention. But the provision of the annuities being the first in order, and from its nature, presumed to be of first importance in the testator's mind, and the words being clear, the Lord Ordinary thinks that nothing but the most express words in a later part of the deed could be held to take away a right so explicitly given.

"There seems to be no doubt on the point which stands second in the interlocutor, that the annuitants were entitled to a full year's annuity at the second term after the testator's death. It is much the same as if he had ordered a half-year's annuity to be paid at the first term after his death. The point seemed to be conceded.

"The third finding merely comprehends certain points of fact, necessary for raising the fourth question. But it was certainly admitted in the debate, that the fact of Alexander Paterson having survived majority was sufficiently proved.

"That fourth question is the great difficulty in the case. It is purely a question of intention. Some aid may, indeed, be obtained from the decided cases. But when they have been all considered, it still becomes necessary to return to the deed itself, and to weigh every word of the remarkable clauses in this destination of the residue of the estate.

"If there had been a surplus after securing the annuities, there is no doubt that it must have become payable to each of the *nominatim* legatees who survived the testator, if they also attained marriage or majority. But though this circumstance creates a peculiarity in this trust, if the shares of the capital sums invested for the annuities must be dealt with in a different manner, it does not appear to the Lord Ordinary that it goes a great way to solve the question here in controversy. The case of a surplus is a very simple case; and it could scarcely come to any other result, unless it were supposable that it might be a question, whether even marriage or majority was necessary to vest the right? But while the terms of the deed would probably exclude this last construction, the question as to the capital sums which were to be locked up evidently stands on a separate footing, in so far as a separate and independent quality or condition necessarily came to be added to the other suspensive declarations.

"The trustees are appointed to pay that part of the residue, 'as and when such capital sums become tangible by the deaths of the said annuitants respectively.' This means tangible to the trustees. When that event happens, they are to pay to the individuals named, 'and the survivors or survivor of them'—Survivors of what? If the deed had gone no farther, the words must either have meant survivors of the testator, or survivors of the event before mentioned. The subsequent clauses will not admit of the first construction; and it seems but reasonable to suppose, that at least 'survivors' of the event was included in the expression. But the clause goes on to fix the terms of payment, which are the first term after majority or marriage,

thereof; [700] and in so far as it sustained the claims of the other residuary legatees to the share of the residue left to the said [701] Alexander Paterson, and found no expenses due. The respondents reclaimed against the interlocutor in so far as it was unfavourable to them. On advising these reclaiming notes, the Lords of the

'or as soon after the first of the said events as the capital sums shall become tangible' by the deaths of the annuitants respectively. Here it is distinctly contemplated, that the parties might be married or of age, while yet the shares could not be paid to them, the funds not being tangible. This last event, therefore, is a separate and necessary term or condition of the payment; and if it must be granted that the provision in favour of the survivors is a conditional institution, with reference to the terms of marriage or majority, it is very difficult indeed to say that it is not so in respect of the term before which no payment could be made to any one.

"The two clauses which follow, allowing the interest or dividends to be applied for the maintenance and education of the legatees until the shares become payable, and empowering the trustees to advance part of the principal sum to Alexander Paterson, if they should think it necessary, evidently have reference to this state of the case, that the funds had become tangible by the death of the annuitants, while yet some of the legatees were neither married nor of age; for it cannot be supposed that the trustees could exercise such a power, while the funds stood wholly invested, and required for the annuities. However useful in argument, therefore, these clauses might have been, if the question were, whether there could be a vesting before marriage or majority, they evidently do not apply to the event of the funds continuing locked up. And this leads inevitably to the inference, that the provision to the 'survivors' had a much more direct reference to the fact of the legatees being survivors of the one event essential to the payment, than to the terms of marriage or majority, afterwards mentioned.

"But the clause which appears to the Lord Ordinary to be of most importance, in connexion with the provision to 'survivors,' is that which declares, that in the event of the deaths of any of the individuals, 'before the term of payment (one or more, as the case may be,) of their shares as aforesaid, but that such deceasers shall leave lawful issue of their bodies in life, and which issue shall be in life at the time their father or mother would have been entitled to have received payment of their shares, had they survived,' the share shall belong, and be paid to such issue, 'and that at the periods at which such deceasing parents would have received the same had they been in life.' It is impossible to doubt, that in this clause the testator had in view all the events on which the payment was suspended, and specially the decease of the annuitants. The words 'one or more,' in the way they are placed, are very singular, and really must relate to the successive contingencies in the deaths of the annuitants. What is the substance of the provision? The effect of it will be best tried by looking to the case of Mary Paterson. The clause necessarily supposes marriage; so that that term of payment was necessarily past. Yet it is provided that in the event of any of the parties dying 'before the term of payment,' ('one or more'), leaving issue, which shall be in life at the time when their father or mother would have been entitled to receive payment, 'had they survived,' the share shall belong and be paid to such issue. The party being married, and leaving issue in life, even that issue shall not take, unless it be in life at the still postponed term at which the parents, if surviving, would have been entitled to payment. Then, who is to take if the issue survived the parent but was not in life when the money was payable? Plainly, not the parent who had predeceased the child, nor any one in that parent's right; and not the child's heir, seeing that it never was within the condition of the destination, not having been in life at the period fixed. In the case supposed, the share must evidently go to the 'survivors' of the other legatees.

"But take it in another way:—Mary Paterson dies, her children survive, and are in life when Mrs. Fotheringham's annuity ceases. Are they not conditional institutes? The very case stated is, that they were in life at the time when Mary would have been entitled to receive payment if she had survived; in which it is implied, that as she did not survive, she never was entitled to receive payment, and that it is in their own right as conditional institutes, and not as substitutes through her, that the children are entitled to take the share, and exclude the other survivors. The Lord

Second Division of the Court, of this date, pronounced the following interlocutor:—  
 “16th December 1836. The Lords, having heard counsel for the parties, and advised the cause, adhere to the findings in the Lord Ordinary’s interlocutor reclaimed against; recal the decernitures therein contained, *hoc statu*, and remit to his Lordship to apply these findings, and to proceed in the cause as to his Lordship shall seem just.”

Ordinary must confess, that he sees no other way in which the clause can be reasonably construed. It distinctly explains the meaning of ‘survivors’ in the previous clause, and renders it impossible to suppose that the testator considered the share as already vested in the married legatee, so as to enable him or her to defeat the right of the children.

“But, if the share was not vested in Mary Paterson, so as to enable her to exclude her own children, neither could it be vested either in her or in Alexander Paterson, to the effect of excluding, by deed, the conditional institution of the other legatees surviving, in the more general case of the party dying before the capital sums were tangible, and leaving no issue. The clause seems to demonstrate, that in the estimation of the testator, the term of payment to which the survivance peculiarly referred was the period when the capital sums might successively be set free; and therefore the Lord Ordinary is on the whole of opinion, that it is impossible to hold that there was any vested right to render a conveyance effectual by a party who did not survive that term.

“It must necessarily follow, from the view above taken of the clause as to the case of a legatee dying, but leaving issue, that such issue must be considered as in the same place in which the parent, if surviving, would have been, and so entitled as one survivor to a share of the legacy fallen by the death of Alexander Paterson.

“The Lord Ordinary will not enter minutely into the cases cited. The late case of *Marjoribanks* against *Aikman*, 18th February 1836, (14 D., B., and M., 521.) was much relied on. That was itself a very difficult case. The Lord Ordinary would have concurred in the judgment, though he must have also agreed with the Court in not adopting the test for such cases laid down in the note of the Lord Ordinary in that case. But the present is a far more special case, in which, however natural the leaning may be in favour of the vesting of such a legacy, he finds himself constrained, by what he thinks the evident intention of the testator, to hold that the right was not vested. The case of *Smith* against *Leitch* (4 S. and D. 659., new edit. 665.) is a very important case, though the report of it in the House of Lords (3 W. and S. 366.) is not quite satisfactory. But the judgment in that case would have been the other way if it had not been for the marked change in the form of expression in the destination to Andrew Leitch, from that which had been used in all the previous branches of the destination, and the omission in his case of the material words which distinctly qualified the right given in the others.

“The only other case to which the Lord Ordinary will refer (though a great many were quoted to him) is that of *Wallace* against *Wallace*, 28th January 1807, (Fac. Coll.) He certainly thinks that case of great importance, and it seems to him, when carefully considered, to afford a safe guide for the decision of this cause. There were two points in it, and the parties who maintain the vested right naturally refer to that which is reported second in order as the most important. That related to a simple legacy to Alexander Wallace, the deed providing that on the death of the longest liver of the testator and his wife, the trustees should pay that legacy to him. There was no destination over or ulterior, and the simple question was, whether that legacy had lapsed by Alexander Wallace predeceasing Mrs. Houston? It cannot be doubted that the judgment was right, which found that it had not lapsed. But it would have been a very different case even in that branch of it if there had been a farther, and, as in this case, *nominatim* institution or substitution of others, in case he did not survive the longest liver.

“But the first part of that case appears to be the most instructive for the present cause. That related to the residue of the estate, which was to be divided among the children of Alexander Wallace ‘that may be in life at the death of the longest liver of me and my said spouse;’ these sums being made payable also at marriage and majority, ‘whichever of these events shall first happen after the decease of the longest liver of me and my said spouse.’ Then there was a provision, that in the event of the death of any of the said children before their share became payable,

Mrs. Fotheringham's executors, Messrs. Pearson and Robertson, appealed against the above interlocutors in so far as the claim of the legatees to the share left to Alexander Paterson was sustained.

The Misses Casamaijor, Mrs. Rynd, and Mrs. Long Wellealey (legatees) entered a cross appeal against the [702] first finding in the interlocutor of the Lord Ordinary adhered to by the Court.

*Appellants.*—It is clear, from the structure and terms of the trust deed, that the intention of the testator was that Alexander Paterson, one of the *nominatim* residuary legatees, having survived the testator, and having also survived his own majority, there became vested in him a right to one-fifth part of the whole residue, including those portions of the residue which had been set apart to answer the annuities.

In the law of Scotland a fundamental distinction, in reference to the question of vesting, is to be found between legacies left to individuals called *nominatim*,—known to the testator as existing persons,—about whose identity there can be no doubt or uncertainty; and legacies left to persons called by mere description, as members of a class, *nati* or *nascituri*, whose very existence, number, and identity are contingent and uncertain, not only at the date of the testament, but also at the death of the testator. The certainty and complete ascertainment of the legatees which obtains in the former class, as opposed to the contingency and uncertainty as to the persons and number of the legatees which may exist in the latter, has given rise to very different, and indeed to contrary, rules of construction in regard to the vesting of the legacy, as applicable to these two classes of legacies.

The rules as to the vesting of legacies in *nominatim* legatees adopted by the law of Scotland from that of Rome are:—

1. A legacy, even when left to a *nominatim* legatee, does not vest until the death of the testator; and there-[703]fore, unless the legatee survive the testator, the legacy does not vest in him.

2. When a legacy is made payable to a *nominatim* legatee at a certain fixed period, however remote, or at a time that must arrive, although it is uncertain when,—the legacy is held to vest at the death of the testator (*dies legati cedit*), although the period of payment is postponed (*sed not venit*).

3. When a legacy is made payable to an individual on the occurrence of an event which is in its own nature uncertain, or on the arrival of a period which may never come at all,—the legacy does not vest, unless and until the condition is purified by the occurrence of the event, or the arrival of the period. (*Dies incertus pro*

it should accresce to the survivors equally. Nothing can be more like to the present case, except that the deed there did not contain the clause excepting from the right of the survivors the case of a child dying before the shares were payable, but leaving issue. But what was the question, and the ground of judgment? It was entirely on the implied condition, 'si sine liberis decesserit,' as qualifying the farther institution of the survivors. No one imagined or attempted to argue, that, independent of that special case of a child left, which stands on a peculiar presumption of equity, the share of the residue could have been held to be vested in the child predeceasing Mrs. Houston, to the effect of supporting a conveyance to a stranger. The whole pleadings and opinions assumed the reverse. But wherein does this case differ? Essentially in this only, that here the testator has so provided for that case of a child dying before the fund was set free, but leaving issue, as to shew that in actual intention he meant precisely what in Wallace's case was presumed on a known rule of law, with the additional circumstance of a positive exclusion of the child if not in life when the contingency emerged. No question, Mary Paterson's children must take, and any child of Alexander would have taken also. But does it follow, that either on general law, or on the provisions of this deed, there was a vesting in them to transmit the right, independent of the *conditio si sine*, etc. or the special provision of the testator? The Lord Ordinary thinks not.

"The case of *Mirrlees*, 17th May 1826, (*Mirrlees v. Mathie*, 17th May 1826, S. and D. 591, new ed. 599.) was not fairly tried on the material question, and at any rate was different in essential points, though bearing a resemblance to this case in some particulars.

J. W. M."

*conditione habetur*). But as soon as the condition is purified, the right vests, although the legatee may die before it be possible to obtain payment (Digest, lib. 36, tit. 2, l. 31; Codex, lib. 6, tit. 53, l. 3; *Wallace v. Wallace*, 28th Jan. 1807 (Mor. Dict., App. 6, voce Clause); Sess. Papers, Adv. Lib. 1806-7, II. 267; Semple, 15th Nov. 1792, Mor. 8108; *Hume v. Hume*, 28th Jan. 1807, not reported, but see Hume's MS. Notes; *Leitch's Trustees v. Leitch and others*, 2d June 1826, F.C. and 3 W. and S. 366-379; *Mirrlees v. Mathie*, 17th May 1826, F. C.; *Smith v. M'Beth*, 30th May 1834, F. C.; *Aikman v. Marchbanks* and Brockie, 18th Feb. 1836, F. C. and 14 D., B., and M., 521).

Where legatees are not mentioned *nominatim*, but are called as a class of persons who may or may not exist, or who may be more or fewer in number, the rule as to the vesting of the bequest in any of the contingent legatees is different from that which applies to *nominatim* legatees. The most extraordinary instance of this kind of legacies is where they are left to the children of an existing individual, or to the issue of a subsisting marriage. Where the children of an individual are called, there must exist an uncertainty as to the [704] number of the legatees until the death of the parent. Where the issue of a marriage are called, the same uncertainty must continue until the dissolution of the marriage. In both these cases, therefore, the presumption is, that the testator did not intend that the right should vest at all during the subsistence of the uncertainty. It very often happens that whilst a legacy or a residue is given to children, a liferent is given to the parent, by which the term of payment is postponed until the parent's death; and in this way the period of payment comes to coincide with the vesting of the right by the termination of the uncertainty as to the legatees. But this is merely an accidental coincidence. The coincidence does not take place where the issue of a marriage are called as legatees, and where a conjunct liferent is given to the spouses. In such a case the legacy vests on the death of either parent, although the period of payment does not arrive until the death of both (*Glendinning and Ghaunt v. Walker and others*, 30th Nov. 1825, Fac. Coll., and 4 S. and D. 237, new ed. p. 241; *Dick v. Gillies*, 4th July 1828, 6 S. and D. 1066, new ed.; *Clavering v. Clavering*, 12th Nov. 1833, (by the Lord Ordinary) rep. in 2 S. and M'L. 320 (note); *Scougalls v. Birch or Walker*, 9th July 1834, 12 D., B., and M., 910, affirmed on appeal, 2 S. and M'L. 305; *Buchanan v. Downie*, 12th Feb. 1830, F. C., and 8 S. D., and B., 516).

The cases now cited afford instances of a provision made under a trust deed to the children of a particular person, in which case the uncertainty as to the person and number of the beneficiaries, continues during the life of that parent. But cases sometimes occur where the beneficiaries are described as the children or the issue of a particular marriage. In such cases, the dissolution of the marriage, by the death of either of the parents, is the event which puts an end to the uncertainty. This, to be sure, may not be the term of payment, where a conjunct liferent is provided to the two [705] parents. But still, by the death of either parent, the children of the marriage are finally ascertained; there no longer remains any uncertainty as to the number or persons of the beneficiaries, nor any objection in principle to the vesting of the fee, under the burden of the surviving parent's liferent (*Sivright v. Dallas*, 27th Jan. 1824, Fac. Coll., and 2 S. and D. 643, new ed. 543).

Certain terms of payment are specified, viz. the marriage or majority of the legatees; but the period at which the legacy is to vest is nowhere expressly stated. The mere circumstance that the whole or a portion of the estate bequeathed is subject to the interest of an annuitant or liferenter in no respect affects its vesting according to law, although it may afford a very good reason why the testator should provide that the legacy should not be paid, even at the specified term of payment, if the fund from which it is to be paid is not at the term of payment released from the operation of the liferent. The testator has created a liferent over certain funds, the fee of which he has also disposed of; and as he has specified no period at which the fee is to vest in the party to whom it has been so disposed of, it is clear that it must legally vest in that party upon the death of the testator. The payment was necessarily postponed, not with reference to the circumstances of the legatee, but to the state of the property (*Atkins v. Hiccocks*, 1 Atky. 500). The class of legatees must answer the description at the time the gift was to take effect.

Where several legatees are called together, there is frequently a substitution of the survivor or the survivors. The effect of such a provision may be, either that

the [706] survivors are to take after the original legatees, which is the case of proper substitution, or else that they are to take in case some of the original legatees fail without having taken at all, which is the case of conditional institution.

It may be well to consider the clause of destination which occurs in the present case, in both of these lights. There is here a destination in favour of seven individuals, "share and share alike, and the survivors or survivor of them." Now, if this provision in favour of the survivors or survivor be considered as a proper substitution, its effect merely was, that as each of the individual legatees died their right of legacy should pass by succession to the survivors, provided that no alterations had been made by the decessing legatee upon this order of succession. The survivors, being understood to take by succession, were of course liable to have that succession disappointed by the deed of the original legatee, in whom the right is supposed to have been previously vested. An instance of proper substitution occurred in the case of *Duncan and others v. Miles and others*, 27th June 1809 (Fac. Coll.). If, again, it be considered as a case of conditional institution, the condition was purified by the legatee's survivance of the testator.

By the application of these rules to the present case it follows that the legatees must survive the testator, but it is by no means necessary that they should survive the annuitants who are appointed to liferent certain parts of the residue. The existence of these annuitants may delay the payment of such parts of the residue as are employed to meet the annuities, but cannot prevent [707] the vesting of the legatees' right. The meaning of the term survivors or survivor is plainly the survivors or survivor of the testator. The surplus of the estate, after a sum is set apart for answering the annuities, clearly became vested in the legatees at the death of the testator, though the enjoyment thereof, except in so far as necessary for the maintenance of the legatees, might be postponed till their majority or marriage; and the same words cannot be read differently as to portions of the same fund. In *Cripps v. Woolcott* (4 Mad. 11), by Sir John Leach, words of survivorship were referred to the period of division and enjoyment, but there the meaning put on survivor is inconsistent with that in *Doe v. Prigg*, 8 Barn. and Cress. 231. (See judgment as delivered by Bayley, J. (8 B. and C. 235)), where it was held that the term "surviving" referred to the testator's death; the question being now *sub judice* in a case before the Lord Chancellor (*Wordsworth v. Wood*, (since decided,) 4th Dec. 1839); and see also *Hill v. Chapman* (1 Ves. jun. 405).

*In the Cross Appeal.*—The trustees of Mrs. Fotheringham, who there appeared as respondents, maintained, that it was clear from the terms of the sixth purpose of the trust, that the legacies to George and Thomas Paterson ought not to be deducted from the capital invested for answering the annuities. The whole residue of the estate, after payment of debts and other onerous obligations, "whatever it might be," was directed to be invested in payment of the annuitants, if there were not otherwise funds for the purpose; in short, with the exceptions above referred to, and the payment of the legacy to Mrs. Alexander, these annuities were to be at all events secured to the full extent of funds left by the [708] testator. These were clearly the primary objects and purposes of the trust; every subsequent bequest was plainly subsidiary thereto.

*Respondents.*—It being admitted that the will is to be construed according to the *enixa voluntas* of the testator, the clear inference is that Alexander Paterson's share did not vest, in respect he did not survive Mrs. Fotheringham. Till the death of the annuitants there was no vesting of the legacies, which therefore depended on contingencies; Alexander Paterson's share did not vest because the event of the fund being tangible had not arrived. When a trust is granted for the protection of the interest of various substitutes the deed subsists, and enures to the protection of all parties interested. The view of the appellants is sufficiently met by the authorities. The case of *Wallace* (Mor. App. voce Clause, No. 6) illustrates the effect of a destination of a residuary trust fund, after the death of a liferentrix, to a class of persons and the survivors of them, and shews that the survivance of such term of division and payment was a condition precedent of such right, even although it had been also qualified with an express declaration that the shares were to be payable to such persons on their respectively attaining majority or being married. See also *Lawsons v. Stewart* (2 W. and S. 625); *Davidson v. Miln*, 13th Feb. 1828

(6 S. and D. 536); Buchanan, 12th Feb. 1830 (8 S., D., and B., 516); *Mowbray v. Scougall*, 9th July 1834 (12 D., B., and M., 910); and in the House of Lords, 31st August 1835 (S.C. 2 S. and M'L. 305).

[709] But even although the right to a share of the fee or capital should be held to have vested in Alexander Paterson in his lifetime, yet that right could not be defeated by the gratuitous settlement on which the appellants founded. A right to two or more parties jointly, subject to a condition of accretion in favour of the survivor of them, communicates to each of the joint owners not only a qualified right to his or her own share, but a conditional right to the other shares,—not to be defeated gratuitously, while it remains in the possession of a trustee subject to its ultimate destination. Bissett, 26th Nov. 1799 (Mor. App. 1 voce Deathbed, No. 2); Seton, 6th March 1793 (Mor. 4219); Ersk. b. 3, tit. 8, s. 44, and the case there cited.

*In the Cross Appeal.*—According to the sixth purpose of the trust, the funds (the interest of which was to be paid to the annuitants) were to consist of the residue of the trust estate, after deducting the provisions to George and Thomas Paterson; the yearly sums which were divisible between the annuitants could not exceed the interest or dividends arising from such residue. The provisions to George and Thomas Paterson were expressly directed to be paid to them at the first term of Whitsunday or Martinmas after the testator's death, and to bear interest from the said term of payment till paid, and that not subject to any qualification whatever in favour of the annuitants.

Lord Chancellor (16th July).—My Lords, on one part of this case I confess I am surprised that such a decision should have been made; more especially when I find it must have been twice argued, first before the Lord Ordinary, [710] and afterwards before the Inner House; for it appears to me, though there is a little discrepancy between the two clauses, taking the whole instrument together there is not a foundation for the argument. The author of the deed directs certain sums to be invested for the payment of three annuities to his sisters, in the event that the residue of his funds and estate should be sufficient for that purpose, after payment of all the debts, fulfilment of all obligations in which he might stand bound at the time of his death, payment of the expenses attendant on the execution of the trust, and of £500 to his sister, Mrs. Alexander; but if the residue of his funds and estate shall not be sufficient for yielding the aforesaid annuities thereby settled on his sisters, they should be reduced accordingly, not enumerating in that list the deductions from the capital monies required for the purpose of paying portions of £1000 to George and Thomas Paterson. By a subsequent part of the same deed he directs the payment of £1000 to those two persons; and then he says, there shall be paid a certain sum after his death; “the remainder of the said residue being to be vested and laid out for yielding the said annuities hereby provided as aforesaid, the above-mentioned eventual legacies being to be paid to the said George and Thomas Paterson at the first term of Whitsunday or Martinmas after my death, with interest from the said term of payment till paid.” He gives, therefore, £1000 each to those individuals, to be paid at a certain specified time after his own death, and he directs that the remainder of the residue shall be invested and laid out for yielding the annuities. He has omitted, undoubtedly, in the first enumeration, the deduction from the residue to realize these sums, though [711] he has fixed the precise period at which they are to be paid. The question being whether those sums are to be paid to the prejudice of the annuitants, the Court have held that the annuitants are to be paid in full, notwithstanding the express direction in the deed that these legacies are to be paid within a certain time after his death. It appears to me there is no room for dispute as to the necessity of giving effect to that direction; that exhausts one of the appeals. The judgment of this House must interpose to set that right. With regard to the other clauses, they are not consistent with each other; and I would, therefore, propose to your Lordships to reserve the consideration of the questions arising out of these till Thursday next, when your Lordships will have had an opportunity of looking more particularly into them.

Further consideration adjourned.

Lord Chancellor (18th July).—My Lords, this case was adjourned for the purpose

of giving your Lordships an opportunity of looking over the deed on which the question arises. There were two appeals: one as to the payment of two sums of £1000 each, which by the judgment of the Court of Session it had been found were not payable, except subject to annuities. The note of the Lord Ordinary sets out the grounds on which he had come to that conclusion, stating that "The sixth provision of the conditional legacies to George and Thomas Paterson, however it may seem to interfere with the investment of the funds for securing the annuities contains no declaration that the annuities shall be at all diminished on account of those legacies. It is entirely a question of intention; but the provision of [712] the annuities being the first in order, and from its nature presumed to be of first importance in the testator's mind, and the words being clear, the Lord Ordinary thinks that nothing but the most express words in a later part of the deed could be held to take away a right so explicitly given."

The decision of the Lord Ordinary, therefore, agreeably with that of the Inner House, proceeds upon this, that there is nothing to shew that the annuities were to be diminished on account of the legacies, and that unless there are express words in the latter part of the deed, they will not have the effect of taking away the right that is expressly given in the early part of the deed. There are certain words contained in this deed which must by some accident have been overlooked. In the earlier part of the deed, after directing payment of his debts, and fulfilment of the obligations existing at the time of his death, payment of the expenses attendant on the execution of the trust and of £500 to his sister Mrs. Alexander, he directs that, in the event of the residue of the proceeds of his funds not being sufficient, the whole shall be invested in the annuities. There is, in that enumeration, no doubt, no mention of those legacies to George and Thomas Paterson; but he provides in what events the property he might leave to his legatees shall be payable. In the event of the residue being £15,000 or upwards, then he directs £1000 to be paid to each of George and Thomas Paterson. If it shall be under £15,000 and not less than £8000, then that George and Thomas Paterson shall only have £500 sterling each. The remainder of the said estate was to be vested and laid out for yielding the annuities as aforesaid. But if such residue shall not amount to £8000, then he says, [713] "It is my intention that the said George and Thomas Paterson shall not be entitled to receive any thing whatever under this deed; and I direct my said trustees and trustee to regulate themselves accordingly; the above-mentioned eventual legacies being to be payable to the said George and Thomas Paterson at the first term of Whitsunday or Martinmas after my death, with interest from said term of payment till paid." There is a distinct period fixed at which those legacies shall be paid; and it is obvious that those legacies are to be paid even in the event of there not being sufficient to provide for the payment of those annuities and those sums without a diminution of the amount of the annuities. I apprehend, therefore, it is quite clear there is that which the Lord Ordinary says would be sufficient. There is evidently a statement in the latter part of the deed giving a construction which would be undoubtedly the proper construction if there had been such a provision in the other part of the deed; taking then the whole together, I apprehend there is no doubt that the decision of the court below is incorrect, and that these legacies of £1000 each are payable at the time therein directed, though that may interfere with the payment of the annuities.

The other question which arises is undoubtedly a question of much greater difficulty, turning entirely upon the construction of this instrument, and how the words "survivors or survivor" are to be understood to apply,—whether at the period of the testator's death, or at the several periods at which the several sums he has given by this instrument are to be payable, *i.e.* referring the payment of any surplus from the sums set apart to [714] answer the several annuities, together with these sums, to the periods at which the several annuitants might die, by which death the funds, according to the expression used in this deed, would be tangible.

My Lords, in a case of this kind, very little assistance is to be derived from reference to authorities, for though the general rules are very well understood, both in this country and in Scotland, yet when there are particular expressions used on the face of an instrument leading to the indication of intention, they must govern; the general rules apply only where there is no particular indication. The earlier



judgments in this country, in cases where there is nothing to lead to the contrary conclusion as to the testator's intention, have a very strong tendency to refer the provision to the period of the testator's death. The later cases have very much departed from that rule, and notwithstanding the very strong opinion expressed by Sir John Leach in one of the cases referred to (*ante*, p. 707), it may be considered that the point is not now very clearly established as a distinct proposition; but that in the one class of cases or the other we must be regulated by the expressions used by the testator. Your Lordships must endeavour to collect the inference to be drawn from these expressions; it is impossible to reconcile all the expressions in this instrument.

The testator has given several annuities of £400, £400, and £200 to his three sisters, and he has directed his trustees to invest capital sufficient to secure those annuities. He has then provided for two events, that of there being more money belonging to his estate than sufficient for the purpose of securing the payment of the annuities; [715] and he has provided for another event, that of his estate not being adequate to provide for the payment of all those annuities. He directs that if the estate is not sufficient for the payment of all those annuities, then the annuities shall abate; but if there be more than sufficient, if there be a surplus, he directs that the surplus, together with the invested sums when tangible by the deaths of the said annuitants respectively, shall be paid by the trustees thus, "or in the event of there being no surplus, then the said invested sums, when tangible as aforesaid, shall be paid to 'seven persons,' share and share alike, and the survivors or survivor of them, and that at the first term of Whitsunday or Martinmas after their respectively attaining twenty-one or being married."

Now, in speaking of the death of the annuitants, and the period therefore at which these various sums would become what he calls tangible, he refers to those periods as the periods at which the sums would be to be paid; he also refers to two other periods, at which he says they shall be paid, namely, when the legatees attained twenty-one or were married. It is obvious one of the periods referred to is when such invested sums should become tangible by the death of the annuitants, the other refers to the period at which the annuitants should respectively marry or attain twenty-one; and looking therefore at the subsequent clauses, the author of this instrument has given us this clue to his meaning, that in speaking of the periods of payment he speaks of the periods at which the property would become tangible, and also the periods at which the parties should die or attain twenty-one.

Then there are four provisions with reference to the [716] interests of those several legatees. The question will be, whether in directing those provisions there is any indication of intention sufficient to shew what he means by the words "the survivors or survivor of them,"—to what period they should apply. He provides first that the legatees should have maintenance payable out of their shares; secondly, there is a power to the trustees to advance to Alexander, who is one of the legatees, for his outfit and establishment, the whole or any part of the sum falling to his share. Now those two provisions evidently assume that the property, or some portion at least of the property, has become vested in enjoyment, or is capable of enjoyment by the intermediate interests being removed before the legatee attains majority or is married. It is not a fund of which any other persons could have the enjoyment; he must have meant maintenance out of a fund belonging to the legatee appropriated to the legatee, and he provides for the maintenance of the legatee for the period during which from personal inability he was not in the enjoyment of it, namely, before majority or marriage. When he authorizes the advance to Alexander of any part of the sum falling to him, he must mean the share which was his, subject to personal disability, in which case the trustees are authorized to advance to him any portion of the sum they might think proper. In the same way, in the third place, a power is given to the trustees to settle and secure the shares falling to all or any of the female legatees, so as to enable them to draw the interest of their shares during their lives, and the capital of their shares to go to their heirs and executors. It is not absolutely necessary that the property for that purpose should be in possession, because the settlement might be [717] made prospectively, in order to secure the share which might eventually become theirs. The great probability is, that if the

question had arisen upon these provisions, it would have been considered that those were shares of what they were entitled to in possession, but with a power given to the trustees to intercept the actual enjoyment for the purpose of settling upon them for life, with remainder to those that might come after them.

But then, my Lords, comes the provision upon which the great question arises. It is provided, that if any of the legatees die before the term of payment (one or more, as the case may be) of these shares, leaving issue which shall be in life at the time the parent would have been entitled to have received payment of their shares had they survived, such issue shall take the parent's share at the time at which such deceasing parents would have been entitled to receive the same if they had been in life.

Now the way of trying the question upon this provision appears to me to be this:—suppose the shares were all vested at the time contended for by the appellants, namely, at the moment of the testator's death, and not, as contended for on the other hand, that the vesting was postponed during the continuance of the particular interests of the annuitants:—if the legacies vested, and the term of payment only was postponed, it is singular that a provision should be made for the children of those particular parties who would be provided for without it, because it would become the property of the parent, and the parent would of course have dominion over it, for the purpose of providing for his children.

But it is hardly necessary to reason upon the impro-[718]-bability of that being the testator's intention, because, though he has before expressed other periods of payment, namely, that the payment is to depend on attaining twenty-one or marriage, yet the payment even at these terms is to depend upon the sums becoming tangible by the death of the annuitants. When he therefore refers to the time at which the legatees are to be entitled to their legacies he refers expressly to the time at which the capital shall become tangible, the terms of payment referred to as "terms of payment (one or more) of their shares as aforesaid" are dependent entirely upon the fact of the funds having become tangible by the death of the annuitants. A legatee attaining twenty-one and marrying, would have no power over his legacy expectant upon the death of an annuitant, his or her death, before the death of the annuitants, would give the legacy to his or her children; if the legatee died before the annuitant, leaving a child, the legatee clearly would not take, the child is to come in his place. Nothing is more improbable than that the donor should intend to provide for the children of a legatee who should attain twenty-one, and marry, as against the parent, but it is very natural that he should wish to secure the legacy to the family of a legatee who should die before he became entitled, leaving children. It seems to me clear that the testator conceived that if the legatee should die before the funds became tangible, such funds would not belong to the legatee. He says, "the payment of the share which the father or mother would have become entitled to receive had they survived," and he gives it to such children only as shall be in life at those times; if the term "survivors" refers to the times at which the funds would become tangible, and therefore divisible, [719] the provision is natural and consistent, as it only secures to the family of each legatee dying before the time of payment, leaving issue, the benefit of the legacy against the other surviving legatees.

It is from this clause, and this clause only, it appears to me that the testator's intention may fairly be inferred; and it does appear to me that the provision in that clause in favour of children is not consistent with the vesting of the capital at the time of the testator's death; that the provisions are not consistent with what must have been his obvious wish if he had looked to the vesting of the capital either at that period or at the time when a legatee became of age or was married; that it can be reconciled only with his applying it to the survivorship, at the periods at which the funds constituting the capital might be relieved from the payment of the annuities. I think that your Lordships will come to the conclusion that there is sufficient upon the face of this instrument to shew that the term "survivor" does not refer to the period of his own death, but that it refers to the period at which those sums would become tangible: that would therefore lead to an affirmance of the interlocutor appealed against. With regard to the other question, the interlocutor brought before your Lordships by the cross appeal must be reversed. Your Lordships have not before

you the means by which this can be set right here. I apprehend that the form of the order will be to affirm the interlocutors in the original appeal, and to vary them so far as relates to the legacies, declaring that those legacies were payable to George and Thomas Paterson, at the first term of Whitsunday or Martinmas after the testator's death, and then to remit it to the Court below, to [720] carry into effect that order, because your Lordships have not the proceedings in that state before you which will enable you to settle the question finally. I understand that the cause is in that state which will enable the Court below to proceed upon that declaration.

Lord Advocate.—Certainly, my Lords.

The House of Lords ordered and adjudged, That the said original petition and appeal be and the same is hereby dismissed this House; and that the said interlocutors, so far as complained of in the said original appeal, be and the same are hereby affirmed: And it is further ordered and adjudged, That the part of the said interlocutors which is complained of in the said cross appeal be varied, by omitting so much thereof as finds that the claim to such annuities cannot be diminished or affected by the subsequent provision of the two legacies to George and Thomas Patersons by the sixth purpose of the said trust, or by the interests accruing on those provisions: And it is declared, That the legacies of one thousand pounds sterling to each of the said George and Thomas Patersons (under the trust disposition and settlement of Alexander Porterfield esquire) were payable to the said George and Thomas Patersons at the first term of Whitsunday or Martinmas after the death of the said testator; and that the sum applicable to the payment of the annuities payable under the said trust disposition and settlement was the residue of the said trust fund, after deducting as well the testator's debts and obligations, the expenses of the trust, and the legacy of five hundred pounds to Mrs. Alexander, as the said two legacies payable to the said George and Thomas Patersons: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this declaration and judgment.

RICHARDSON and CONNELL,—SIMPSON and COBB, Solicitors.

## [721]      APPEAL FROM THE COURT OF SESSION, SCOTLAND.

MALCOLM STEWART, Esq., of Atholl Bank, *Appellant*.—Lord Advocate (Rutherford—James Anderson; WILLIAM GLOAG, Esq., residing in Perth, Manager, and Others, the Ordinary Directors, of the County and City of Perth Fire Insurance Company of Scotland, for themselves, and for behoof the said Company and whole individual Members thereof, *Respondents*.—Pemberton—A. McNeill [25th July 1839].

[Mews' Dig. i. 331; xi. 829.]

*Advocation—Amendment of the Libel—Practice*.—An insurance company raised an action against one of their former partners and directors to have him ordained to concur in signing a discharge of an heritable debt which stood in his name; an extended deed of discharge was produced along with the summons, and the conclusion of the libel was to ordain the defender "to grant, execute, and deliver to the pursuers the aforesaid discharge and renunciation, to be produced at calling hereof;" the defender stated objections to signing the deed in the shape it then stood; the pursuers craved leave to amend the summons by inserting the words "or such valid and sufficient discharge and renunciation of the said debts as the debtor therein is bound to receive;" the defender opposed the amendment, and the sheriff found the proposal incompetent, "because changing and extending the nature [722] and conclusions of the libel." The record was closed, and the sheriff found that the defender was not bound to execute the deed libelled on and produced, but suggested alterations which he, the sheriff, thought necessary; and a new deed accordingly altered, having been lodged in process, the sheriff "decerned

\* Rep. 16 D., B., and M., 86.

the defender to subscribe the amended deed of discharge," which the defender refused to do, and advocated; the pursuers did not advocate on the ground of refusal to allow the amendment, neither did they propose to open up the record, and state an additional plea in law on that point: Held (reversing the judgment of the court, but affirming the interlocutor of the Lord Ordinary) that the defender was not bound to sign the only deed which he was called upon by the summons to subscribe.

Observed, per L. C.—(1.) In courts of equity, under a prayer for general relief, the court is at liberty to give relief consistently with the case stated, but there the court never give relief inconsistent with the case stated; and if the case stated had been that of the delivery of a particular instrument, and the demand of the execution of that particular instrument, and it turned out that the defender was not bound to execute that instrument, no court would think of directing the execution, not of the deed itself, but of some other deed which the court should take upon itself to frame and tender to the party. (2.) It is well understood now, and settled to be the practice in England, that when a judgment has been pronounced, and one party complains and brings the judgment under review by a regular course of appeal to a superior court, the other party, if he has any thing to allege against the judgment, is at liberty to state his objections to the judgment in the same proceeding. It is a constant rule in chancery, that if a party appeals against part of an order, the appeal is open as to the rest; and that is the whole effect of the Scotch case of *Cunningham v. Duncan*, 17th July 1837 (2 Sh. and M'Lean, 984), and the judgment in that case did not go the length of letting in the parties to amend in the superior court.

[723] The action commenced by an ordinary summons before the sheriff of Perth, at the instance of Mr. Gloag and other directors of the Perth Fire Insurance Company, against the defender Mr. Stewart, dated the 26th of May 1835, and which set forth, that by the thirty-fifth article of the copartnery of the said County and City of Perth Fire Insurance Company, it is stipulated, "That all dispositions, assignments, securities, and other writings whatsoever to be executed in favour of the company shall be taken to and in name of the manager and the three junior ordinary directors, or those standing at the bottom of the list of such directors for the time, or such other three of the ordinary directors as the directors or major number of them may appoint, and to the survivors or survivor of them, and their or his assignees; but in trust always for themselves and the whole other partners of the company, future as well as present; and which trustees and their foresaids, in whose favour such securities and writings shall be taken and conceived, shall be bound at any time when required to denude themselves by habile conveyances of the said trust property, but that always at the expense of the company, and to convey the same to such person or persons, and upon such terms, and under such conditions and declarations, as shall be appointed by the directors, with warrantance from their own facts and deeds; and all dispositions, assignments, renunciations, bonds, contracts, submissions, and other deeds whatsoever to be executed by the company shall in like manner be signed and executed by the manager and the said three ordinary directors at the bottom of the list for the time being as aforesaid, or [724] such other three of the ordinary directors for the time as the directors or majority of them may appoint, unless the same shall happen to relate to any of the subjects or matters vested in trust, as above written, in which case the said deeds to be executed by the company shall be signed and executed by the proper trustees, but always under the control and superintendence of the directors as aforesaid." That the defender was a partner of said company, and on 21st March 1832 was elected director, and acted as such; he was one of the three junior ordinary directors during the remainder of the year 1832, and was present at a meeting of the ordinary directors, on 7th May 1832, at which he was elected preses, and as such subscribed the minute of the meeting, when it was agreed to advance a sum of £1400 sterling upon an assignment of a security held over the lands and estate of Kinloch, the property of John Campbell esq., and it was then agreed that the manager should advance the said sum as soon as the necessary assignation could

be prepared; that the sum was, in terms of said minute, advanced by assignation dated 15th May 1832, which, in terms of the company's contract, was taken to the manager, and two other parties and the defender, as the three junior ordinary directors, and to the survivors or survivor of them, and their or his assignees, in trust always for themselves and the whole other partners of the company, future as well as present; that the said John Campbell intimated his intention to pay off the said debt to the manager of said company, and a discharge and renunciation was prepared by the agent of Mr. Campbell, and subscribed by the said William Gloag as manager and the two other directors, and on the 28th day of December 1834 it was intimated [725] that Mr. Campbell's agent was ready to pay the amount of the said heritable debt, and interest due thereon, on receiving the discharge and renunciation; "but in consequence of the said defender refusing to execute the said discharge and renunciation unless certain clauses were inserted therein, to which the agent for Mr. Campbell would not agree, the pursuers have been unable to obtain a settlement of the said debt and interest; therefore the said defender ought and should be decerned and ordained to grant, execute, and deliver to the pursuers the fore-said discharge and renunciation, to be produced at calling hereof."

In defence it was admitted that the defender was at one time a shareholder and a director of the company, but that he had ceased to hold shares therein. His objections to sign the deed were thus stated:—

"Subsequent to the period when the defender's connexion with the company so terminated, and, as he thinks, about the time mentioned in the summons, the agent of the pursuers presented to him the discharge and renunciation libelled, requiring him to subscribe the same as a director of said company. This deed proceeds in name of Mr. Gloag, the present pursuer, as manager of the company, and Mr. Robert Bisset, writer in Perth, Malcolm Stewart esquire, of Atholl Bank, and George Lawson Cornfute, manufacturer in Perth, three of the ordinary directors of the said company, for themselves and the whole other partners of the said company, future as well as present; and the defender, in an after part of the deed, as trustee or director and for [726] behoof of said company, is made to exoner and discharge the debtor in the bond, and to bind himself, and the whole partners of the company, in absolute warrandice of the discharge; the defender refused and still refuses to subscribe this deed, because it sets forth, on the face of it, a positive falsehood. It proposes to make the defender a party to it in a false and fraudulent character, namely, as a director of the company, while in point of fact, he is no director, having long ago ceased to be so, and notified this to the public through the medium of the local newspapers;" and it was pleaded that the conclusion of the action being, that the defender should be ordained to execute a particular deed in the character of a director of the Perth Fire Insurance Company, but the defender not being, in point of fact, either a director, shareholder, or in any way connected with the company, such conclusion is incompetent, because the defender cannot be compelled to assume and act in a false and fictitious character, or to execute any deed at variance with the fact, or write himself down a director, while he is neither a director nor a shareholder of the said company; and that the defender is entitled to absolvitor, with expenses.

Upon advising the case afterwards, with replies for the pursuers and duplies for the defender, the sheriff, on 25th September 1835, ordered the parties to state, within a certain period, whether they were willing to hold their pleadings as containing their full and final statement of facts. Against this interlocutor the pursuers reclaimed, craving, before closing the record, to be allowed to amend their libel in certain terms; [727] the sheriff substitute, by interlocutor of 18th November 1835, found, "that the same is incompetent, because changing and extending the nature and conclusions of the libel, and refuses the motion to amend." \*

\* "Note.—The conclusions of a summons may be restricted by a minute, without any amendment, because that the greater comprehends the less. But it is incompetent to change the nature of the action, or to extend its conclusions. In this case the conclusions are specific to compel the defender to execute a certain deed, and the amendment craved is to generalize the conclusions, so as to embrace any deed necessary for the end sought. Although such amendment cannot, on correct principles, be permitted, perhaps it is unnecessary, because when the deed libelled is objected

Thereafter the record was closed, and the following interlocutor pronounced: "Perth, 16th December 1835. Having advised the closed record, before answer, appoints the pursuers, between and the 23d current, to produce the original assignation of date 15th May 1832, or certified copy thereof." And the assignation ordered by the last-quoted interlocutor having been produced, the sheriff substitute (23d December 1835) found, "that the defender, having admittedly accepted the office of one of the directors of the pursuers' company, is bound at common law, and under the rules of the company, to execute all writings necessary for the ordinary management of the business of the company, and specially for the [728] transfer and discharge of all such securities as may have been taken in name of the said defender as one of the said company directors, and, as such, one of the trustees for the company; but finds that the defender, as admittedly no longer a partner, nor of consequence a director, in the said company, is not bound to subscribe any deed or writing as may be inconsistent with the said last-mentioned fact, and which, in any way, recognizes him as being, at the time of subscribing the same, a partner in the said company; therefore, requires the pursuers to delete from the discharge, No. 3 of process, the words 'three of the ordinary directors of the said company, for ourselves and the whole other partners of the said company, future as well as present,' which words are in the preamble in the said deed, and are unnecessary as well as inconsistent with fact; requires the pursuers farther to introduce after the words 'to and in favour of,' which occur on the first line of the fourth page of the said deed, the words as they stand in this dispositive clause of the disposition and assignation, No. 13 of process, as follows, 'We the said William Gloag, manager of the said company, etc., and to and in favour of us the said Robert Bisset, Malcolm Stewart, and George Lawson Cornfute, three of the then ordinary directors of the said company,' and thereon deleting the words, 'us, as managers, and' on the first line of the said fourth page; farther, requires the pursuers to delete the words 'and directors foresaid' on the margin of page fifth, and the word 'other' on the seventeenth line from the top, and the words 'ourselves and' on the fourth, and the word 'other' on the [729] third line from the foot of the sixth page of the said discharge, these words being all unnecessary, and of doubtful consistency with the fact that the said defender is not now a partner of the said company: Appoints the said deed, as so amended, to be of new engrossed and produced in process, and thereupon decerns the defender to subscribe the same, reserving consideration of the farther conclusions of the summons, and decerns." To which interlocutor the sheriff substitute (10th February 1836) adhered.\*

to by the defender, on certain technical grounds, there appears no incompetency in the court making such alterations on the deed as may obviate these objections, and decerning for execution of the deed so amended. No change would be made on the action, but this result would arise from the defence, and the court would decern in terms of the libel as modified by the defence. Is it not the recognized rule of law that where the nomination does not specially stipulate to the contrary a majority of the trustees possess the whole powers of the trust? *Stair*, b. i. tit. 12, sect. 13; 12th June 1824, *Campbell v. M'Intyre*. In the case, 15th February 1827, Lord Lynedoch, (affirmed) the deed declared three to be a quorum, to which number the trustees were reduced."

\* "Note.—The defender's case has been pled with remarkable ability in the reclaiming petition, remarkable the more that a very trifling question has been raised into one of importance. It is permitted to explain the conclusions of a summons by the narrative. The narrative of the summons in this action clearly shows that all that was sought at the hands of this defender was a valid discharge of a certain heritable security, in the constitution of which the defender's name was assumed as one of the trustees for the creditors in the debt. The conclusion, no doubt, bears reference to a certain writing produced as the discharge sought at the defender's hands, and there is no question but that the conclusion might have been framed in more general terms. The defence was that the defender was not bound to subscribe the discharge in the precise words used in the writing put in. But if the objectionable words were removed there existed no other legal defence against becoming a party to the deed. The court has adopted the defence, and ordered the objectionable words to be expunged, and the deed, as so expunged, to be subscribed. The defender

[730] And again, (25th March 1836,) having advised with the sheriff, adhered, the sheriff adding the following note, "This case is attended with very considerable difficulty; it involves an important point in regard to the forms of process, and the sheriff does not think that there are sufficient grounds to warrant an alteration in the judgment appealed from."

The pursuers then produced a discharge and renunciation, with alterations as appointed by the sheriff substitute, and craved that the defender might be ordained to subscribe the same, when the sheriff substitute (25th May 1836) "allowed the defender to see the extended discharge, and to state any special objections against his being ordained to subscribe the same between and the 7th day of June next." On 24th June the sheriff substitute, "on the defender's failure to state any special objections to the amended deed of discharge, decerns the defender to subscribe the same."

[731] To which interlocutor the sheriff substitute (13th July 1836) adhered,\* and the sheriff, on appeal, adhered.

Stewart advocated to the Court of Session, and gave in a note of additional pleas in law, in these terms:—1. The advocator, having ceased to be a director or a partner of the County and City of Perth Fire Insurance Company, was not bound to execute the deed libelled on. 2. The record having been closed on a summons which concluded specifically to have the advocator ordained to execute the discharge libelled and produced with it, and the sheriff having found that the advocator was not bound to execute that deed, the advocator ought to have been assoilzied or the action dismissed. 3. It was incompetent for the sheriff to order a new deed to be prepared, or the old one remodelled, under the conclusions of the respondents' summons, and the narrative on which they proceeded, more especially as the grantee of the

now pleads that the action must fall, because the deed which he is decerned to execute is no longer the deed embraced by the conclusions of the summons. With the most scrupulous observance of form, there exists a clear and obvious distinction between the substance of a deed and its mere materials. The deed wanted, and concluded for, is substantially the discharge of a certain bond, and nothing but that discharge has been decerned for, although it may be that the discharge may not be on precisely the same paper,—but even this may be effected,—and although a few words are expunged. Suppose a summons brought to compel the execution of a certain conveyance, and that there, as here, the proposed disposition is concluded for specially conform to the same produced. Suppose farther, that the defender objects that the deed so produced binds him in absolute warrandice, and that he is liable only in the restricted warrandice from fact and deed. Suppose the court sustains the defence, and ordains the deed to be corrected, so as to obviate the objection, and then decerns the same to be executed, would the defender be heard in his plea, that the pursuer must be nonsuited, because he had not succeeded in compelling the defender to execute the identical deed produced in its every word? This case is not so strong as the one supposed, because in this case no one obligation is changed, but merely the defender's designation altered from a present to a former manager of the company. With regard to the defender's plea, that the deed only negatively shows that he has ceased to be interested in the company, the answer is, that the positive evidence of that fact is in his public announcement to that effect, and there is nothing in the deed which can, by any torture of argument, be made to prove a reassumption of liabilities. His continued obligation to extricate the company from the securities contracted in his name exists both at common law and under the contract. Of course no decision can be given in this case as between the company and the debtor in the bond. If the latter refuses to pay on an ample discharge he must just take the consequences. He cannot interpose himself in the question between the company and the defender."

\* "Note.—The question urged in the first branch of the petition has been long since determined by final judgments. The defender is not entitled to his expenses, seeing that he has been unsuccessful in his defence that no alteration could be permitted on the deeds of discharge as originally produced. Expenses have not been given against him, because that he has been assoilzied from the claim of interest up to the date when the deed has been finally approved."

deed by whom it was prepared was no party to the action. 4. Although the advocator might be obliged to concur, along with the existing directors, in executing a discharge and renunciation, setting forth the *res verae gestae*, he was not bound to appear actively, and undertake obligations on himself individually or the company collectively; and he was entitled, before being dragged into court or called upon to subscribe the deed, to revise it for his own safety and interest; and the [732] whole tenor of the deed sought to be executed was adverse to or inconsistent with the advocator's true condition and capacity. 5. At all events there were no *termini habiles* in the action brought by the respondents, to adjust the character and terms of the deed which the advocator was bound to concur in, or the grantee bound to accept.

Gloag, in his note of additional pleas in law, pleaded:—1. The advocator having, as director and trustee for the County and City of Perth Fire Insurance Company, held an heritable security in trust for the company, was bound to become a party to any deed necessary for enabling the company to receive payment of the sum so secured. 2. The advocator having absolutely refused to become a party to the execution of any such deed, upon the sole ground of his having ceased to be a shareholder in the company, and therefore not under any obligation to execute any such deed, an action became necessary with a view to compel his concurrence. 3. The only tenable objection made by the advocator to the execution of the necessary deed being that it was prepared upon the erroneous assumption that he was an actual director and partner at the time, and that objection having been removed by an alteration of the deed, and the withdrawal of the objectionable expressions, the advocator had not the slightest shadow of a pretext for withholding his subscription to the deed. 4. For the like reasons the advocator had no just interest in bringing or in insisting in the present advocacy, in respect that the only objections which were tenable against the subscription of the deed have been completely obviated, and that [733] there truly exists no disputable matter for a decision of the court between the parties.

The parties having respectively lodged their notes of additional pleas, and being satisfied with the record as made up in the inferior court, the Lord Ordinary, Corehouse, before whom the cause originally came, pronounced the following interlocutor:—"23d December 1836. The Lord Ordinary, in respect the record as closed in the inferior Court is not objected to, and the parties having each given in additional pleas in law, holds the record as closed in this court, and appoints parties to debate."

No renewal of the proposal to amend their summons was made by the (respondents) pursuers.

Lord Corehouse having been moved to the Inner House the cause came to depend before Lord Cockburn, as Ordinary, and his Lordship, on hearing parties, pronounced the following interlocutor:—"8th June 1837. The Lord Ordinary having heard parties, and considered the process, sustains the reasons of advocacy, advocates the cause, recalls the interlocutors of the sheriff; finds that the advocator was not bound to sign the only deed which he was called upon by the summons to subscribe; sustains this defence, assoilzies the defender, and decerns; finds him entitled to expenses incurred by him in this and in the inferior court, and remits to the auditor to tax the account thereof, and to report." And added this note:—"The original pursuers should, in prudence, have concluded generally against the defender for the execution of any proper discharge. But, instead of this, they exhibit a specific deed, already extended, and subscribed by other parties, and conclude solely [734] for the execution by the defender of this particular instrument. Perceiving that the defender had an invincible objection to sign this as it stood, they apply to the sheriff for leave to generalize the conclusion; but this the sheriff refuses, and the interlocutor containing the refusal has been allowed to become final. Yet the sheriff, by the interlocutors in question, directs the defender to set his name, not to the specific deed concluded for, but to a different deed, containing most material additions and alterations, which, in effect, just amount to the very clauses which it had been fixed could not be introduced under the summons."

The respondents reclaimed.

On advising the cause, the First Division pronounced the following interlocutor:—"Edinburgh, 21st November 1837. The Lords having considered (see their Lord-



ships opinions in 16 D., B., and M., 91) this reclaiming note, and heard counsel for the parties, alter the interlocutor reclaimed against, repel the reasons of advocacy, and remit to the sheriff simpliciter, and decern: Find no expenses due to either party."

Stewart appealed.

*Appellant*.—The summons concludes for one thing, the judgment orders something different to be done; the deed, as altered, is made quite different from what the appellant was asked to sign,—so far different indeed as to involve him in liabilities with other parties; and so conscious were the respondents of the incompetency of [735] this, that they proposed to extend the grounds of their action by amending the libel. Yet the sheriff and court erroneously, under an action which did not conclude for that, ordained the appellant to subscribe the deed. The Lord Ordinary's view of the matter is the correct one. There are objections to the deed proposed to be signed, particularly in the clause of warrandice; but the question is, whether under this unamended action the appellant can be required to sign it. After closing the record in the Court of Session it was no longer competent to ask to amend the libel; the party must, under 6 Geo. 4, c. 120, abandon his action if insufficient. A deed newly engrossed, and to be executed of new, was produced, under the judgment of the sheriff; therefore it was not a deed that under this summons the appellant could be required to execute. The appellant was not bound to state any other objections to the action.

There were no other parties than the appellant and respondents to this action; the grantee, Mr. Campbell, was not made a party to it. The only issue raised by the summons was whether the deed, as proposed and prepared by the grantee's agent, should be forced upon the appellant for signature. That was given up; but without any alteration on the action, the appellant was asked to sign another deed, involving him in obligations which he did not choose to undertake. Although the deed is not set forth in terms in the summons, it has been held in the Court of Session that by simply referring in the summons to a deed to be produced it is sufficient. [Lord Chancellor.—This is important, because if the deed were set forth in the summons the [736] alterations proposed on the deed might be held to be amendments.]

A party is not entitled to bring forward new grounds of action not in his summons (Shaw's Digest, p. 207, *Forbes v. Livingstone*, 16th Feb. 1832, affirmed 8th July 1834; *Rollo v. Campbell*, 12th Jan. 1831, 9 S., D., N., and B., 260; Webster, 1st March 1823, 2 S. and D. 229, new ed.; Blincow's Trustees, 22d Jan. 1831, 9 S., D., N., and B., 317; Hyslop, 16th June 1824, 2 Sh. App. 451; M'Brien, 22d March 1826, 2 W. and S. 66; Clerk, 1 Murray, 195, 10th July 1817; and see also Lord Corehouse's opinion in the present Case, 16 D., B., and M., 91).

In *Cunningham v. Duncan* (House of Lords, 17th July 1837, 2 Sh. and M'Lean, 984), referred to by the respondents, there was acquiescence by the parties to the action as it stood, but reference may be made to the Lord President's opinion in *Gifford v. Trail*, 8th July, 7 S. and D. 854, who holds that the nature of the action is to be gathered only from the conclusions of the summons, by which the judgment is alone to be regulated.

Even where the variance lies not in the thing claimed, but in the reason for claiming it, the pursuer will not be entitled to succeed in that action. A party who concludes for payment of a sum of money as due by a bond, will not be entitled to a decree for the sum on showing that it was due under a bill. This has been frequently found. Thus, in the case of *Dickie*, the rubric is, "A pursuer is not entitled, without an amendment of the libel, to set forth new grounds of action in the condescendence." Much more inflexible is the rule in regard to the conclusion. A new ratio may be introduced by amendment, but in the general case a new conclusion cannot, because that would be altering [737] the basis of the action. *Vide* also Peacock, 26th November 1821; Jackson, 9th December 1825; Still's Trustees, 12th November 1829; Stirling, 4th March 1830; and Waldie, 2d December 1830. In all these cases the court applied the rule that a pursuer could not found on grounds of action not contained in the summons.

Now, to oblige the appellant to sign the newly engrossed deed would be to make him do what is quite out of the conclusion of the summons, and involving obligations which, at the proper stage, he will show he is not at law, independently of this matter of form, bound to undertake.

The argument of the respondents upon the point of still allowing the amendment leads to important consequences, because if they did not ask the Court of Session to allow amendments, how can they ask this House to do so? [Lord Chancellor.—In such a state of matters this House is accustomed to reverse the interlocutor, and remit to the court, when the parties may ask and the court do what is thought necessary.] The advocacy touched only the merits, not the interlocutor refusing the amendment; then there is a new closing of record in the Court of Session, which clearly shut out the amendment, no such amendment having been proposed.

Besides, there can be no amendment of the libel after the record is closed; see 6 Geo. 4, c. 120 (Judicature Act), confirmed by the case of *Wilson*, 11th July 1826 (Shaw's Digest, voce "Process," p. 371, sec. 5, and references).

[738] *Respondents*.—It is always important to keep in view Lord Eldon's (*Lord Kinoulv v. Gray*, 1st March 1805; House of Lords) opinion in Lord Lynedoch's case as to interfering with decisions on points of practice, and also what was observed by Lord Brougham in *The Magistrates of Annan v. Farish* (14th July 1837, 2 Sh. and M'Lean, 930). There is no doubt that, if the amendment had been or were still admitted, decree might be given conform to the amended action. Although no counter advocacy was brought, the amendment was not the less competent in the Court of Session, as is clear, for though Lord M'Kenzie's opinion inclined to there being no necessity for a second advocacy, the case of *Cunningham v. Duncan* (2 Sh. and M'Lean, 984) settled what Lord M'Kenzie held not fixed law,—that the advocacy brings up the whole cause. Here the amendment was tendered before the record was closed; and thus it was competent to the sheriff or to the superior courts to allow it to be received. There can be no ground then for dismissing an action which may be competently amended. The respondents admit that they can ask nothing but what is within the summons. [Lord Chancellor.—Can he amend now, the record being closed?] Although by 6 Geo. 4, c. 120, amendment cannot be allowed, yet when an amendment has been tendered before the record was closed, and refused by the judge, a superior court may remit to the sheriff to open up the record to allow the amendment.

The deeds were to be prepared by the directors, and executed by the parties. After repeated applications in vain, the action was raised; the appellant did not refuse [739] to sign a discharge, but objected only to particular parts of the deed as framed, because he says, "it sets forth a falsehood," he not being a director, as set forth on the deed. Liberty was refused to amend, because the sheriff thought it unnecessary; so it was not to be expected that the interlocutor so refusing would be carried to review by the respondents. [Lord Chancellor.—They do not seem to have the prayer for general relief in Scotland.] The words "to add and eik" were used in defences; and to "do otherwise as to your Lordships shall think proper," in petitions, confine the parties within the conclusions or substantial prayer of the application. But farther, the appellant now admits he is bound to execute a discharge though not under this action. The respondents do not ask for general relief, nor indeed for more than is concluded for in the summons; but they are entitled to that, under such modifications as the appellant by his defence called for as necessary. The court merely adopted the appellant's own defence, and suggests under what alterations he ought to sign the deed.

The appellant's defences and pleas in the sheriff court shew that his defence was exclusively confined to the deed setting forth erroneously that he was then a director. The deed which the party is now required to sign imports no higher obligation than is contained in the first deed. Instead of giving the respondents more it gives them less, if possible, than they ask. Instead of individual warrandice, as required in the first deed, mere general warrandice is introduced into the second. Besides no plea upon the ground was taken by the appellant.

[740] Lord Chancellor (23d July).—My Lords, in this case one cannot but regret (whether the cause of regret is to be attributed to the parties on the one side or the other is of very little consequence) the great expense which has been incurred; but it involves a question of some importance with regard to the practice of the court, and nothing would be more unsafe than to permit our judgment to be influenced by the litigious conduct of either party, and so lead to a decision which may prove very prejudicial to the general practice of the court below.

My Lords, certainly the summons is addressed to no particular instrument; the pursuer alleges that a certain instrument had been prepared, "that the said John Campbell, intending to pay off the said heritable debt, intimated this to the manager of the said company, and a discharge and renunciation was prepared by the agent of the said John Campbell, and was subscribed by the said William Gloag as manager, and the said Robert Bisset and George Lawson Cornfute, on these dates; and on the 28th day of December last it was intimated that Mr. Campbell's agent was ready to pay the amount of the said heritable debt and interest due thereon, on receiving the discharge and renunciation, but in consequence of the said defender refusing to execute the said discharge and renunciation unless certain clauses were inserted therein, to which the agent of Mr. Campbell would not agree, the pursuers have been unable to obtain a settlement of the said debt and interest. Therefore the said defender ought and should be decerned and ordained to grant, [741] execute, and deliver to the pursuers the foresaid discharge and renunciation, to be produced at calling hereof."

Therefore the whole suit is founded upon this, that a certain instrument had been prepared which the pursuers alleged the defender ought to have executed. They do not ask that he may perform any other duty, or that he may execute any other deed, but they state a certain deed to be produced, and that he ought to be called upon to execute that deed, and the whole of the pleadings proceed upon that supposition. His defence is grounded on the fact, not that he is not bound to give any discharge, but that he is not bound to give a discharge in the terms in which it had been tendered. Thus the contest between the parties is, whether he is bound to execute that deed. The pursuers seem to have been aware of that in bringing before the court a case entitling them to what they ask, and that no doubt was the ground of the application to amend their summons; and accordingly they made an application in due time, the record not being closed, to be permitted to amend. The sheriff was of opinion that ought not to be granted. He "finds that the same is incompetent, because changing and extending the nature and conclusions of the libel: Refuses the motion to amend, reserving all questions of expenses to the final issue."

Now whether the sheriff was right or wrong in that opinion I apprehend is not a question which your Lordships are now called upon to consider at all; but I cannot but observe, as applicable to this part of the case, that what the sheriff ultimately did is not very consistent with the reasons he assigns for refusing per-[742]-mission to amend. For he goes on to say, "The conclusions of a summons may be restricted by a minute without any amendment, because there the greater comprehends the less; but it is incompetent to change the nature of the action, or to extend its conclusions. In this case the conclusions are specific, to compel the defender to execute a certain deed, and the amendment craved is to generalize the conclusions so as to embrace any deed necessary for the end sought."

Those are all very intelligible reasons. The ground upon which the sheriff came to the conclusion that he ought not to give leave to amend does seem a very odd result of that reasoning; that because it so altered the nature of the action that he could not be permitted to amend he might still have the power of giving the relief which was asked without any amendment at all. If that be to generalize it will be to do more than the summons prayed, and if it be the acknowledged rule that the court cannot give more than the summons prays, where a specific thing is prayed, then all the reasons which he suggests against the application to amend, one would suppose would have been applicable to the question which he afterwards decides, namely, whether on such a record he could grant the relief prayed.

The whole of the subsequent proceedings seem to have arisen from the suggestion which the sheriff made. He goes on to say, "Although such amendment cannot, on correct principles, be permitted, perhaps it is unnecessary, because, when the deed libelled is objected to by the defender on certain technical grounds, there appears no incompetency in the court making [743] such alterations on the deed as may obviate these objections, and decerning for execution of the deed so amended. No change would be made on the action, but this result would arise from the defence, and the court would decern in terms of the libel as modified by the defence. Is it not the recognized rule of law, that, where the nomination does not specially stipulate to the contrary, a majority of the trustees possess the whole powers of the trust?"

My Lords, on that the record was closed, and there was no complaint made on the part of the pursuers against the sheriff refusing liberty to amend. Then, on the matter coming on again before the sheriff, on the 23d of December, this interlocutor was pronounced:—"Having resumed consideration of this process, finds that the defender, having admittedly accepted the office of one of the directors of the pursuers' company, is bound at common law, and under the rules of the company, to execute all writings necessary for the ordinary management of the business of the company, and specially for the transfer and discharge of all such securities as may have been taken in name of the said defender, as one of the said company directors, and as such one of the trustees for the company; but finds that the defender, as admittedly no longer a partner, nor, of consequence, a director in the said company, is not bound to subscribe any deed or writing as may be inconsistent with the said last-mentioned fact, and which in any way recognizes him as being, at the time of subscribing the same, a partner in the said company." That was, according to the fact in issue between the parties, the pursuers and [744] defender, a distinct adjudication in favour of the defender, the sole question between the parties being, whether the deed tendered was such a deed as the defender was bound to execute; there is therefore, looking at the proceedings, looking at the matters in issue, looking at that which alone was the matter in contest, an adjudication that the defender was not bound to execute that deed so prepared and tendered.

Then what is there in issue between the parties as to what deed he shall execute? This refusal to execute any deed was nowhere brought into question; but, without any discussion between the parties, without any opportunity of raising any points, at least on the pleadings, as to whether any particular instrument should be executed or not, without any opportunity to take objections, after the whole proceedings were closed, and the case was in a situation for judgment, the sheriff "requires the pursuers to delete from the discharge, No. 3 of process, the words" he mentions. He then goes on, and gives directions as to the alterations to be made, not in this deed, but describing what sort of deed he is of opinion ought to be the deed executed by the defender; and "appoints the said deed, as so amended, to be new engrossed, and produced in process, and thereupon decerns the defender to subscribe the same, reserving consideration of the further conclusions of the summons, and decerns."

My Lords, there have been cases referred to for the pursuers which I must have an opportunity of minutely examining before I finally dispose of this case; but I have had no case referred to in which it has been held to be competent to a court in a suit of this sort, raising a particular question between the parties as to a par-[745]-ticular act to be done by one of them, which was claimed to be done by the pursuers, and resisted on particular grounds by the defender,—in which it has been thought competent to a court to adjudicate that the defender was quite right in the resistance he made to the execution of a particular instrument tendered, but the court still went on to direct that another deed should be prepared, and that he should execute the deed so prepared. *Non constat*, with respect to the deed directed by the sheriff to be prepared and submitted to the defender, that he would not have resisted the execution of it; but the matter was never submitted to his consideration, therefore he never had an opportunity of acquiescing in or resisting such application.

My Lords, this case was brought by advocacy before the Court of Session, and the Lord Ordinary took precisely that view of it. Still there was no advocacy against the refusal of the sheriff, and for liberty to amend. The cause was brought up entirely on the last interlocutor; and the practice of the court gave the party an opportunity still of putting new matter in issue, if he had thought proper to make an application for the purpose. But on the 23d December 1836 the Lord Ordinary pronounced the following interlocutor: "In respect the record, as closed in the inferior court, is not objected to, and the parties having each given in additional pleas in law, holds the record as closed in this court, and appoints parties to debate."

Now, what advantage might have been afforded, if such opportunity had been taken, in the advocacy, it is not necessary now to consider, because it is conceded on all hands that the act of parliament is imperative on that point, that after the record is closed [746] there can be no question of amendment. But the record might be closed adversely, the sheriff having refused the parties liberty to amend; the record being closed might be the consequence of his so refusing to allow the party to amend against

whom that decision was made, namely, the pursuers; and if the pursuers thought proper to quarrel with the decision of the sheriff, inasmuch as the application was made before it was closed, it might be considered that they had a right to bring the decision of the sheriff under review, inasmuch as they were right in insisting that they ought to be at liberty to amend, and the subsequent interlocutor would be erroneous in having proceeded on an erroneous refusal of the pursuers to amend; but here they come into the Court of Session and make no such application, and the record is again closed in the Court of Session, and if they had the power of so doing, no application is made to amend, nor is that part of the proceeding of the sheriff brought under consideration.

The case of *Cunningham v. Duncan* (2 Sh. and M'Lean, 984) has not gone the length of letting in the parties to amend. It is well understood now, and decided to be the practice here, that where a judgment has been pronounced, and one party complains of the same, and brings it under review by a regular course of appeal to a superior court, the other party, if he has any thing to allege against the judgment, is at liberty to state all legal competent objections to the judgment in the same proceeding, so that the expense of double proceedings or of a cross appeal is saved by the adoption of that rule. It is a constant rule in the Court of Chancery, that if a party [747] appeals against part of an order, the appeal is open as to the rest; and a very convenient rule that is; it saves great expense. That is the whole effect of the decision in *Cunningham's* case.

Now, here is an interlocutor not brought under review; the others are; and there is an appeal against the decision on the merits. I cannot but consider that your lordships will ultimately come to the conclusion that the interlocutor of the Lord Ordinary was the correct one, and that the alteration of it in the Inner House cannot be supported; that there is no reason for altering the interlocutor of the Lord Ordinary, so far as it disposed of the record. When it came before the Lord Ordinary he pronounced this interlocutor: "Sustains the reasons of advocacy; advocates the cause; recalls the interlocutor of the sheriff; finds that the advocator was not bound to sign the only deed which he was called upon by the summons to subscribe; sustains this defence, assoilzies the defender, and decerns; finds him entitled to expenses incurred by him in this and in the inferior court."

On the case coming before the Inner House the court simply remitted it to the sheriff; but the reasons given by the learned judges on which they founded their opinion seem to have proceeded very much on the supposition that there ought to have been liberty to amend. Now, it does not appear to me that that opinion was well founded, or that they were correct in thinking there ought to have been liberty to amend, and that therefore it was competent to the court to adjudicate on the merits as if there had been liberty to amend. On the contrary, if it were necessary to amend in order to come to that conclusion, that would [748] be a strong reason against coming to the conclusion. But it comes simply to this, whether on such a record, without reference to the question of amendment, it was competent to the court to adjudicate such relief. It would be very inconvenient if such were the practice, because no man can know what he is called upon to resist. He is called on to do a particular act, and the court holds he is not bound to do that act. That is the whole suit; the whole contest. The court says, We are of opinion that you were right in resisting it; it was quite competent for you to refuse to execute that deed; but we are of opinion that you ought to have executed some other deed containing some other provision.

But the question is not whether the alterations were right or wrong. In one view of the case they might become material. If it were competent for the court to go into that question at all, then the particular alterations would be material to be considered; but if the court did not adjudicate on any thing but the particular deed, then it would be immaterial whether the alterations were more or less material, or such as the defender had a right to insist upon, because the objection would not be to the interlocutor, but to the jurisdiction of the court to deal with that subject matter at all.

There were some decisions referred to by the appellant, for the purpose of showing the extent to which it is competent for the court to go in cases where the court has thought it not competent to go beyond that which the pursuers have asked. I do not find the cases referred to on the other side lead to the conclusion which the learned judges of the Inner House seem to have come to; but as it is a point of practice of the

court, [749] and a point on which this House is unwilling to interfere,—inasmuch as those who are in the daily habit of practising in those courts are much more competent to decide what that practice is, than it is possible your Lordships can be on a case of appeal,—it appears to me to be a case that requires great caution and consideration to be exercised before your Lordships would differ in opinion from a judgment pronounced on argument in the court below. But if, on reference to the authorities, it appears that that which has been done by the court below has been contrary to the practice, it will become the duty of your Lordships, if there has been any such departure, to keep that practice within its proper limits; because nothing can be more injurious to pleading in general than the introduction of a laxity of practice, in consequence of an opinion applying to the circumstances of a particular case. It is that which courts in this country are very cautious in permitting; and it is now a very wholesome rule to keep the practice within the limits which the ordinary rules prescribe, and not to make exceptions to it, on account of feelings that exist because one party or another may be thought to be improperly litigious. It is much to be regretted that this expense has been incurred by these parties, between whom there is scarcely any thing in question; still it is your Lordships' duty to look to the general question, and the effect of the general practice. There are two or three cases which bear on this subject, which I shall be glad to have an opportunity of looking at, and for that purpose I would propose to your Lordships that the further consideration of this case be postponed.

[750] Lord Chancellor (25th July).—My Lords, this is a case which I approach with considerable anxiety, as it involves a question of practice on which I have the misfortune of not coming to the same conclusion to which the court below has come. And undoubtedly, my Lords, I feel extremely reluctant to interfere with a judgment of the Court of Session, inasmuch as the learned judges who have decided are in the constant habit of considering these questions in their own court, and their minds must be more familiar with the practice which ought to regulate their proceedings than it is possible for your Lordships to be; but this, my Lords, appears to me to fall within the exception which has been recognized in the observations of Lord Eldon and other members of this House, when adverting to the danger of reversing interlocutors turning on points of practice. I find it impossible to ascertain the grounds on which the judgment of the court below can stand.

My Lords, the proceeding was for the purpose of compelling a party to execute a discharge of an heritable debt by subscribing a particular deed. The directors of the company had come under an obligation to do that which was necessary to enable the company to carry on their concern. The appellant ceased to be a director; the nature of the transaction made it necessary that a deed should be executed, and he, being a director at the time the transaction took place, was one of the necessary parties to that deed; and the deed having been prepared and approved by the party who had been dealing with the company, the appellant, having been a director, was called upon to execute the deed; he declined, whereupon the company instituted [751] proceedings against him, and, at the conclusion of the summons, stated these facts:—They stated that the deed was prepared; that the deed was approved by the borrower; that what they asked was, “that the defender should be decerned and ordained to grant, execute, and deliver to the pursuers the foresaid discharge and renunciation, to be produced at calling thereof.” He alleged an objection to the deed so prepared, and stated grounds on which he was not compellable to execute, not any deed, but the deed so prepared. The whole cause turned upon that ground, whether that deed was such as the defender was bound to execute. So satisfied were the pursuers in the course of the cause that that was the issue, that they felt no hesitation in coming to the hearing of the cause, praying nothing else against the defender but that he might execute that particular deed.

The cause came on first before the sheriff, and then they applied for liberty to amend their summons, and to plead generally that he should execute that deed, or some other deed for the purpose of operating as a discharge and renunciation of the said debt. The sheriff thereupon disposed of the cause in the manner already stated.

The whole question then, my Lords, was disposed of; there was nothing that was asked by the pursuers but what was disposed of by the finding of the 23d December 1835; the whole suit appears to be at an end; the pursuers having unfortunately

limited their demand to call upon the defender to execute that deed, they could have no redress against him for not executing some deed, which, so far as appears, he had never refused to execute. The sheriff [752] before had refused to permit an amendment because it extended the object of the suit; but strange as it may appear, in a case where amendments were rejected because they purported to extend the object of the suit, such suit, without any amendment, was considered competent to enable the defender to do that which, according to the decision of the sheriff on the motion to amend, was felt to be subject to objection, as being beyond the object of the suit; and yet the sheriff goes on, and says, "therefore requires the pursuers to delete from the discharge" such and such words; so that, after finding he is not bound to execute the deed tendered, and that the pleadings cannot be altered so as to comprehend another deed, because it would change and extend the nature and conclusions of the libel, he goes on, and enumerates the objections to the deed, with respect to which there is nothing to be found on the pleadings, except that the defender insists on particular circumstances as furnishing reasons for objecting to the particular deed, and another stating the particulars in which he is of opinion the deed ought to be corrected, he directs the deed, so amended, "to be newly engrossed, and produced in process, and thereupon decerns the defender to subscribe the same;" that is to say, the deed tendered is not a proper deed to be executed; but in this proceeding, which had for its object only to compel the execution of a particular deed, you shall be directed to execute some other deed, though that is so foreign to the purpose, and much larger than the object of the suit instituted for the purpose of procuring his signature to a particular deed.

My Lords, this case, according to the usual practice, having been afterwards brought before the Court of [753] Session, the Lord Ordinary altered the interlocutor of the sheriff, but the Court recalled his Lordship's interlocutor; and in that shape it comes before your Lordships.

Now, this being a question of practice, however unwilling your Lordships may be to meddle with the decisions of the Court of Session in matters of that kind, and your Lordships are always very slow to interfere with the course of practice of courts of a peculiar jurisdiction having their own rules, the case being brought to your Lordships' bar it is our duty to deal with it, and it so happens that not one case can be found that justifies or approaches this case in its principle; on the other hand, several cases are cited, which though they do not correspond exactly in their facts, go a great way to shew that the practice of the Court of Session is much more reasonable than it would be supposed to be according to this decision. I will only call your Lordships' attention to three or four of the cases to which reference has been made by the counsel. They all go to the full extent for which they are cited.

The first is, *Dickie v. Gutzmer*, 6 Shaw and Dunlop, p. 637. The case was of this nature:—The libel stated the liability; the defender having raised a defence, the pursuer by his condescendence stated a new case, leading however to the same liabilities. The question was, whether he was justified in the mode by which he attempted to come to his conclusion; and the court said the pursuer was not at liberty to go out of his libel, and to state a totally different ground of action on his condescendence. The only competent remedy would be an amendment of the summons.

[754] The case of *Williamson v. Jackson*, on the 9th December 1825 (4 S. and D. 292, new ed. 296), was an action on a bill alleged in the summons to have been drawn by A. B. The defender alleged that the signature of the drawer was not that of A. B.; but it purported in the title of the bill to be drawn by A. B. Upon this the pursuer offered to prove that the signature was by the son of A. B., by his desire, and in the presence of the acceptor. It was held that it was not competent, with a view to support the allegation of a liability by the personal signature of the party, to allege that which was the same thing in effect,—the signature by another person, with his concurrence.

The case of *Still's trustees*, on the 12th of November 1829 (8 S., D., and B., 9), was an action by an outgoing tenant against an incoming tenant, to compel him to take the crops, alleging a verbal agreement with him so to do. The defender denied that there had been any such agreement. In reply to which the pursuer alleged, that in the lease he had taken from the lessor he had bound himself so to do. It was held that the pursuer was not at liberty, having put his claim on the personal liability of the in-

coming tenant, to support his case by a covenant in a lease with the landlord in a totally different form from what he had stated in his pleadings.

In the case of Kerr, on the 10th of July 1827 (5 S. and D. 926, new ed. 860), an action for the delivery up of a bill alleged in the summons to have been obtained from the pursuer by fraud, the case was attempted to be supported by the allegation that it had not been obtained by fraud, but was actually [755] a forged bill. It was held that the party was not enabled to go into proof of that, because it was not consistent with the case he had himself stated.

There is another case referred to in the printed papers, which appears to me also to be of considerable importance on this question; the case of *Forbes v. Livingston*, the judgment in which case was affirmed in this House, 8th July 1834. The summons in that action concluded to have it found that certain lands were comprehended within and were parts and pertinents of the pursuer's estate, and that the defender had no right to them. The defender also brought a counter-action of declarator, concluding to have it found that the disputed lands were his property, and that the pursuer had no right to them. There was an adverse claim therefore by the pursuer and by the defender, each claiming the lands. It turned out in the course of the action, that the pursuer in the first summons discovered that he had made an error, and that the lands were not exclusively his, nor exclusively the property of the parties with whom he was contending, but that they were what is called runrig lands, or mutual property. The objection there was the other way. He had made out a case; but as that case was not consistent with the claim in his summons, inasmuch as he had claimed the lands exclusively as his, it was held that he could not support his action. The Lord Ordinary having sustained his right to the extent to which he had proved it, the Court of Session, on the ground that the decree was not warranted by the conclusion, altered the interlocutor; and this is stated to be the reason of the judgment:—"In respect that [756] there appears not to be sufficient evidence to warrant the finding of the interlocutor, and that the said findings are not applicable to the conclusions of the summons in the conjoined actions;" and that judgment was affirmed on appeal. The Lord Chancellor (Lord Brougham, C.) of that day observed, he had very little doubt whatever as to the judgment to be given.

All these cases, though none of them are cases exactly similar to the present in their circumstances, clearly apply to the present, and they establish that the courts of Scotland require that there should be consistency between that which is asked and that which the court shall ultimately decree. It is very proper it should be so, and I should very much regret to find the practice of the Courts of Scotland different from that which exists here. Here there is no question that the party would be immediately nonsuited if, proceeding upon one ground, it turned out that he could claim only on another. There is a mode of proceeding in courts of equity whereby, under what we call a prayer for general relief, the court is at liberty to give relief consistently with the case stated; but there the court never give relief inconsistent with the case stated, and if the case stated had been that of the delivery of a particular instrument, and the demand of the execution of that particular instrument, and it turned out that the defendant was not bound to execute that instrument, no court would think of directing the execution, not of the deed itself, but of some other deed which the court should take upon itself to frame and tender to the party.

[757] On the other hand, if the complaint had been that he refused to execute the deed tendered, and that he refused to execute any deed, that might have given the court jurisdiction; but if it had been confined in its terms to the complaint that he had not executed a particular deed, no court would take the course adopted in this proceeding, because he had refused to execute the deed itself, of proceeding to alter the instrument, and of decreeing that he should be ordered to execute the deed so altered.

Under these circumstances, my Lords, I cannot but think it would be very unsafe if your Lordships were to affirm the interlocutor appealed from; for that would be binding upon your Lordships and the court, and would necessarily lead to the greatest possible laxity in future proceedings, which could not but produce great injury to the public. I cannot but think that in coming to their conclusions the court were a little too much influenced by the litigious conduct of the defender. I have nothing to say in favour of his conduct; he appears to have given a great deal of unnecessary



trouble, and occasioned a great deal of unnecessary expense, in refusing to do that which in some form or other he was bound to do. I very much regret that, according to the course your Lordships are bound to pursue, you are putting the company to additional expense; but they will have their remedy in a proceeding properly framed for that purpose, if the appellant should be advised, or without advice should think proper, to continue the conduct which he has hitherto pursued. The result will be to reverse the interlocutor appealed from, and to affirm the interlocutor of the Lord Ordinary, if your Lord-[758]-ships take the same view of the case which I have now submitted to your Lordships.

The House of Lords ordered and adjudged, That the several interlocutors, so far as complained of in the said appeal, be and the same are hereby reversed, and that the said interlocutor of the Lord Ordinary of the 8th of June 1837 be and the same is hereby affirmed: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this judgment.

DEANS and DUNLOP—G. and T. WEBSTER, Solicitors.

### [759] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

DAVID BARRY, surviving Partner of Robertson and Barry, Merchants in Leith, (Pauper,) *Appellant*.—John Stuart—Jemmett; ARCHIBALD WADDELL, Accountant in Glasgow, Trustee on the sequestrated Estate of John Geddes of the Vereville Glassworks, *Respondent*.—Lord Advocate (Rutherford)—Sydney S. Bell [25th July 1839].

*Account*.—Judgment of Court of Session in a circumstantial case of accounting, affirmed.

The nature of this case, which involved matters of accounting which had been the subject of investigation by an accountant, by order of the Court of Session, is explained in the note of the Lord Ordinary subjoined to his interlocutor of the 10th June 1836, adhered to by the court, and in the judgment by the Lord Chancellor affirming that of the court.

There were previous interlocutors, of 20th January 1832 and 8th March 1833, pronounced by the Lord Ordinary. Upon hearing parties on their objections to the accountant's report, the following interlocutor was pronounced by Lord Moncreiff:—"10th June 1836. The Lord Ordinary, having heard parties' procurators [760] on the objections to the accountant's report, and having made *avizandum*, and particularly considered the said report, with the objections thereto, and the whole conjoined processes,—Repels all the objections, and approves of the report: Finds, in the action of declarator and constitution at the instance of John Geddes, that there was due to him from the estate of Barry and Robertson, and the defenders, on 30th June 1804 a sum of £554 19s. 4d., with legal interest thereon since that date, subject to an obligation to account to the creditors of Messrs. Robertson and Barry, the compositions on whose debts had not been paid, and others having interest, for his intromissions with the estates of the company, and the partners thereof, and in particular with the rents and prices of George Robertson's dwelling house and warehouse in Leith, in so far as the same may have been received by him posterior to the said date of 30th June 1804, or may yet remain to be realized by him: Finds, that it has not been made to appear in this process that the said balance due to the said John Geddes, with the interest accruing thereon, has been liquidated by any such intromissions already had by the said John Geddes; but in respect of the minute lodged by him, of date the 22d January 1822, being No. 30 of process, finds that no personal decree is asked against the defender David Barry; therefore, in terms of the said minute, decerns and declares in terms of the libel, to the extent of the said debt and interest, *cognitionis causa tantum*, against the company of Robertson and Barry, and against the heirs of George Robertson, as an individual: And in the action of count and

reckoning, at the instance of the [761] said David Barry, sustains the defences, and assoiliizes the defenders, and decerns; reserving always, as aforesaid, the right of any creditor of the said company, the compositions on whose debts may not have been paid, and others having interest, to call the said John Geddes to account for his intrusions had or to be had with the estates of the company, or the partners, and in particular the heritable property and rents above referred to, posterior to the said 30th June 1804 as aforesaid, or in time coming: Finds, that as no personal decree can be pronounced against the said David Barry, it appears to the Lord Ordinary to be unnecessary to give any deliverance on the expenses of process, the said David Barry having alone carried on the litigation; but allows the cause to be enrolled, in order that any motion which may be necessary for finally extricating it may be made.

"(Signed) JAMES W. MONCRIEFF." \*

\* "Note.—This cause, which began in 1817, and relates to affairs which were in a great manner closed in 1804, has proceeded under the old forms of the Court; and when the Lord Ordinary looks at the process lying before him, he sees a warning example of the evils which have since called for and obtained a remedy.

"The cause does also, in his opinion, present a notable example of the extent of trouble and vexation which a man may bring on himself and others, to whom he stood under the greatest obligations, from indulging a mere humour of dissatisfaction, originating in circumstances in which he had himself the chief concern, and in regard to which, at any rate, his opponent was perfectly innocent. Mr. John Geddes and his brother had the misfortune, from motives of friendship, to interpose their credit as cautioners for Mr. Barry and Mr. Robertson, in a composition-contract with their creditors. At their own desire, these gentlemen were at first allowed to manage the bankrupt estate; but they quarrelled with one another, and it was then necessary to put the management in Mr. Masterton, accountant. Mr. Robertson continued to give assistance, but Mr. Barry refused to do so. The management went on, however, and in 1804, Mr. Masterton made up his final states, against which no specific objections were stated. Mr. Masterton left this country in the same year 1804, and Mr. Robertson died abroad in 1807. From that time down to 1817, no proceedings took place. In that year Mr. Geddes, finding himself to be in advance for the estate, and seeing that some of the compositions were still unpaid, found it necessary to obtain a decree of constitution against the heirs of George Robertson, no one representing him, by which he might obtain a title to the heritable property which had belonged to him, and the price of which, though it was sold, could not otherwise be recovered. That summons necessarily called the defender Barry, and unfortunately concluded for a sum which has been found by the accountant to be extravagant and untenable. But the pursuer, by the minute mentioned in the interlocutor, passed from any personal decree against Barry. The latter, however, had raised his action, concluding for upwards of £5000, on an account framed on the principle of discarding all Mr. Masterton's accounts and states; and after thirteen years, when Masterton and Robertson were both gone, refusing to Mr. Geddes credit for any thing, unless all the books, vouchers, etc. should be of new opened and exhibited. No creditor has made any claim. These causes have now been nineteen years in court; and Mr. Geddes, thus struggling with a bankrupt on the poor's roll, has himself become a bankrupt.

"The Lord Ordinary having read with care the whole report, and attended to all the objections to it, is completely satisfied that the accountant has done full and fair justice. 1st. He thinks that he judged rightly, seeing that no personal decree was asked by Geddes, and that he was in a litigation with a party on the poor's roll, in proceeding, for the reasons explained in pages 10 and 11 of the report, to endeavour to ascertain whether the documents in process were sufficient to show that there was a debt of any amount due to Geddes. 2dly. He thinks that he has done justice in giving the weight which he has done to the states of Masterton, which were examined and approved of by so many persons having interest, and fully qualified to check or appreciate them. 3dly. He is of opinion, that the report itself contains sufficient answers to all the special objections now insisted on. It is therefore unnecessary for him to go into particulars. Many of the objections put before the accountant were palpably untrue and unfair; some were given effect to, and the rest seem to have been rightly decided.

"One objection (the eighth before the accountant, and the tenth now insisted on)

[762] The appellant reclaimed to the court, praying for absolvitor in Geddes's action, and, in the accounting at [763] his own instance against Geddes, for decerniture with costs, "or at least to recal the said interlocutor *in hoc statu*, and remit to the Lord Ordinary to make up a record in terms of the judicature act, and relative act of sederunt."

Against that part of the interlocutor, whereby his Lordship "finds, that as no personal decree can be pronounced against the said David Barry, it appears to the Lord Ordinary to be unnecessary to give any deliverance on the expenses of process, the said David Barry having alone carried on the litigation," the respondent presented a reclaiming note; and prayed the court to "find the said David Barry liable in said expenses, at least from 22d January 1822, the date of the minute referred to in the Lord Ordinary's interlocutor, or to do otherwise in the premises as to your Lordships may seem proper."

[764] On advising both the reclaiming notes the following interlocutor was pronounced (16th May 1837): "The Lords, having considered this reclaiming note for poor David Barry, and another note for Archibald Waddell, reclaiming against the same interlocutor as to the expenses of process, adhere to the interlocutor in so far as complained of in this note, and refuse the desire thereof; and on the other note, find David Barry liable in the expenses of process, from the date of the remit to the accountant; allow the account to be given in, and when lodged, remit to the auditor to tax the same, and report, in so far altering the interlocutor of the Lord Ordinary."

Barry appealed.

*Appellant*.—The course of procedure below had been such as to baffle every attempt by the appellant to get into the real truth and merits of the transaction.

*Respondents*.—The respondent maintained that the proceedings, not having admitted of the application of the modern forms of pleading, presented much to be animadverted on; but that substantial justice had been done, and every facility of investigation afforded by the accountant's report, which had undergone the judicial review of the Lord Ordinary and the Court.

Lord Chancellor (18th July).—The objections to the account are all to be found on the face of the account itself; there is no evidence *dehors* the account?

Mr. Stuart.—The first objection is printed in the accountant's report at page 25, and afterwards at page 42. My Lords, at page 42 it is perhaps more explicitly [765] stated, because there the objections are narrowed and more conveniently printed.

Lord Chancellor.—Does that appear on the face of the report?

Mr. Stuart.—Yes, my Lords.

might afford reasonable ground of doubt. Robertson, Mr. Barry's partner, and one of the bankrupts, gave assistance to Mr. Masterton in realizing the estate; and he appears to have received a sum of £335, which he did not pay over to Masterton. The question is, Whether, in a question with Barry, Geddes the cautioner must be liable for what Robertson so received and did not account for? The Lord Ordinary thinks that the accountant is right in his judgment, as explained in the report, p. 67. Robertson was not factor for Geddes. But, at any rate, the point by itself is really of no importance. The sums employed by Robertson, in payment of the third instalment of the composition, and otherwise, must be set against the sum so received, which would reduce it to £143 9s. 1d. But as no personal decree is asked, this could evidently make no real difference on the state of the case.

"Mr. Barry insists much on what is the first objection before the accountant, and the seventh now pleaded. This is £186 paid by Mr. Geddes to take up a bill of a creditor who refused to accede to the composition. The Lord Ordinary can only say, that any thing more unfair or discreditable, to be advanced by Mr. Barry, after so long a period, in the face of his own letter at the time, (29th July 1803,) as quoted by the accountant, p. 61, and of Masterton's state approved of by Robertson and the creditors, he has seldom seen; and he cannot think that it can be listened to, coming from Mr. Barry in such circumstances.

"The Lord Ordinary thinks it unnecessary to advert to any of the other objections.

"J. W. M."

Lord Chancellor.—Your four objections are objections to the course the accountant has taken on the facts as they appear on the face of the report. There is no evidence *dehors* the report.

My Lords, in this case, which is an appeal against four interlocutors of the Court of Session, the two first objections appear to me to be without any foundation; the two latter depending entirely on an examination of the account, it may be proper to take some time to investigate the account, and the entries on which the objections depend; but the two first are for not having made an order on an application by the appellant, for which I cannot find on the face of the proceedings, or on any thing that is stated at the bar, that there was any foundation. In the course of the contest between these parties it was referred,—the whole matters of account were referred,—to an accountant by an interlocutor of the year 1830, and against that there is no appeal. The interlocutor, therefore, is binding on the party; and the sole question is, whether in carrying that into effect the accountant has or has not done his duty which the court intended he should do,—that is, whether there has been a miscarriage in the mode in which he has performed the duty which the interlocutor imposed on him. The two first interlocutors do not touch that part of the question. They are appealed against as interlocutors of the Court of Session refusing the application requiring certain special directions to be given to the accountant as to the mode [766] in which he was to carry out the account, an application inconsistent with the interlocutor of December 1830, which directed him to take the account generally. I do not find any ground laid before the Court of Session to induce that court to depart from the direction of the interlocutor of 1830, therefore there is no ground for the appeal against the order which refused that application.

My Lords, the other two interlocutors, that is to say, the third, which disposed of a complaint against the mode in which the account was taken, and the fourth, which gave effect to the decision of the Lord Ordinary, is a subject involving a question of account, which appears entirely on the face of the account. In a complicated case of account it would not be satisfactory to dispose of a question of that sort without taking an opportunity of accurately examining the account itself; and for that purpose I propose to your Lordships to adjourn the consideration of this case till Monday next, it being then considered that the two first interlocutors are to be affirmed, and the question to remain open on the two last, which raise the question of the account.

Lord Chancellor (25th July).—My Lords, I do not feel it to be necessary to trouble your Lordships at any length in this case, having in fact stated my views at the close of the argument. It appears that the appellant Mr. Barry and his partner Mr. Robertson, who had been merchants in Leith, became insolvent in the year 1801. The partnership property was sequestrated, and a trustee elected, but the bankrupts having offered a composition of seven shillings and sixpence in the pound by three several payments, the offer was accepted on condition of sufficient security being given for the first and [767] second payments. The Messrs. Geddes accordingly became cautioners for the payment of those instalments, in consideration of which the whole of the sequestrated estate and effects was conveyed to them, and the sequestration was recalled. The Messrs. Geddes, residing at Leith, appointed Mr. Masterton their factor, and he made up statements from time to time of the monies he had received and expended on account of the estate. Whatever came in from the original estate beyond that which was necessary to indemnify the trustees in the payment of that 5s. in the pound, on the debts to the firm, would of course immediately go to the insolvents, or those who stood in their place. That trust continued for a great number of years, during which time statements of the acts and transactions were furnished for the inspection of those interested in the cause; they investigated the concerns of the general firm, which are represented to have remained in the hands of Robertson, the late partner; afterwards another person was appointed to get in the property, and ultimately the present appellant, Barry, obtained from the creditors an assignment of all their interest, so that at last he came to represent those interested under the sequestration; and under these circumstances he has called in question accounts of Messrs. Geddes with the creditors of the bankrupt estate. It was contended that he had no interest, because the creditors under the sequestration had no interest except for the purpose of seeing that there was a due appropriation to the payment of those instalments of 2s. 6d. each in the pound, making 5s. in the pound,—it is in the first

instance to themselves, and ultimately to the creditors interested under them. There was another suit by Messrs. Geddes, for the purpose of estab-[768]-lishing the deed, in order to enforce the claim they had against the real property of Barry and Robertson.

When this suit had made some progress the whole of the accounts were referred to an accountant; the accountant investigated them very thoroughly, as appears upon the face of these accounts, and transactions between the parties; and in the report to the year 1804 it appeared that there was a sum of £554 due to Messrs. Geddes, being the excess of what they had paid beyond what they had received; and he found that, although there had been some interest for items arising from part of the property not realized, the interest on the other side of the account exceeded the amount of that on the items, which could have been received by Messrs. Geddes. Taking up the account as it had been stated, it appeared on the investigation that Messrs. Geddes were largely in advance when Barry interfered, having acquired an interest by the assignation of the creditors, and interested of course in the ultimate proceeds of the estate in case there had been a surplus. On the making up the account to that time, no creditor complaining, the accountant found that under any view of taking the account, giving credit for all that might possibly come in, there was a debt of upwards of £600,—a very considerable sum,—due to Messrs. Geddes for money paid by them beyond that they had received; and Barry, standing in the situation of creditor under the sequestration, having produced nothing to break in upon that, under those circumstances the court properly, in my opinion, decreed against him, his only object being to establish a surplus beyond what was necessary to be applied by Messrs. Geddes's in indemnifying themselves against that which they had undertaken to pay; and on the cross suit they [769] found no personal demand against Barry, the whole object of that suit being to establish a claim against Robertson, who had been permitted to assist the factor in getting in the property.

Your Lordships have before you not Robertson, who has since died,—you have not before you any creditor of Barry, who, if any thing wrong had taken place under those circumstances, would have been aggrieved by that which had been done, and would have had a right to complain,—your Lordships have nobody before you but Barry, the original debtor, who could have no possible interest in the proceeds of the estate, unless he could shew that there was a surplus beyond that which was necessary to pay Messrs. Geddes. The accountant has investigated these accounts, and he reports them to be perfectly correct, and that it is impossible there can be a surplus coming to Barry. Under these circumstances it is clear that there is no ground for this proceeding on behalf of Barry, who is suing in *forma pauperis*, and never can possibly have any thing coming from this source. The interlocutor appealed from disposes of his claim finding that he has not made out his claim; and as to the other suit, finding that the pursuer has made out a title to that which he asks. The interlocutor brought before your Lordships is only appealed from as far as it affects Barry; consequently any other question as to the property, though perhaps unnecessarily reserved, is entirely between the creditors and Messrs. Geddes. It is quite open to them to investigate the accounts of Messrs. Geddes,—nothing precludes them from that; the whole object of the interlocutor being to shut out Barry from any right to investigate the account, in which, from the statement [770] of accounts, it appears he cannot possibly have any interest.

My Lords, it is unnecessary to go into details of these items, but there is one which has been very much observed on, and to which, therefore, I will just call your Lordships' attention, inasmuch as it shews the ground taken by these parties. It appears that the creditors in a bill of £186 refused to come into the arrangement, and Messrs. Geddes, as the friends of the bankrupts, ultimately produced the money to satisfy the creditors, by paying off that debt in full. That gave rise to an objection, on the ground of an alleged improper payment out of the bankrupts' estate; but the £186 was not paid in fact out of the bankrupts' estate; it no longer constituted a debt upon the bankrupts' estate, as it was actually paid by Geddes himself. The question as to that bill is not between the creditors and those who claim under it; Geddes can claim repayment of that bill of £186 only as between himself and Barry and Robertson, for whom it was paid. It was attempted, however, to confound that with payments made on account of the estate with the money of the creditors, for which

there is no ground; it is clearly not liable to any objection, Barry cannot dispute the right of Messrs. Geddes, as between him and them, to be repaid that sum of £186.

My Lords, there are some other objections, which are equally void of foundation. I had not any doubt, from the argument, that the conclusion arrived at below was perfectly satisfactory, yet as it involved matter of account, I thought it safer to investigate the whole circumstances accurately before I should state to your Lordships the opinion to which I have come. It only remains [771] that I should move your Lordships to affirm the interlocutors complained of; there can be no costs, as the party sues in *forma pauperis*.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

A. DOBIE—ARCHIBALD GRAHAME, Solicitors.

[772] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

The MAGISTRATES and TOWN COUNCIL OF DINGWALL, Mrs. C. M. ROSS of Cromarty and Husband, and JOHN C. STEAVENSON, their Tacksman, *Appellants*.—Dr. Lushington—Sandford; HUGH MUNRO, Tacksman, and the Hon. Mrs. M. HAY MACKENZIE of Cromarty, *Respondents*.—Attorney General (Campbell)—H. J. Robertson [29th July 1839].

*Bona fide Possession—Salmon Fishing*.—During the dependence of proceedings in court to determine a disputed right of salmon fishing, one of the parties was allowed for several years to possess the fishings in dispute, subject to an express order of Court to keep and preserve an account of the number of salmon caught by such party or his fishermen, which was accordingly kept till the question of right was determined; and the adverse party having established his right to said salmon fishings:—In an action by the party who had so established his right, to recover from his opponents the free proceeds of said salmon during the period of possession thus illegally retained,—Held (affirming the interlocutor of the Court of Session) that a plea of *bona fide* possession set up for the defenders was not well founded.

*Jury Trial*.—Observed, per L. C., (in reference to the circumstances aforesaid,)—that as this was a subject of account arising out of a right as established in a previous suit, there appeared to be no ground whatever for sending the cause in the first instance to a jury.

[773] This was a branch of a long-pending litigation between the same parties relative to a right of salmon fishing in a part of the river Conon. This litigation commenced in 1825, by a summons of declarator and damages, at the instance of the respondents, under which the question came to be, whether two valuable pools in the above river, called Pool Oure and Pool Breakenord, belonged to the appellants or to the respondents? It was ultimately decided by the Court of Session, on 11th July 1832, and by the House of Lords, 12th April 1834, that these pools belonged to the respondents, and they have since then been in their possession. For the greater part of the period, during which this question continued in dependence, these pools were allowed to be possessed by the appellants, under an order of court which enjoined them to keep an account of the number of salmon caught till the final issue of the cause. In consequence of the judgment above mentioned in 1834, the respondents raised an action, concluding that the value of the fish caught by the appellants beyond their own boundary as ultimately established during the dependence of the litigation should be accounted for and paid to Captain Munro, the tacksman of the fishings.

To this action the appellants in their four first pleas pleaded, that on a true construction of the judgments pronounced, the pools had actually been adjudged to belong to them and not to the respondents; and to aid the appellants in this plea, they raised two successive actions of declarator to have it so found and declared, but

which were both dismissed with expenses; and the defence rested on this plea was thereupon abandoned.

The appellants however further contended that they [774] were protected against any accounting, by the plea of *bona fide* possession, and the determination of this point formed the remaining subject of contention between the parties.

The Lord Ordinary (11th March 1837) pronounced the following interlocutor:—"The Lord Ordinary, having heard counsel for the parties, repels the first four pleas in law for the defenders, reserving full effect to all the defences, in so far as they are founded on the defenders' alleged *bona fide* possession of the fishings in question; and on the same defence of *bona fide* possession appoints the parties to prepare and lodge mutual minutes of debate by the second box-day in the ensuing vacation, to be seen and interchanged, and lodged revised by the third sederunt-day in May next."

Upon advising minutes of debate the Lord Ordinary (30th June 1837) pronounced the following interlocutor:—"The Lord Ordinary having considered the revised minutes of debate for the parties, appoints them respectively to box the same, and that within eight days, with the view of reporting to the First Division of the Court." *Note*.—The circumstance of the defenders being ordered to keep an account of the fish caught while they were allowed to continue the possession, does not, with absolute certainty, imply that they were bound to account for the proceeds, now that the case has been decided against them. But looking at the whole course of procedure \* [775] there does appear to the Lord Ordinary strong ground to pre-

\* The following is a sketch of the proceedings so far as necessary to explain the above judgments. The predecessors of the respondents (the Commissioners of Forfeited Estates) raised an action against the predecessors of the appellants, to determine their respective boundaries, in which the following was the judgment:—"24th Jan. 1778. On the report of the Lord Auchinleck, and having advised the informations, *hinc inde*, the Lords find that the commissioners of the annexed estates have not produced a sufficient title to the fishings of the river Conon; but find that the magistrates and town council of Dingwall have produced a sufficient title to the fishings in the said river opposite to their property from the march at Breakenord down to the sea; therefore, not only assoilzie the said magistrates and council from the action against them brought by the said commissioners, but decern to the effect foresaid in the action at their instance against the said commissioners, and declare accordingly."—The point at issue in the action, which gave rise to the present dispute, was the precise position of the march of Breakenord; and in this action the following interlocutors were pronounced:—"9th March 1826, the Lord Ordinary, having heard parties procurators, ordains the defenders to keep and preserve an account of the number of salmon to be hereafter caught by them or their fishermen in the river Conon, all as craved in the foregoing minute, reserving all questions touching the expenses of clerks or otherwise, in consequence of carrying this order into effect. J. Clerk."—"3d June 1826. The Lord Ordinary, at desire of the procurator for the pursuer, ordains the defenders to keep and preserve an account of the number of salmon caught by them or their fishermen in that part of the river Conon called the New Pool, (further up the river than Pool Breakenord) and that in place of the account ordered to be kept by them by the interlocutor of the 9th of March last; reserving all questions touching the expenses of clerks or otherwise, in consequence of carrying this order into effect. J. Clerk."—"14th June 1827. Ordains the defenders instantly to produce in the clerk's hands the account of the number of salmon caught by them or their fishermen in that part of the river Conon called the New Pool, and ordered to be kept by them by the interlocutor of the 3d of June 1826. J. Clerk."—"24th November 1827. The Lords having resumed the consideration of this note, and heard the counsel for the parties, they recal the interlocutors of Lord Eldin, Ordinary, complained of, and remit to Lord Corehouse, Ordinary, in place of Lord Eldin, to proceed in the cause as to his Lordship shall seem proper, reserving all questions of expenses until the issue of the case. C. Hope, I.P.D."—"11th March 1828. The Lord Ordinary having heard counsel for the parties upon the whole cause, and in particular upon the demand now made for an interdict against the defenders to fish above the march between the lands of Balblair and Breakenord,

sume that that liability was contemplated both [776] by the parties and the Court. In particular, it would be difficult to attach any other meaning to [777] the passages quoted from the defenders' answers to the pursuers' petition for interim execution after the [778] final judgment of 11th July 1832. But as frequent reference is made by both parties to the views of the Court in altering or continuing the state of possession at different stages of the procedure, and as those views, on which the Lord Ordinary possesses no certain information, may materially affect the question now in dispute, he has thought it best to report the case."

in respect it is averred that the defenders have been fishing above the said march, which, by their admissions on the record, they are not entitled to do, in the meantime prohibits, interdicts, and discharges the said defenders, or any of them, their tenants, servants, fishers, or dependents, from fishing or killing salmon in any part of the river Conon above the line delineated on the plan in process as the march between Balblair and Breakenord; but in respect the defenders do not admit that the said line is accurately laid down in the plan, without prejudice to the parties to ascertain the exact march between Balblair and Breakenord before the interdict is declared perpetual, grants diligence at the defenders' instance against havers for recovering the printed informations in the case which depended between the commissioners of annexed estates and the magistrates of Dingwall founded on as *res judicata* by the defenders, or copies of these informations, and commission to the sheriff depute or substitute of the bounds within which the havers may be for the time to take their oaths and depositions and receive their productions to the day of May next; appoints the parties to prepare mutual cases upon the whole cause, etc.; appoints them to print, at their joint expense, the proceedings in the mutual actions between the commissioners of annexed estates and the magistrates of Dingwall, including the said informations, if recovered, and to lodge copies thereof along with their cases. Geo. Cranstoun."—"12th November 1828. The Lord Ordinary finds that the words 'opposite to their property' in the judgment 1778 are demonstrative, and not taxative, and therefore finds that the magistrates of Dingwall, and those in their right, have a sufficient title to the fishings in the river Conon from the march at Breakenord down to the sea; and to that effect assoilzies the defenders from the conclusions of this action, and decerns; but in respect parties are not agreed as to the march between the lands of Balblair and Breakenord, appoints the pursuers to put in a condescendence, specifying what they aver to be the situation of the march, and allows the defenders to answer the same, and in the meantime continues the interdict: farther, in respect the pursuers allege that the defender Steavenson (the appellants tacksman) has been fishing and is continuing to fish in an illegal manner, appoints them to put in a condescendence of what they aver on this point, and allows the defenders to answer the same; the condescendences now ordered to be lodged within three weeks, and the answers by the box day in the Christmas recess. Geo. Cranstoun."—"11th July 1829. The Lords having advised the petition and complaint, with the revised cases given in for the parties, and heard counsel, they renew the interdict as granted by the Lord Ordinary against the respondents fishing in the Pool Oure and Pool Breakenord; and in the meantime direct the complainers to keep an exact account of the fish caught in these two pools;" etc.—"11th March 1831. The Lord Ordinary having considered the closed record and whole process, and heard counsel for the parties thereon, finds that by the words 'the march at Breakenord,' as used in Lord Corehouse's interlocutor of 12th November 1828, is meant, as shown by the subsequent part of that interlocutor, the march betwixt the lands of Balblair and Breakenord, and that it is not now competent to inquire in what sense these words were employed in the interlocutor in the former process of 24th January 1778: Finds, that as the parties are now agreed as to the precise situation of the march betwixt these lands, it is unnecessary to inquire further into this matter; and that the line so agreed upon forms, where it touches the river, the western limit of the fishings belonging to the defenders; but in respect the march so ascertained does not correspond with the line delineated on the old plan of 1763 (Sangster's plan, on which the judgment of 1778 proceeded) as the march betwixt Balblair and Breakenord, recalls the interdict imposed by the interlocutor of 11th March 1828, and decerns: that justice, however, may be done to the pursuers in case this interlocutor should



Thereafter, the revised minutes of debate having been boxed, the following judgment was pronounced by the First Division of the Court (6th July 1837):—"The Lords having advised this case upon the report of Lord Fullerton, and heard counsel for the parties, repel the plea of *bona fide* possession set up for the [779] defenders; find that they are bound to account in terms of the conclusion of the libel, and decern accordingly; find the defenders liable in expenses, appoint an account thereof to be given in, and remit the same to the auditor to tax and report. *Quoad ultra*, remit to the Lord Ordinary to proceed with the case. Signed 7th July."

be altered, ordains the defenders to keep an account of the number of salmon taken by them in the pools named Pool Oure and Pool Breakenord, from this time till the final determination of this point in the cause: Finds the defenders entitled to the expenses incurred by them subsequent to the interlocutor of the Court of 20th January 1829. Alex. Irving."—"17th June 1831. The Lords having advised this reclaiming note, and heard the counsel for the parties, they recall the interlocutor reclaimed against (except in so far as it recalls the interdict), and find that it is competent to inquire in what sense the words 'the march at Breakenord' were used in the decree 1778. For that purpose, allow the parties to give in cases on the import of the evidence in process, so far as concerns this point, and in particular on the import of the proof led, the pleadings and other proceedings in the cause on which the decree 1778 proceeded; said cases to be lodged on the second box-day in the ensuing vacation, and appoint said cases to be revised, printed, and boxed by the third sederunt day in November next, reserving all questions of expenses. C. Hope, I.P.D."

Judgment of the House of Lords in the first petition and complaint:—"Die Lunae, 11 Julii 1831. After hearing counsel, etc., it is declared by the lords spiritual and temporal in parliament assembled, that the mention of Pool Oure and Pool Breakenord in the said interlocutors complained of shall not prejudice, bind, or at all affect the question touching the course of the boundary line, nor decide whether the said line runs below or above the said two pools; and that, with the above declaration, it is ordered and adjudged that the interlocutors complained of in the said appeal be and the same are hereby affirmed; and it is further ordered, that the cause be remitted back to the Court of Session in Scotland to proceed therein as shall be just, and consistent with this judgment. (Signed) W. Courtenay. Dep. Cler. Parliamentor."

After several years' litigation this question was finally settled, by the judgment of the First Division, in these terms:—"The Lords (11th July 1832) having resumed consideration of this reclaiming note, with the revised cases and interlocutor of this Court, 17th June 1831, and plan and report by James Jardine, civil engineer, dated the 9th day of March last, and proof on which the decree of 1778 proceeded, and heard the counsel for the parties, they of new recall the interlocutor of Lord Newton, 11th March 1831, and find that 'the march at Breakenord' used in the decree 1778 is the Fishers' Lodge on the south side of the river Conon, or on Island More, and the letter P at the bend eastward of the burn of Ousie on the north side; and the said James Jardine having, by the direction of the Court, drawn a red line from the point denoting 'Ruins of Fishers' Lodge' on the plan in process made by him across the water of Conon to the letter P aforesaid, they find and declare the said red line to be the march in respect to the right of fishing salmon in said water betwixt the pursuers and defenders, and that the defenders have no right of salmon fishing higher up than the said line, and the pursuers no right below it; and the Lord President, and Adam Rolland, principal clerk of session, have, with reference to this judgment, certified the said line on Jardine's plan in process, by putting their names along it, and decern: Find the defenders liable in the pursuers' expenses since the date of the remit to the said James Jardine, and in his charge for survey, plan, and report; and remit the account thereof to the auditor of court, to tax, and to report; and further, the Lords remit to Lord Fullerton, in place of Lord Newton, deceased, to hear parties on the account of the number of salmon taken by the defenders beyond the line of march as hereby adjusted referred to in the Lord Ordinary's interlocutor of 11th March 1831, and all objections thereto, and to do therewith, and with any other points in the cause not disposed of, as shall be just." This judgment was affirmed on appeal 12th April 1834.

The defenders appealed.

*Appellants*.—Possession of the disputed subjects for at least thirty years does in law raise the defence of *bona fide* possession, and is a conclusive answer to the claim for bygone fruits. In the leading case of Agnew (*Agnew v. Earl of Stair*, 22d July 1828, Wilson and Shaw's Appeal Cases, vol. iii. p. 296), some of the opinions delivered, particularly the opinion of Lord Glenlee, afford valuable authority as to the general nature and foundation of the defence of *bona fide* possession. As the respondents are, in the present case, claiming restoration of the bygone fruits or issues of the property which have been reaped and consumed, it lies, of course, upon them to prove that there was *mala fides* on the part of the appellants, who were in the occupancy and possession of the subjects.

The appellants were so far from being in the situation of reaping the fruits of the subject under a *conscientia rei alienae*, that the Court itself, at one time, determined the matter in their favour. They refer to the interlocutor of Lord Newton, Ordinary, of 11th March 1831, by which they were restored to the possession of the disputed pools, and the respondents subjected in a [780] large proportion of the costs. It is true that interlocutor was afterwards altered by the Court, which is just an example of that vacillation of judgment which Lord Pitmilley observes, in the above case of Agnew, had been expressly laid down by this House as one circumstance which prevents the *conscientia rei alienae* from attaching till final judgment. But even in the end, the Court, in deciding the case unfavourably for the appellants, only subjected them in a small part of the costs; and this House ultimately, in affirming the judgment, refused to award to the opposite party the costs of the appeal; and yet, in a case where the respondents have been refused their costs, both in this House and in the Court below, they have succeeded in the latter in obtaining judgment against the appellants for damages on the footing of a fraudulent and *mala fide* possession by them. But if the slightest ground had existed for considering the case as one of that description, it is impossible to doubt that the very least thing that could have been done would have been to award to the respondents the full costs of the litigation. The circumstance that only a small part of the respondents costs was allowed in the Court below, and none at all in this House, conclusively shows that though the appellants were held to be wrong in the claims which they were maintaining, there was nothing improper in the manner in which they had maintained them, and nothing dishonest or fraudulent in their possession, which was fairly referable to their titles as they stood interpreted by the judgment of 1778. This is plainly the view of these matters taken by Lord Denman, who moved the judgment of affirmance in 1834, adding the following important statement:—"And I apprehend that as these matters have all arisen [781] from the carelessness of the pursuers (respondents), the defenders in the former action, and as very great doubts have arisen in consequence of the ignorance of the parties as to the real extent of their rights, that ought to be done (the affirmance of the judgment) without any costs."

*Respondents*.—The judicial challenge in 1825, and the orders of the Court thereupon, that an account of the number of fish should be kept, put the appellants in *mala fide* in consuming the fruits of their illegal possession.

The principles by which the defence of *bona fide* possessions are regulated have been clearly laid down by the institutional writers (*Stair*, b. ii. tit. 1, sect. 23; *Ersk.* b. ii. tit. 1, sect. 25, end.)

The defence of *bona fide* possession can never be sustained, where, after a judicial challenge of the party's right has been brought he has been ordered by the judge to keep an account of the whole proceeds of the subject, with a view to an ultimate accounting, in case his antagonist should be successful. From that time forward he cannot, in reason or common sense, consider these proceeds as his own. He is, in truth, possessing for the benefit of both parties, and not for his own exclusive benefit. Accordingly, there is no case to be found in which, notwithstanding such an order and such a course of possession, the defence of *bona fide* possession has been sustained to the exclusive benefit of the party possessor.

Such a doctrine, indeed, would be altogether inconsistent with the almost invariable practice of the Court in similar questions in making such orders upon one or [782] other of the parties, rather than granting an interdict in favour of either, by which the proceeds of the subjects in dispute might be entirely lost to both of

them. See the case of the *Earl of Fife v. the Magistrates of Banff*, 27th November 1829 (8 S., D., and B., 137), and the course there followed.

Further, and independently of the order to keep an account, it is impossible that the defenders could be allowed the benefit of *bona fide* possession; for, no sooner was the record closed, than Lord Corehouse, upon the statement of the defenders themselves, interdicted them from fishing above the line upon Sangster's plan, which interdict was renewed and explained by the Court to embrace the two pools in question. The defender's case was, *prima facie*, so desperate, that, before any discussion on the merits, it was held that they were not entitled to the benefit of the interim possession.

Lord Chancellor.—This appeal is part, and it is to be hoped the last part, of a contest which commenced in 1763. The town of Dingwall and the proprietors of the estate now possessed by the respondents claimed right of fishing in the river Conon, the limits of which it was supposed had been finally ascertained and fixed by an interlocutor of 1778, by which it was declared, that "the magistrates and town council had produced a sufficient title to the fishings in the river opposite to their property, from the march of Breakenord down to the sea."

It may be assumed, that at this period the position of the march at Breakenord was well known; but as, for many years after this time, the rights of fishing of both [783] parties were let to the same lessee, evidence of their boundary was not preserved.

In 1825 the respondents commenced a suit, complaining of the appellants fishing in pools of the river beyond their limits, and particularly in Pool Oure or New Pool. The respondents insisted upon their rights to fish thus, under the interlocutor of 1778, contending that the march at Breakenord, described in the interlocutor of 1778, was above and not below the place in dispute. By an interlocutor of Lord Corehouse, of the 12th November 1828, affirmed by the Court 20th January 1829, it was declared, "that the words 'opposite to their property,' in the judgment of 1778, were demonstrative and not taxative, and therefore the Court found that the magistrates of Dingwall (in the words of the judgment) have a sufficient title to the fishings in the river Conon from the march at Breakenord down to the sea; but, in respect parties are not agreed as to the march between the lands of Balblair and Breakenord, appoint the pursuers to put in a condescendence upon that point."

The introduction of the new term, "the march between the lands of Balblair and Breakenord," supposed at the time to be synonymous with the term "the march of Breakenord," gave rise to new difficulties. At last, after an appeal to this House, the interlocutor of the 11th July 1832 was pronounced, which finally fixed the position of the march of Breakenord as being between Pool Oure or New Pool and Pool Breakenord, and thereby decided the boundary in favour of the respondents, and this interlocutor was affirmed in this House on the 12th April 1834.

It having been held, that it was not competent for [784] the respondents to claim compensation in that suit in which those proceedings took place, for the invasion of their ascertained rights during the dependence of the action, the present suit was instituted for that purpose. The appellants, in their defences, attempted to open the question of boundary, and also insisted that should the question of right be otherwise, they, having been *bona fide* possessors, were not therefore liable to account for damages. By an interlocutor of the 11th March 1837 all the defences, except the last, were repelled, and this interlocutor not having been appealed from is conclusive. By an interlocutor of the 6th of July 1837 the defence on *bona fide* possession was also repelled, and the appellants were ordered to account in terms of the libel. From this interlocutor the appeal is now brought. The question therefore is, whether the appellants are bound to account for the profits of the fishings in this part of the river, to which it has been decided that they are not entitled, or whether they are to be protected from such account by the rule in the law of Scotland as to *bona fide* possession.

In considering this question it is necessary to attend particularly to several proceedings in the former suit, to which I have not before adverted. By an interlocutor of the 9th March 1826 the appellants were ordered to keep and preserve accounts of the number of salmon caught by them in the river generally; but this was, in June following, altered, and confined to that part of the river called New

Pool. On the 11th March 1828 the appellants were interdicted from fishing in any part of the river above the black line in Sangster's plan; but it being disputed what part of the river the black line represented, another interlocutor of the 11th of July 1829 was pro-[785]-nounced, by which the interdict was renewed, prohibiting the appellants from fishing in Pool Oure and Pool Breakenord, and directing the respondents to keep an exact account of the fish caught in these two pools, which assumes that these two pools were considered as being protected by the interlocutor of the 11th of March 1828. Upon this, the respondents obtained possession of those two pools, and kept possession till March 1831. By another interlocutor possession of those pools was again delivered to the appellants but (in the terms of that interlocutor), that justice might be done to the respondents in case that interlocutor should be altered, the appellants were ordained to keep an account of the number of salmon taken by them in Pool Oure and Pool Breakenord.

After the first decision of the right in 1832, the respondents applied for interim execution and possession of the pool, but it was by consent, on the 17th January 1833, ordered that the application should be refused, the appellants being still obliged to keep an account of the number of salmon taken by them in those two pools, till the final determination of the cause. It has been suggested, as the reason for leaving the appellants in possession subject to account, that they, having no right of fishing higher up the river, were interested in obtaining all the fish they could from those places; whereas if the respondents were put in possession subject to account, they might neglect the fishings in those places altogether, trusting to catch the fish higher up. It is obvious that in making these several orders as to keeping accounts, the Court contemplated having the means of giving to the respondents, if their right should [786] be established, compensation for the loss sustained by having been kept out of possession. If, after such order, the Court has not the power of directing such compensation, this arrangement of leaving one party in possession subject to account can never be beneficially resorted to.

The appellants also must have known that such was the object of the Court, as the order for them to keep an account would otherwise be useless; and in their resistance to the application for interim possession in 1833, they do not dispute such to have been the object of these interlocutors. If, therefore, the rule of law were in their favour, it would be to be considered whether they were not in this case precluded from availing themselves of it.

It is however to be considered what is the rule of law as to *bona fide* possession. Lord Stair, book ii. title 1, section 23, and Erskine, book ii. title 1, sec. 25, put this rule upon the only rational ground, that is, that a party in possession, supposing his title to be good, consumes the goods without any expectation of being called upon to account for the value of them. It would therefore be a great hardship to compel him to do so in favour of the successful party, who by not asserting his title earlier had led the possessor into this confidence. But Lord Stair says "else" that is, if they had no reason to trust to their title, "they are presumed to preserve the fruits, or employ them profitably for restitution." Now in this case the judgment of 1778 informed the defenders that they had no title to fish upon the march at Breakenord; and the plan of 1763, upon which they rely, places a march, therein described as "march between Balblair and Breakenord," above Breakenord, the place mentioned [787] in the judgment of 1778, and below Pool Breakenord, and beyond all question below Pool Oure. The appellants must have known that they had no title above the march at Breakenord; what point was intended to be included in that description was one that became doubtful, but it was a mere question of fact. Upon that doubt as to the fact they assumed the right of fishing in Pool Oure and Pool Breakenord, above both the line marked in Sangster's plan, and the place called Breakenord, an assumption inconsistent with any assignable position of the march at Breakenord. Besides which, the confusion of boundary, so far as it existed, appears to have risen from the town having let their fishings to the same person who was lessee of the fishings immediately above and contiguous to these, for it appears that the lease from the proprietors of the respondents lands was of an earlier date than that from the town. Whether under such circumstances the principle of *bona fide* possession could be pleaded, is important only to those periods and to those parts of the river as to which the direction to keep account did not apply,

which is but a small part of the case. No authority has been cited to show that it can be set up in such a case. The Court of Session has decided that it cannot. It would, I think, be most unjust that it should, and I therefore cannot think that your Lordships will lay down any such rule.

As to those parts of the case which are included in the direction to keep accounts, it would be a fraud upon the pursuers and upon the Court to give effect to such a defence. The condition by which the Court was guided with respect to the possession was, that the party [788] in possession should keep an account; this necessarily implied that the result of the account so kept should be dealt with as the Court should think fit ultimately to direct, and necessarily excludes every principle upon which the doctrine of *bona fide* possession is founded.

It was contended for the appellants that this case ought, under the Judicature Act, to have been sent in the first instance to a jury; for that I see no ground whatever; this is not a case of *quasi* delinquency, where the conclusion is for damages only, it is a subject of account arising out of the right as established in the former suit. There is no question of fact to be tried. This appeal appears to me to be a very unnecessary prolongation of the contest which has so long subsisted between the parties, and a very unfortunate addition to the expenses attendant upon it, and which, if successful, would be productive of great injustice.

For these reasons, and being of opinion that the judgment of the Court below is not one open to any substantial objection, I move your Lordships to affirm the interlocutors appealed from, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of [789] Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL—DEANS and DUNLOP, Solicitors.

## [790] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

Mrs. CATHERINE CAMERON LOGAN or GILL, residing at Hillend near Airdrie, Widow of the deceased Captain Henry Gill, sometime of the 50th Regiment of Foot, *Appellant*.—John Miller—W. Daune; MARGARET LOGAN, only child and nearest and lawful heiress of line and of tailzie and provision of the deceased John Maxwell Logan, Esquire, of Fingalton, and her Trustees and Tutors, *Respondents*.—A. McNeill—G. Robinson [1st August 1839].

*Entail—Institute—Life-rent and Fee—Service*.—A party, by deed of entail, disposed his lands “to and in favour of M. in life-rent only, during her lifetime after me, and to the second son to be lawfully procreated of her (M.’s) body, and the heirs to be lawfully procreated of his body, whom failing,” to other parties “heritably and irredeemably.” The deed provided that “the second son of the said M., and the other heirs substitutes,” should bear the entailor’s name and arms; the cardinal prohibitions, and relative irritant and resolute clauses, were directed against “the said M., or any of the heirs aforesaid.” J., the second son of M., was not born till some time after the entailor’s death. Upon his attaining majority he expedie a general service as nearest and lawful heir of entail and provision to the entailor, and a title was completed in favour of M. in life-rent only, and himself in fee. In a question

betwixt J. and a substitute heir,—Held (affirming the judgment of the Court of Session), 1. that [791] the fetters had not been effectually imposed on J. the institute.

Held, 2. that if a party be, by the terms of a deed of entail, the first beneficial taker of the fee, he is the institute, although, by the conception of the destination, the fee would appear to be *in pende* between the death of the entailer and his birth, without supposing a fiduciary fee in a party having a previous life-rent.

Held, 3. that a party who is institute by the terms of an entail does not, by expeding a service as heir of tailzie and provision to the entailer, and making up his title under the entail, debar himself from pursuing a declarator of his immunity as institute from the fetters of the entail.

By disposition and deed of entail, dated 14th February 1793, and recorded in the register of tailzies 14th November 1819, John Maxwell, esq., of Fingalton, on the narrative of the love and regard which he bore to Mrs. Margaret Baird, his spouse, “and for the affection I have for Mrs. Margaret Mitchell, spouse of Walter Logan, junior, merchant in Glasgow, who lived in my family from her infancy to her marriage, and it being always my intention that she should succeed me in my estate after my death, and for many other good causes and considerations me hereto moving,” under the provisions, conditions, reservation, and power and faculty therein mentioned, gave, granted, assigned, and disposed from him, and all others his heirs and successors, “to and in favour of the said Margaret Mitchell, in life-rent only, during her lifetime after me, and to the second son to be lawfully procreated of her body, and the heirs to be lawfully procreated of his body; whom failing, other substitutes, heritably and irredeemably, all and whole,” the estate of Fingalton, therein particularly described: [792] “But providing and declaring, as it is hereby expressly provided and declared, that the second lawful son of the said Margaret Mitchell, and the heirs of his body, and the whole other heirs substituted by this deed, whether male or female, and the descendants of their bodies succeeding to the foresaid lands and estate, and teinds thereof foresaid, according to the foresaid destination, shall be holden and obliged to assume, and constantly retain, use and bear the sirname, arms and designation of Maxwell of Fingalton,” etc. Then followed a prohibitory clause. The irritant and resolute clauses provided that in case the “said Margaret Mitchell, or any of the heirs hereby called to the succession,” shall do in the contrary, etc., the acts and deeds should be null, and the right of the party forfeited.

John Maxwell, the entailer, died in the year 1793, and Mrs. Margaret Mitchell or Logan entered into possession of the estate. John Maxwell Logan, second son of the said Mrs. Margaret Mitchell and the said Walter Logan, was not born till some time after the death of the entailer; but in 1816, upon his attaining majority, titles were made up in his person under the entail.

In 1834 John Maxwell Logan, and also his sister Mrs. Gill, and other substitute heirs, brought mutual declarators to ascertain his rights under the entail. The summons by the substitute heirs (signed 20th March 1834), set forth that John Maxwell Logan had “made up titles to the said estate as the institute or first person called by the said deed, and has possessed the same as such, along with his mother, for a number of years,” and concluded that it ought and should be found and declared, by decree, etc., that according to the true spirit, [793] intent, and meaning of the said entail, as well as the sound and true legal construction of the expressions therein contained, the whole provisions, declarations, restrictions, and fetters thereof, apply to the said John Maxwell Logan, defender, as institute or first person called under the said entail, and that the said John Maxwell Logan, has no right to sell, alienate, dispose, or otherwise burden the said estate, whereby the same may be evicted from the said series of heirs called to the succession thereof. The statement in John Maxwell Logan’s summons (signed 21st March 1834) was almost in terms the same as in the other summons, but containing an *e conversio* conclusion. A supplementary summons, calling the whole heirs substitutes, and containing similar statements and conclusions, was afterwards brought by John Maxwell Logan.

In their condescendence the substitute heirs set out the terms of the service and

of the deeds constituting John Maxwell Logan's title, which were in conformity with the terms of the entail; and the two following pleas in law were stated by them on the record:—1. From the peculiar structure and terms of the deed of tailzie libelled on, the pursuer, Mr. Maxwell Logan, is not a proper institute in the conveyance. On the contrary, as he was not in existence at the date of the tailzie, his mother, Mrs. Margaret Mitchell or Logan, was the fiduciary fiar to whom the estate was in the first instance conveyed; and the fetters being applied to her expressly, and her successors, necessarily applied to John Maxwell Logan.

2. His proper character under the tailzie in question is that of an heir; and having made up a title to the estate by service, and been retoured, "*proximus et [794] legitimus haeres talliae et provisionis demortui Joannis Maxwell,*" he cannot, while that title subsists, maintain that he is not an heir, or maintain any plea inconsistent with that character.

The Lord Ordinary ordered cases, and thereafter pronounced the following interlocutor, adding a note:—"27th May 1836.—The Lord Ordinary having considered the revised cases for the parties, with the record, productions, and whole process, in the action and supplementary action at the instance of John Maxwell Logan, decerns in terms of the conclusions of the libels; and in the action at the instance of Mrs. Catherine Cameron Logan or Gill, assoilzies the defender, and decerns; and in these conjoined actions, finds the said John Maxwell Logan entitled to expenses, and remits to the auditor to tax the account thereof when lodged, and to report."

"*Note.*—The Lord Ordinary hopes that it is no longer necessary to state the grounds of a judgment finding that the fetters of an entail, imposed upon heirs only, do not bind the institute. If it be, no point in the law of Scotland can be held as settled. The attempt to show that John Maxwell Logan is not the institute, but an heir of entail, it is thought, has entirely failed. The estate is conveyed to his mother in life-rent, for her life-rent use only, and to her second son; the fee vested in the second son, John M. Logan, *ipso jure*, as soon as he came into existence as institute. No fee could be transmitted to him from his mother; if he served heir to her, it was for the purpose not of acquiring, but of declaring a right to the estate. None of the decisions cited by the substitute heirs bear upon the case."

[795] The appellant reclaimed, and pointed out a mistake in the Lord Ordinary's note as to John's service to his mother instead of the entailor. The Court pronounced the following interlocutor:—

"20th December 1836.—The Lords having advised this reclaiming note, and heard counsel, recal the interlocutor reclaimed against, in so far as it finds expenses due to Mr. Logan; *quod ultra*, adhere to the said interlocutor, and refuse the desire of the reclaiming note, and find that the expense of this process must be paid from the entailed estate of the pursuer, John Maxwell Logan; appoint the account of expenses incurred by the said George Logan and others to be given in, and remit the same to the auditor to tax the same, and report."

Mrs. Gill appealed; and John Maxwell Logan having died, appearance was made for his infant daughter and representative as respondent.

*Appellant.*—If John Maxwell Logan was the institute under this entail, the respondents were clearly entitled to found on the Duntreath class of cases. But the question raised is, whether he is not an heir, and must necessarily take as such? and in reference to this question there are two points to be made for the appellant, both depending upon nice and difficult questions of law.

1. Was John the institute or an heir? The disposition was to Mrs. Mitchell in life-rent, and to her second son and a series of other heirs; John the second son not having been born at the death of the entailor, the fee necessarily devolved on some party, as it could not remain *in pende*te. The institute has been always [796] understood to mean the party to whom the fee of the estate first passes. It may be that the entailor intended to make the second son of Margaret Mitchell the first beneficial taker; the expressions used by him denote that intention. But, while the intention is clear, it is necessary, in order to effectuate that intention, that there should be due conformity with the legal mode of transference; in order to this it must necessarily be assumed that the fee passed to Margaret Mitchell at the death of the entailor, otherwise, contrary to an acknowledged maxim of law, the fee would be *in pende*te from the death of the entailor to the birth of her second

son. Either then Margaret Mitchell was the first taker of the fee, in other words the institute, or the bequest in favour of her second son is void. When a conveyance is made to a party in life-rent, and his children *nascituris* in fee, the fee is held to be vested absolutely in the parent as the only mode of excluding the heir at law. Hence it is necessary, in order to impose a trust upon the life-renter, to use the words "in life-rent only." But this limitation applying only to the beneficial enjoyment, the legal fee is in the life-renter as much in the one case as in the other; the life-renter is, equally in both, the first taker of the fee. See Lord Corehouse's opinion in *Mein v. Taylor* (5 S. and D. 781, new ed. 729), which appears to be directly at variance with his Lordship's views in the present case, and which is submitted to be the correct statement of the law as established in *Wellwood v. Wellwood*, 23d February 1763 (Mor. 15463), *Dundas v. Dundas*, 2d January 1823 (2 S. and D. 145, new ed. 133). The case of *Newlands* (Mor. 4289) does not [797] meet the difficulty in the present case, for there the children were in existence at the death of the testator.

2. That it is only in the character of heir of entail, as distinguished from the institute, John Maxwell Logan could acquire a title to the estate, is proved by the manner in which he made up his title. As institute he did not require a service to entitle him to take up the procuratory; unless he was heir of entail he has not acquired a title to the estate at all.

Erskine (Ersk. b. iii. tit. 8. s. 31) explains, as to making up titles, that substitute heirs cannot take up the succession as heirs of the disponent, but must succeed as heirs of the disponent. In the *Seaforth* case the party claiming to be institute had completed her title by service as heir, and feeling the importance of the step, afterwards attempted to disregard that service. Although the decision did not depend upon that service, still the mode of completing the title was held properly to weigh with the judges, as is plain from Lord Glenlee's opinion at the advising, on 24th November 1818. The title in John being that of heir, he could not by this process get quit of that title and assert a different character (*Effect of Service*.—Ersk. b. 3. tit. 8. sec. 63. and 73.; 2 Bell's Illustrations, 427; Bell's Princip. 781; Ersk. b. 3. tit. 8. sec. 31.; Blackwood, *Kirk v. Sasine*, Mor. 14327; *Ayton v. Ayton*, 7th July 1784, Mor. 9732; *Peacock v. Glen*, 22d June 1826, F. C., and S. and D.; *Colquhoun v. Colquhoun*, in the House of Lords, 17th Feb. 1831, 5 W. and S., and in C. of S., 8th July 1831, Fac. Coll., and S. and D.; *M'Kenzie v. M'Kenzie*, 24th Nov. 1818, F.C., Lord Glenlee's Opinion therein). [The Lord Chancellor directed the attention of the appellant to the terms of her own summons, which set forth the legal character of John, as that of institute, both parties indeed so stating the fact, and asking a declaratory [798] finding by the Court how far, as institute, he was fettered by the entail.] The appellant referred to the pleas in law upon the record as raising the points now argued.

*Respondents*.—In the mutual declarators, both parties, in the subsumption and conclusions of their summonses, set forth that John was the institute, and asked the Court to declare whether the fetters of the entail were effectually imposed on him. The present case is clearly within the rule settled in the *Duntreath* case, and recognized in the series of decisions\* commencing with the case of *Findrassie* in 1752, and ending with that of *M'Gregor Murray*, affirmed in the House of Lords in 1838.

\* (*Duntreath Class of Cases*.)—(*Findrassie Case*) *Leslie v. Leslies*, 24th July and 5th Dec. 1752; Elch., *voce* Tailzie, No. 49; (*Randaston*) *Erskine v. Hay Balfour*, 14th Feb. 1758, Mor. 4406; (*Duntreath*) *Edmonstoun v. Edmonstoun*, as reversed by House of Lords, temp. Lord Mansfield, 15th April 1771, Mor. 4409; (*Gordonstoun*) *Gordon v. Lindsay Hay*, 8th July 1777, Mor. 15462, and App. 1, Tailzie, No. 2; *Kinloch v. Rochied*, (Inverleith and Darnchester,) as reversed by House of Lords, 22d March 1790, temp. Lord Thurlow, C. (Lords Journals, vol. 38. p. 569, and cited in Baron Hume's Lect.); *Gordon v. M'Culloch*, 23d Feb. 1791, Mor. 15465; *Sir C. Preston v. Wellwood*, 23d Feb. 1791, Mor. 15463; same case, 31st May 1797, F. C. and Mor. 15466 (subject to observation per Lord Brougham, in 1 Sh. and M'L. 46); *Marchioness of Tichfield v. Cumming*, 22d May 1798, Mor. 15467, affirmed 20th June 1800; *Miller v. Cathcart*, 12th Feb. 1799, Mor. 15471; (*Culdares*) *Mensies v.*



The term "institute" clearly applies to the party who first takes beneficially. A mere supposition or [799] fiction, to satisfy a technical rule, cannot alter the character imposed upon the donee by the will of the disponent, particularly as the only object in resorting to such a fiction is to give his intention effect. In the present case, as it was clearly the will of the entailor that the second son of Margaret Mitchell should be the first actual taker under the deed, the fiction or supposition of a fiduciary fee, if brought into operation at all, must be so, not to destroy but to effectuate that intention. But the current of authorities \* clearly establishes that this technical difficulty, if it ever existed, no longer exists in the law.

Lord Braxfield, J. C., in the case of *Gerran v. Alexander*, 14th June 1781 (Mor. 4402), held, 1. that a fee may be in pendente, and that there was no *necessitas juris* to uphold a contrary presumption; 2. that the intention of the disponent was the paramount principle to be looked to in fixing the character of the disponent; and, 3. that even if the rule that a fee cannot be in pendente remained in force, the principle was met by supposing a fiduciary fee in the parent till the child was born, the institution of the heir then clearly taking effect. Thus the Court had been prepared to find authoritatively, as was done in the leading case of *Newlands*, 9th July 1794 (Mor. 4289), affirmed on appeal *tempore* Lord Loughborough, C. (Mor. 4291), that the fee was clearly vested in [800] the children; and the same was held by Lord Eldon, C., affirming, in 1812, the case of *Thomson v. Thomson* (1 Dow, 417), decided below, of even date with the case of *Newlands*, but which had stood over; and, finally, the Court, in *Harvey v. Donald*, 26th May 1815 (Fac. Coll.), disposed of the difficulty now raised by the appellant as to the children, the disponents, not being born when the succession opened; it being held that the case of *Newlands* had settled a general rule, applicable alike whether the children were born at the death of the disponent or not. But *esto*, that it was necessary to suppose a fiduciary fee in the parent till the birth of the child, and so Lord Corehouse probably thought; still the character of institute impressed on the fiar by the will of the disponent remained unchanged.

Besides, a life-rentrix, as fiduciary fiar, was in no respect in the situation of an absolute fiar, institute, or first taker under the deed. She held the property, not for her own absolute use, but for the use of another. No doubt as life-rentrix she was in many respects *interim domina* of the subject, and saved from casualty of ward and non-entry, and accordingly in the brieve in a special service, the seventh head of inquiry was,—In whose hands the fee has been since the death of the ancestor? This is no farther answered than to prove life-rents where they have existed, as they exclude non-entry while they last. So that the appellant had overlooked important authorities, and had relied on the case of Lord Dundas, which, from the very short report of it, appeared to have been one of those amicable suits now discouraged by the court, where those acting [801] for Lord Dundas had thought fit to consult the court upon the accuracy of the title completed in his Lordship's person. The objection started in the name of a substitute heir was, that a general service having been expedited by Lord Dundas upon the supposition that the precept had been exhausted by the infetment of the first Lord Dundas in life-rent merely, that must have been done on the footing of the first lord being a fiduciary fiar; but the court held the title valid,—in other words, considered the general service, by which Lord Dundas took nothing, to be immaterial.

*Menzies*, 25th June 1785, F. C., Mor. 15436, 18th Jan. 1803, and affirmed 20th July 1811 per Lord Eldon; (*Baldastard Steel v. Steel*, 12th May 1814, F. C., affirmed 24th June 1817, 5 Dow, 72; *Murray v. Elibank*, 2d July 1833, F. C., affirmed 19th March 1835, 1 Sh. and M'L. 1; (*Herbertshire*) *Morehead v. Morehead*, as reversed, 31st March 1835, 1 Sh. and M'L. 29; *Brown v. M'Gregor Murray* 11th March 1837, F. C., affirmed 12th Feb. 1838, 3 Sh. and M'L. 84.

\* (*Question of Institute of Heir.*)—Ersk. b. 2. tit. 1. sec. 4.; Stew. Ans., voce Fiar; Dirl., voce Fiar, Nos. 9 and 10.; Kam. Sel. Dec. 169; *Forbes v. Forbes*, 3d Aug. 1756, Mor. 14859; *Gerran v. Alexander*, 14th June 1781, Mor. 4402; *Newlands*, 9th July 1794, Mor. 4289, affirmed on appeal; *Thomson v. Thomson*, 1812, 1 Dow, 417; *Harvey v. Donald*, 26th May 1815, F. C.; Ersk. b. 2. tit. 9 sec. 41.; Craig, lib. 2., diag. 22., sec. 21.; Bell's (W.) Digest, voce Special Service.

2. As to the effect of John's service as heir; it is well known that a service is not confined to the case of an heir, as distinguished from a donee or institute. Where a party is about to make up a title it may be equally necessary for him to establish his character of donee as to establish his character of heir, and equally in the one case as in the other this may be done by service. In the present case, John Maxwell Logan was not named in the deed; it was proper that he should establish his character of second son before making use of the procuratory, and this was aptly done by service. If the procuratory might be used without this ceremony, *a fortiori* has it been used with it?

Apart from the technical distinction between an institute and an heir, the circumstance that the second son is specified in one provision of the deed, and omitted in the statutory clauses, is, according to the known rule of construction of entails, sufficient to shew that he is not restrained by them.

Besides, the question was as to John's powers under the deed, and therefore the objection of the appellant was not *hujus loci*, there being no question with a [802] purchaser, nor, as in Lord Dundas's case, any opinion asked as to the accuracy of John's title.

John took nothing by his service that was not already vested in him. He could no more by a service alter his character as institute, than an heir could make himself institute by erroneously completing a title under the procuratory and precept, and without a service. A party may make up an imperfect title under a correct notion of his rights, or he may make up a perfect title under an erroneous idea as to his rights, and still his true character, whether an institute or heir, remain unchanged. The fact of a service having been expedite was no criterion of the party being heir; although the fact of being an heir is the legal test and criterion of the necessity of a service. And truly the Court had in such cases held that the "form of making up the titles is of no consequence," as in *Henderson v. Henderson*, 12th Nov. 1796 (Mor. 15442); and in *M'Kenzie v. M'Kenzie*, 24th Nov. 1818 (Fac. Coll.), the objection to the Lady Hood M'Kenzie's service as heir while she claimed as institute was so little regarded, that though noticed in the appeal cases it was not urged in the House of Lords, at least it did not enter into Lord Eldon's judgment. But in the pleadings in the Seaforth case reference was made to the Cudraes case, in which the same question had been fully discussed, and an objection to the title to sue in respect of the party in possession having completed his title by service as an heir of tailzie, disregarded.

The Cudraes case involved the question how far James Menzies was to be considered institute or heir, and the latter character was attempted to be attached to him in [803] respect of a service expedite as heir of tailzie. The first decision of the Court is reported under date 25th June 1785 (Fac. Coll., and Mor. 15436), (the report, however, being confined to one branch of the argument). The cause, having been appealed, was remitted by the House of Lords on 30th June 1801, and the Court having by a judgment on 18th January 1803 adhered to their former interlocutor, the same was affirmed on appeal, 20th July 1811 (not reported), temp. Lord Eldon, C.

Lord Chancellor.—My Lords, in this case I think your Lordships cannot entertain any doubt of the propriety of the interlocutor which has been pronounced. This was a disposition by a deed of entail to Margaret Mitchell in life-rent, and to her second son, and he now claims the right to sell or dispose of the estate as he may think fit. Now it is not contended to be doubtful that the institute is not bound by the fetters of this entail, as the fetters only apply to the heirs and not to the institute; and my Lords, it is clear that in this case the respondent John Maxwell Logan was institute. He is designated as such. He is the stock from whom the heirs substitutes are to proceed. It is manifest from the structure of the deed, that in imposing the burdens on Margaret Mitchell and the heirs, the entailer does not impose them upon the institute. For this unquestionably is law, that the clause imposing fetters must be construed strictly, and the Court must find in that clause express terms including the institute, which there are not here.

[804] Then my Lords, there are two grounds upon which the case of the appellant is put; first of all it is contended that the fee cannot be in the second son, who was

not in existence when the succession opened, but that it must be vested in Margaret Mitchell. Now, under that entail Margaret Mitchell is in terms the life-rentrix; and I do not see that it is material to consider where the fee is vested during the interval, since clearly Margaret Mitchell was only life-rentrix.

Then it is said, that John, the second son, has lost the right he now claims, by his having made up his title to the estate by service as heir of entail. We have no authority quoted for the purpose of shewing that the party is to lose his right, because of the terms of his service, and it would be a most extravagant result of a legal rule if it were so. There may be reasons, if it be at all doubtful whether his character is that of institute or substitute, why he should content himself with one character rather than another. But where is the authority, that having done so, he is to be excluded from contending for the construction of the entail which he now contends for. There are no authorities offered in support of that, and there are many authorities referred to by the respondent shewing the contrary. There is the case of *Henderson v. Henderson* (Mor. 15442), in particular, quite conclusive as to this.

And, moreover, when you come to look at the proceedings, namely, the summons on behalf of the present appellant, and the summons on behalf of John Maxwell Logan, those do not proceed upon any such ground. [806] They both asked the declaration of the Court as to the right of the parties upon the construction of the deed of entail. The Lord Ordinary and the Court unanimously came to the conclusion, that John Logan is not heir of entail, and that he is the institute, and is not included within the fetters of the entail. It seems to me, there is no doubt raised as to the propriety of that view, and therefore I shall move your Lordships to affirm the judgment. Probably the relationship of the parties would induce the respondent not to ask for costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

DEANS and DUNLOP—CALDWELL and SON, Solicitors.

#### [806]    APPEAL FROM THE COURT OF SESSION, SCOTLAND.

JAMES BEVERIDGE and JOHN WRIGHT WILLIAMSON, *Appellants*.\*—Lord Advocate (Rutherford)—John Stuart; ALEXANDER SMITH, *Respondent*.—Pemberton—James Anderson [5th August 1839].

*Bona fides—Competition*.—Circumstances in which Held (affirming the judgment of the Court of Session) that an arrangement had been entered into by the general creditors of an insolvent debtor, including a party holding a prior heritable security and parties holding postponed heritable securities, which would make it a breach of good faith in the parties to adopt separate proceedings; and the postponed heritable creditors having, subsequent to said arrangement, poinded the ground, Held, further, in a question with the prior heritable creditor, that such proceedings could not have effect, and that it was immaterial whether a preference at law had been thereby gained, since it could not equitably be used.

In December 1829 Thomas Thomson, innkeeper in Kinross, granted a bond and disposition in security for £1800 over certain heritable subjects to Alexander [807] Smith the respondent. In 1830 he granted to Smith another bond over the same subjects for £1100; and on both securities Smith was infeft. In 1831 Thomson granted a bond and disposition in security for £300 to the appellant, James Beveridge, and another bond and disposition in security for £1261 to Skelton and others, who subsequently conveyed it to the other appellant, John W. Williamson, a writer in Kinross.

\* 16 D., B., and M., 381.

In the beginning of 1832 Thomson became insolvent, and several personal creditors proceeded to do diligence against him. Thomson called a general meeting of his creditors, which was held at Kinross on 21st March 1832. Among others, the respondent, and Skelton, and Williamson as acting on behalf of Beveridge, attended on this occasion, and concurred in the resolutions adopted at the meeting. The minutes bear, that Thomson had before the meeting a state of his affairs, and that "the meeting having taken into consideration the above state of debt, along with the circumstances of the business carried on by Mr. Thomson, are of opinion, that in the meantime it is most advisable, and for the interest of all concerned, that the establishment should be kept open, under the control of the creditors; and that, for this purpose, a committee should be named to superintend the management of Mr. and Mrs. Thomson, to see all monies regularly and periodically lodged in the bank in name of said committee, or of one or more of their number, and to pay out such sums as are necessary for carrying on the business." It is then stated, "that the meeting accordingly resolve to manage the business in the manner above mentioned, and appoint the following [808] a committee for this purpose, four to be a quorum, namely, Messrs. Smith, Steedman, Dowie, Brown, Hardie, Williamson, Curror, and Skelton; Mr. Skelton to be convener." The committee were directed to report their proceedings to a general meeting of the creditors to be called for that purpose. And the minutes farther bear, that "as some of the creditors have executed poindings of the furniture, and used arrestments, in the hands of Mr. Pyper and others, the committee are authorized to take measures to render these steps ineffectual, as preferences, in such a way as they may deem advisable, either by paying the expenses of these poindings, etc., or by making Mr. Thomson bankrupt."

The committee of management met on 4th April 1832, and the minutes bear, that, "in consequence of some of the creditors having poinded some of the horses, the sale of which is advertised for to-morrow, the committee consider that if the same is persisted in it will be necessary to purchase back the horses, and take measures for reducing all preferences, and obtaining for the other creditors a share of the poinded effects corresponding to their debts." Immediately after this resolution, by Williamson's advice, actions of poinding the ground were raised, in the names of Beveridge, Skelton, Steedman, and Dowie, the postponed heritable creditors, in which decrees were obtained on 15th May 1832.

At a meeting held on 24th July 1832, Williamson was authorized by the committee to receive payment of money due by Mr. Pyper to Thomson for coaching business, and, in order to prevent arrestments from [809] being used, he was instructed, at a subsequent meeting held on 1st February 1833, "to obtain an assignation to the mail and coach drawing and profits, as trustee for the general behoof."

Of the last meeting of the committee, held on 2d December 1833, the minutes bear that the respondent was instructed "to wait upon Williamson, and receive from him for our information all his accounts relative to Mr. Thomson's matters, that we may thereby be enabled to judge what farther procedure shall be necessary to be adopted in the regulation for the future of Mr. Thomson's matters."

In July 1834 Beveridge and Williamson, having previously raised on each of the heritable bonds a summons of poinding the ground before the sheriff of Kinross, and having obtained decree, and raised and executed letters of poinding, obtaining warrants of sale of the moveables on the ground in the natural possession of the debtor. They did not execute these warrants, but in June 1834 they obtained a fresh warrant and advertised a sale. The respondent obtained an interdict of the sale, and raised a summons of poinding the ground in the Court of Session (Thomson being dead and his heir abroad). Beveridge and Williamson entered appearance to the action and were allowed by the Lord Ordinary (Corehouse) to state their defences, in which they maintained that the respondent had lost his right as a prior creditor, which they by their proceedings had gained a preference.

The Lord Ordinary (Cockburn, before whom the case came in place of Lord Corehouse, who had taken his seat in the Inner House,) pronounced the following interlocutor:—"Edinburgh, 2d June 1837.—The Lord [810] Ordinary having considered the process, and heard parties. Finds that all parties have renounced further probation: Finds, that the defenders, under their decrees of poinding the ground, executions of letters of poinding and warrants of sale, have a preference to

extent of obtaining payment of their respective debts of three hundred pounds sterling, and of one thousand two hundred and sixty-one pounds three shillings and five-pence sterling, over the pointable moveables appraised in the inventories upon which the warrants of sale proceeded, and to this extent sustains their defences, and decerns. *Quoad* any other pointable moveables belonging to the children of the deceased Thomas Thomson, or to his widow, to the extent of the rents due by her, which are or may be on the ground, decerns in terms of the libel: Finds the defenders entitled to expenses; appoints an account thereof to be given in, and when lodged, remits the same to the auditor to tax and to report."

"*Note*.—The pursuer having the prior right, might by due measures have made it effectual. But having done nothing with this view, and the defenders, though their right be posterior in date, having obtained decrees of pointing, which were executed and followed by extracted warrants of sale, the Lord Ordinary is of opinion that these proceedings gave them a preference, and that there is no authority for now holding that the preference must depend on the mere priority of the right in point of time.

"The pursuer no doubt states two personal objections to the right of one or either or both of the defenders to use the advantage they have gained; but neither of these are well founded.

[811] "1. It is said that they were bound to go along with the rest of the creditors, and that this was the special duty of the defender Williamson, who had not only agreed to abstain from separate measures, but was the agent of the creditors. But these averments are not supported by the evidence in process; and the objection, instead of being stated by or for the general body of the creditors, is brought forward by the pursuer individually, who wishes to exclude the defenders, merely in order to enable him to use the very separate measures which he condemns.

"2. It is stated that the defenders have lost the benefit of their diligence *by mora*. The Lord Ordinary does not think so. A long period has certainly followed their warrants, and no actual sale has hitherto taken place. But the first part of this delay, extending to nearly a year, arose from their desire to accommodate the creditors, and the pursuer as one of them, by not turning the widow of the tenant out of possession, and was acquiesced in by them and by him. During the subsequent part of it, they were prevented from proceeding by an interdict at the pursuer's instance, which he afterwards abandoned. Nor did the pursuer ever do any thing in furtherance of his own right during these pauses.

"The Lord Ordinary gives the defenders their expenses, because in so far as they are concerned, the pursuer was wrong. He has got decree *quoad* any moveables that may be on the ground after the defenders debt is paid; but this they never resisted, or had any thing to do with."

The respondent reclaimed.

After advising minutes of debate the Court pro-[812]-nounced the following judgment:—"26th January 1838.—The Lords having resumed consideration of this reclaiming note, and having also considered the minutes of debate, and heard counsel for the parties, in respect of circumstances involving a personal objection to the defenders, recal the interlocutor reclaimed against, and find that they are in consequence barred from obtaining any preference in virtue of their diligence; therefore decern, and declare in terms of the conclusion of the libel: Find the pursuer entitled to expenses; allow an account thereof to be given in, and remit to the auditor to tax the same and to report."

Messrs. Beveridge and Williamson appealed.

*Appellants*.—There is no evidence of any agreement between the appellant Mr. Beveridge and the cedents of the appellant Mr. Williamson on the one hand, and the general body of creditors on the other, to institute and use the pointings of the ground for behoof of the general body of creditors; and even assuming that there had been such an agreement, the respondent, who does not represent the personal creditors, was not *in titulo* to enforce it or to oppose the appellants' preference; at all events, the effect of such an agreement could only be to compel the appellants to communicate the benefit of their pointings of the ground to the general body of creditors, and could never entitle the respondent to obtain a judgment in the terms of

that now appealed from, giving him a preference over and the sole right to the whole moveables on the ground.

[813] There was nothing in the facts or law of the case to raise a plea of personal exception against the appellant Williamson, in his character of assignee of Messrs. Skelton, Steedman, and Dowie, either on the ground of agency or otherwise. Neither the alleged agreement, nor the plea of personal exception, could be urged against or affect the appellant Mr. Beveridge, for he was no party to that alleged agreement, and his interests could in no shape be injured by the plea of personal exception proposed against Williamson. By the law of Scotland it is clear, that by raising their actions of poinding the ground, obtaining decrees therein, executing and reporting poindings of the ground, obtaining and extracting warrants of sale, and advertising a sale to take place, all without the respondent having taken any step to assert his alleged right over the moveables on the ground in virtue of his bonds; the appellants had obtained and secured a preference over these moveables, which the respondent was no longer entitled to defeat. Even if an actual sale should be held to be necessary to complete the appellants' preference over the moveables on the ground, the present question must be viewed as if a sale had taken place, such sale having been prevented solely by delay granted at the respondent's request, and by the wrongous interdict obtained by the respondent, and kept in force by him for nearly a year on the dependence of an action which he thereafter abandoned as incompetent.

*Respondent.*—In the circumstances of this case, the claims of the appellants ought to be rejected as groundless and untenable, and there is no room even for admitting them to the benefit of a *pari passu* ranking; [814] the respondent never directly or indirectly renounced his right to a preference, and, at any rate, the proceedings adopted and contemplated by the general body of the creditors had become inoperative, and the rights of the present competitors must be determined, according to the priority of their infeftments, in the same way as if no such proceedings had taken place.

All the measures adopted by the respondent, as the holder of the first heritable securities, were conducted in a legal and formal manner, and there are no grounds either in fact or in law to bar him from asserting his right to a preference, and obtaining a decree of poinding the ground, in terms of the conclusions of the summons.

Independently of these fair and equitable grounds, the appellants in point of law had not established a preference. Even although they had acquired a complete right to the moveables under their diligence, they were barred, *personali exceptione*, from claiming a preference over the respondent, in respect of their accession to the resolutions adopted at the general meeting of Thomson's creditors, and of the arrangement whereby they became bound to use their poindings of the ground solely for the purpose of defeating the diligence of the nonacceding personal creditors. And in any view, the appellant Mr. Williamson, by acting throughout the whole proceedings as the agent and legal adviser of the respondent and the other creditors, was precluded from claiming any benefit in this competition, and had rendered himself responsible for any loss which might be sustained by his failure to take the necessary steps to protect the respondent's interests.

[815] Lord Chancellor.—My Lords, this case in a court of equity would not have afforded room for discussion; and it is fortunate that the principle adopted by the Court below is the same with that which would have been prescribed in a court of equity.

My Lords, the facts of this case appear to be these: Mr. Smith had the first heritable security. He and the other creditors met in March 1832, and it was arranged that the business should be carried on, and a committee of management was appointed, of whom Mr. Williamson was one. Mr. Williamson acted for Beveridge and other creditors. The former part of the resolution, as set out in the appellants' case, states, that as "some of the creditors executed poindings of the furniture, and used arrearsments, in the hands of Mr. Pyper and others, the committee are authorized to take measures to render these steps ineffectual, as preferences, in such a way as they may deem advisable, either by paying the expenses of these poindings, or by making Mr. Thomson bankrupt." The mode they prescribed was not that which was afterwards adopted on another occasion, to which I will presently refer; but the object was neces-

sarily the object of all parties interested in the estate,—to prevent possession of the estate being obtained by diligence being pursued by a particular creditor: that took place on the 21st of March. On the 4th of April the committee of management had another meeting, in which this appears as their minute:—"In consequence of some of the creditors having pointed some of the horses, the sale of which is advertised for to-morrow, the committee consider that if the sale is persisted in it will be necessary to purchase back the horses, and take measures for [816] reducing all preferences, and obtaining for the other creditors a share of the pointed effects corresponding to their debts." That is in complete accordance with the arrangement previously made; and there can be no doubt that all the creditors who were parties to these proceedings came into the arrangement that no steps should be taken which should have the effect, among those who were parties to the arrangement, of stopping the business; that steps should be taken to prevent any creditor gaining a preference, and that for that purpose those creditors who might attempt to gain preferences should be stopped in the various ways which were suggested. One way of effecting this purpose (those being mere personal creditors) was to institute proceedings on behalf of some heritable creditor, in order that the personal creditors might not obtain the property, and defeat the object of all the creditors present. Now, the proposition contended for by the appellants is, that it was not inconsistent with the good faith pledged between the heritable creditors and all parties to that meeting of the 21st of March, that proceedings should be adopted by the second heritable creditor for getting priority over the first. If your Lordships can suppose that that was the intention of the parties, or if your Lordships feel any doubt as to that not having been contrary to the intention of the parties, then some weight may be given to that argument; but, my Lords, in what situation was the first heritable creditor? If he had thought proper, he might at the meeting of the 21st of March have taken measures to secure the payment to himself. He might have helped himself by virtue of his prior claim; but that he did not think proper to do, probably thinking there was enough [817] to pay himself. He was willing that the property should be taken care of, for the purpose of providing such means as could be found to pay as many creditors as possible. He abstained therefore from using that diligence which it was open to him to use. But can it be supposed that it was his intention not to protect himself against the chance of the second heritable creditor gaining priority over himself? That is quite inconsistent with the whole arrangement between the parties, and quite irreconcilable with any intention that the first heritable creditor could have. Now, that some proceedings were necessary seems universally admitted. They were necessary for the purpose of carrying into effect that resolution of all the creditors, as expressed in the minute of the 21st of March 1832, for preserving the property for the benefit of all who were interested in it. Accordingly, proceedings were instituted for obvious reasons in the name of Smith. It was quite immaterial which heritable creditor was made a party, if the intention was to preserve the relative situation of all the creditors, but by no means immaterial if the object was to gain priority on the part of one over the other. But the object being to prevent the personal creditors gaining an advantage over all the others, it was immaterial which heritable creditor was made a party to prosecute the proceedings. Accordingly, by the direction of Mr. Williamson, proceedings were instituted in the name of Beveridge and others, having such heritable securities. Under these circumstances the proceedings continued until April 1836, when it is quite clear, for the reasons which have been stated at the bar, that at that time Mr. Williamson was agent for Smith; and if the question turned on that, no doubt it would be to be considered how far priority had [818] actually been gained before that connexion subsisted between Smith and Williamson. But I consider it quite sufficient that there was that connexion between Smith and Williamson, and that all the creditors were parties to that arrangement; and it was the bounden duty of Williamson, not only between himself and all the parties to that arrangement, (of course if he was acting for himself the case would be still stronger against him,)—but it is quite sufficient for the present purpose that, being one of the parties to the arrangement, and one of the parties to carry it into effect, it was not competent to him to lend his aid to or permit any one of those creditors who were parties to that arrangement to use the delay to which the first heritable creditor had consented so as to make it operate to the prejudice of that first heritable creditor, he

abstaining from using his diligence, and thereby giving an opportunity to the second heritable creditor to obtain priority over him; it was quite a breach of that good faith which must have been the ground of the proceedings by all those who were parties to the transaction of the 21st of March 1832. I abstain from entering into the question of priority, which in point of law is one which the Court below has considered as not arising, and which undoubtedly cannot arise. If then your Lordships are of opinion that the Court below was right, whatever may be the legal priority obtained by the second heritable creditor, the question is, whether he was precluded by the transaction that took place and the situation he filled from availing himself of that priority. If he gained it,—it is immaterial whether he gained it at law or not,—i.e. if your Lordships are of opinion that supposing he has gained it, he cannot equitably use it. [819] Those are the grounds upon which the Court below have proceeded. My opinion on this subject is, independently of the act of agency by Williamson on behalf of Smith, founded on that arrangement to which all the creditors were parties on the 21st of March 1832, explained by the subsequent proceedings of the 4th of April 1832,—that after that arrangement it was a breach of faith in the parties to adopt those proceedings, and that it is the duty of every court exercising an equitable jurisdiction to confine the parties to that situation to which they ought to have confined themselves, if they had acted with good faith towards each other and consistently with the arrangement they had made.

My Lords, that is the foundation of the interlocutor appealed from; and if it had not been for the difference of opinion among the Learned Judges in the Court below, it appears to me to be a case so entirely established by the resolutions of the creditors in March 1832, regard being had to the subsequent proceedings, that perhaps some of your Lordships' time might have been saved, after hearing the appellants; but, under these circumstances, it is more satisfactory that you should have heard the whole case. I need hardly say, that being of that opinion, I should recommend your Lordships to affirm the interlocutor of the Court below, with costs, because it is a case in which an attempt was made, in breach of good faith, according to the opinion I have formed, to gain an advantage, which attempt, in my opinion, ought not to have been made.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, [820] and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

G. and T. WEBSTER—DEANS and DUNLOP, Solicitors.

## [821] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

CHARLES TENNANT and Company, *Appellants*,\*—Attorney General (Campbell)—Lord Advocate (Rutherford); JAMES HAMILTON (Pauper), *Respondent*.—A. M'Neill—James Anderson [5th August 1839].

[Mews' Dig. vi. 952, 961; x. 254. S.C. 7 Cl. and F. 122; and, in Court of Session, 1 Dunlop, 502; Fac. Coll. 14 Feb. 1839.]

*Bill of Exceptions—Proof—Witness.*—In an action of nuisance one of the defenders' witnesses, when cross-examined by the pursuer, answered, "Knows Glasgowfield (a neighbouring property); never knew of any damage done there." The counsel for the pursuer then proposed to ask the witness, "Whether he had known of any sum having been paid by the defenders to the proprietors of Glasgowfield, for alleged damage?" The judge, at trial, refused to allow the

\* D., B., and M., new series, p. 502; Fac. Coll., 14th Feb. 1839.



question to be put, whereupon the pursuer excepted. There was a verdict for the defenders: Held (reversing the judgment of the Court of Session, which allowed the exception,) that the proposed inquiry, being irrelevant to the subject matter, was inadmissible as evidence.

Per L. C.—It is an acknowledged rule of evidence that a collateral irrelevant inquiry cannot be gone into, to discredit a witness on the other side.

[822] James Hamilton, late gardener at Mount-pleasant near Glasgow, brought an action against Charles Tennant and Co., manufacturers at Saint Rollox, in the immediate neighbourhood, for the purpose of abating a nuisance of which he complained, and to obtain damages from the defenders for the alleged loss sustained by noxious and offensive smoke, and other vapours. The issues sent to trial were:—"It being admitted that the defenders are, and since the year 1819 have been, proprietors of a certain portion of land and buildings erected thereon, near Glasgow, and that chemical substances are and have been manufactured since the said year: It being also admitted that by the lease, of which No. 6 of process is an extract, dated 30th May 1816, the pursuer obtained possession, as at Candlemas 1815, as tenant, of a certain garden situate to the eastward of the said works:

"1. Whether, during the year 1819, and subsequent thereto, up to Martinmas 1832, or during any part of the said period, there arose from the said works of the defenders certain noisome, offensive, noxious, or unwholesome smoke and other vapours, to the nuisance of the said pursuer, whereby the produce of the said garden was deteriorated, and the pursuer incommoded and annoyed in the enjoyment thereof, to the loss, injury, and damage of the pursuer?

"2. Whether, on or about Martinmas 1832, the defenders wrongfully took possession of 150 cart-loads of manure, the property of the pursuer, or about that quantity, and wrongfully retain the same, to the loss, injury, and damage of the pursuer?

[823] "3. Or whether, in the said year 1819, previous to the pursuer's entering into possession of the said garden, the smoke or other vapours issuing from the said works of the defenders were as great or nearly as great in quantity, and as noisome, offensive, noxious, or unwholesome, or nearly so, in reference to the said garden of the pursuer, as those issuing from the said works of the defenders during the said period, from 1819 to Martinmas 1832?"

Upon the trial before Lord Jeffrey and a common jury at Glasgow the pursuer adduced evidence to establish that the smoke and other vapours from the works of the defenders had, in point of fact, occasioned damage and injury to the produce of other grounds in the neighbourhood of the said works; and the defenders adduced evidence to establish that the said works did not, in point of fact, occasion any damage or injury to the produce of any other grounds in the neighbourhood. Among other witnesses for the defenders was a person named David Smith, a land-surveyor in Glasgow, who stated that he had surveyed the lands in the neighbourhood, that he had made a plan of the vicinage, and mentioned several places which, in his opinion, had sustained no damage. On cross-examination, by the pursuer, the witness made the following answer:—"Knows Glasgowfield" (a place not previously mentioned). "Never knew of any damage done there." The counsel for the pursuer then proposed to ask the witness whether he had known of any sum having been paid by the defenders to the proprietors of Glasgowfield, for alleged damage then occasioned by their works? This question was [824] objected to by the defenders; and the objection being sustained, the pursuer tendered an exception.

Thereafter, the jury found for the defenders.

A bill of exceptions was then presented to the First Division of the Court, when their Lordships ordered minutes of debate upon the competency of the cross interrogatory.

On advising the minutes their Lordships pronounced the following interlocutor:—"Edinburgh, 14th Feb. 1839. The Lords having advised this bill of exceptions, and heard counsel for the parties, allow the exception, set aside the verdict in this case, and grant a new trial."

Tennant and Co. appealed.

*Appellants*.—The question rejected does not bear upon the issues. Even though an affirmative answer had been given to the inquiry, it would have been inadmissible as

evidence. The payment of money, though proved, did not establish damage done. An award or compromise, and a sum paid down, would not be relevant evidence for this purpose. Such is the law even in regard to admissions made for the purpose of settling an alleged claim extrajudicially (2 Starkie, 21, 22; *Robertson v. Baxter*, 2 Murr. Rep. 427; *M'Lachlan*, 4 Murr. 218; *Wright v. Ewing*, 4 Murr. 585). Considerations might have induced the appellants to settle with the proprietors of Glasgowfield, although there might have been no damage or no possibility of proving any damage. If the proprietors of Glasgowfield had re-[825]jected a proffered sum, and brought their action for nuisance, they would not have been allowed in that action to give the offer in evidence, nor to put the question as here proposed. It is clear then that the answer to this interrogatory cannot be made evidence for the respondent.

But then it is said that the proposed question was in any view competent as a means of testing the credibility of the witness. In the first place, that was not the object for which the evidence was tendered; this view of the matter was not suggested at the trial, nor there disposed of, nor is it adverted to in the bill of exceptions. Secondly, If the question had been put to test the credibility of the witness, the judge should necessarily have been informed of it. But, thirdly, It could not be put to test the credibility of the witness, because it would clearly produce an answer involving matter irrelevant to the issue. The rule on this subject is well laid down in the last edition of Phillpotts on Evidence, by Mr. Amos (Edition 1838, p. 909). By the law of England you may discredit a witness by examining him as to statements which he made upon other occasions, in order to discredit and contradict him, but then he can only be asked as to statements which are relevant in themselves. See Baron Parke in *Crowley v. Page* (7 C. and P. 791). In trial by jury the attention of the court and the jury ought to be kept to the issue; it is incompetent to travel into other matter. A party may prove his whole case from his adversary's witnesses by cross-examination; but it is not to be done by irrelevant cross questions. [826] Besides, the question was objectionable, as tending not to elicit matter of fact, but of inference.

*Respondent.*—The appellants correctly state that the object and line of investigation adopted by both parties at the trial had been to show, on the one hand, that injury had been done to other grounds; or, on the other hand, that it had not. This, in truth, was the result of the statements on the record, which, if looked to, would show that such damage to the neighbouring grounds had been specifically condescended on. [Lord Chancellor.—That would merely shew whether or not the issues had been rightly framed.] It shows that there was no surprise at the trial, for although some of those statements were denied by the appellants on the record, they were not stated to be irrelevant or incompetent; and no motion having been made to have these struck out, they had competently been admitted to be proved. There was no room for the plea of *res inter alios acta* in reference to the proposed line of cross-examination; it had an immediate legal bearing on the question at issue. If proving the fact of injury to other grounds be competent, it is not easy to understand why matter essential to ascertain the witness's means of knowledge of that fact should be excluded. The competency of proving that damage was done is the test of the relevancy of the question. The witness might himself have relevantly mentioned the fact of payment of money as his *causa scientiae*, supposing his evidence to have been for, instead of against, the respondent. Under the A. S., 29th November 1825, cross-examination for that purpose is permitted. Would not payment [827] of money under a verdict of a jury, or decree of a court, or of an arbiter, have been admissible as evidence? *Non constat* that it was done by compromise. [Lord Chancellor.—How does the question of compromise arise under this first issue?] It arises in this manner: the assumption that the respondent is attempting to make evidence of a payment made in order to compromise a disputed claim, pervades the whole of the appellants argument; this is an entire mistake. It will be time enough to consider whether a compromise of a claim of damages with the proprietors of Glasgowfield can affect the merits of the present cause, when any such compromise is established. The respondent has inquired merely into the witness's knowledge of the fact of the payment, and no point is raised as to whether a compromise between the defenders and a third party may be given in evidence in the present cause. The appellants say no party complained of the nuisance: the respondent says there were complaints, and that sums were paid; to which it is replied that these may have

been paid under compromise. But the question was not, Do you know that there was a compromise? but, Do you know that money was paid for alleged damage? [Lord Chancellor.—How do you make out it was not to buy peace?] Assuming that the fact of payment of money was collateral to the fact of damage having been done, was there any thing to prevent the respondent from cross-examining the witness in relation to it? What is foreign to the issue must not be confounded with what is collateral to the issue; foreign matter may be equally inadmissible, whether it is sought to be proved as a substantive fact, or as testing the [828] credibility of a witness. It is certainly, however, not so with respect to matter which is merely collateral to the issue; although matter be collateral, this does not imply irrelevancy. Collateral matter may indeed be also irrelevant, and then it becomes foreign, but it may likewise be relevant; it may bear on the case, or on the evidence already adduced, or on the credibility of a witness under examination.

Even in chief, collateral but relevant matter may be inquired into, but much more in cross-examination, and where the points to which the evidence is collateral form the substance of the witness's previous examination; for in cross-examination, the object of which is to sift evidence and try the credibility of witnesses, a great latitude is allowed in the mode of putting questions. (Phillipps, Evidence, 272; *Parkin v. Moon*, 7 C. and P. 408; *Harris v. Tippet*, 2 Camp. 637.)

It is in cross-examination that collateral matter generally emerges, and it has been expressly ruled in England that collateral questions trying the truth of a material part of the witness's story may be put (*ex parte Bardeuell*, 1 Mont. and Ayr, 206. Archbold, Dig. Plead. and Evid., 2 ed. p. 486); the same rule is followed in Scotland. (*Pearson v. Walker*, 20th July 1835, 13 S., D., and B. 1138, and F. C. Jury Sitt. p. 85.)

Whatever might have been the abstract competency of the respondent asking the question objected to, the appellants paved the way for it; they laid a foundation by asking questions on the same subject, and they could not prevent the respondent from exhausting [829] the inquiry. This principle applies to the most incompetent species of evidence—a party's own statements. Where a pursuer asks a witness what a defender said, the defender may, in cross-examination, inquire as to further statements, so as to try the accuracy or the general character of the memory of the witness (*Chapman*, 17th March 1821, 2 Murray, 460). The actual damage done might be proved by the cross-examination of this witness; besides, the respondent was entitled to damage the credit due to the witness. The question ought to be fairly looked to, not critically scanned; the word "then," which occurs in the question, meaning the fact of payment for damage "then" done; that is to say, at that time, or before the money was paid.

Lord Chancellor.—My Lords, in this case there was a jury trial in Scotland, and a bill of exceptions tendered upon the examination of a witness named David Smith. The object of the action was to try a question of nuisance to a garden in the neighbourhood of a manufactory, which, it was said, emitted vapour and smoke prejudicial to the property of the pursuer, the party complaining. David Smith was called for the defenders, and he was examined as to certain premises in the neighbourhood of the manufactory in question, but he was not examined by the party producing him with respect to the place called Glasgowfield,—not the place in question, but a place situated near the manufactory. Both parties went into evidence for the purpose of showing what the effect of this [830] manufactory emitting smoke and vapour was upon the lands similarly circumstanced to those of the party complaining. Whether that was a legitimate mode of inquiry is not now to be entered into, for both parties pursued it, and for one purpose it was undoubtedly a legitimate mode of inquiry, viz., for the purpose of ascertaining what the effect was of the smoke and vapour emitted by this manufactory. This witness was examined as to several lands in the neighbourhood, and then a cross-examination took place. He says,—(his Lordship quoted the evidence at length). Then comes this answer, "Knows Glasgowfield; never knew of any damage done there." He is being cross-examined by the pursuer (by the party complaining of the damage); the pursuer, therefore, uses the witness (as he had a right to do), not for the purpose of cross-examining him as to what he had said for the party for whom he was originally called,—namely, the defenders,—but he uses him, if he can, for the purpose of extracting any evidence

that might be beneficial to his side, and he asks him if he knows Glasgowfield; the witness says he knows Glasgowfield; he asks him then whether he had known of any damage done there; his answer is, "I never knew of any damage done there." That was not the answer which the pursuer, cross-examining the defenders witness, wished him to give. He had fixed him with the knowledge of Glasgowfield; he intended to use him to show that Glasgowfield had been injured by the vapour and smoke emitted from the manufactory; but, however, the answer given was not for the benefit of the party cross-examining him. Then the counsel for the pursuer pro-[831]-posed to ask the witness "Whether he had known of any sum having been paid by the defenders to the proprietors of Glasgowfield (the situation of which is pointed out on his plan), for alleged damage then occasioned by their works?"

Now, he had already said that he knew of no damage done there. If that question had been asked him by the defenders, no doubt a great latitude in cross-examination might have been permitted to the pursuer, for the purpose as well of ascertaining what he meant by "did not know," as for the purpose of testing the accuracy of his statement—of the credit due to that statement; but it so happens, when he says he knows Glasgowfield, and never knew any damage done there, it is an answer given by him to a question of the pursuer in cross-examining him. The pursuer is entering into a line of examination for the first time, and having got an answer which did not suit his purpose, he endeavours to get rid of the effect of that answer by putting a question upon a point short of what was the witness's knowledge; viz. "Whether he had known of any sum having been paid by the defenders to the proprietors of Glasgowfield, the situation of which is pointed out on his plan, for alleged damage?" The pursuer meant, if he could get an answer favourable to his view, to make that part of his case; he meant, not being able to get the witness to say that he knew of any damage, to get him to say that which he conceived would be the next best evidence, but which, in fact, would be no evidence at all. If the witness had answered in the affirmative that he had known of money being paid for alleged damage, it would be no evidence, because money paid upon a complaint made,—money paid merely to purchase [832] peace, money paid upon demand,—is no proof that the demand is well founded; it is not, therefore, to be given in evidence in support of the fact of damage being sustained.

Now, upon general principles the rule of law in this country and in Scotland must be the same: if a pursuer calls a witness, and asks him as to money being paid for alleged damage, his answer in the affirmative is not evidence of actual damage. If the pursuer had made a claim upon the owners of the manufactory for damage done to his field from the smoke and vapour emitted, and the owners had given money to quiet his complaint, that would be no evidence of the damage; it is money paid to buy peace, and to stop complaint; it is very often a wise thing, however unfounded a complaint may be, for parties to pay a sum of money in order to quiet the party making the complaint. But this does not rest merely upon general principles. The rule of law in this country, as laid down by a great authority, has been cited by the appellants; and from the authorities also cited by them it appears that there is no distinction between the two countries in this respect (see cases cited, p. 824).

The question then, clearly could not be put in order to elicit evidence for the party making the complaint, but it is said it was admissible in order to test the credit of the witness. Now, the witness had said nothing in his examination by the party for whom he was called, touching this subject matter. He had spoken of other properties, but he had said nothing which could lead to this cross-examination, and therefore it was not for the purpose of testing the accuracy or truth of any thing he had said. It cannot [833] be supported upon that ground, nor was that the ground, as I understood the argument, upon which it was attempted to be supported, but that it might be put as a matter of inquiry, with a view to test his credit. But if it be not evidence, it is an inquiry perfectly collateral; it is an inquiry into a matter which was not relevant to the subject matter in dispute: it would be relevant if it were admissible in evidence, but it is not. It does not relate to the subject matter, and it is an acknowledged law of evidence that you cannot go into a collateral irrelevant inquiry for the purpose of raising a collateral issue to discredit a witness produced on the other side.

On these grounds the Learned Judge trying the cause was of opinion that the question was not an admissible question under the circumstances of this examination, and to that ruling of the Learned Judge, unfortunately for all parties, because leading to great and unnecessary expense, a bill of exceptions was tendered. It was a question which, answered in either way, could not have affected the result of that cause in the slightest degree. The witness, whether his evidence was correct or not, had spoken of other descriptions of property in the neighbourhood of this manufactory, and he is asked whether he knew of money paid for alleged damage to a particular field, as to which he is not examined in chief; whether he answered yes or no, it cannot affect the question; now the Learned Judge so thought; unfortunately, however, a bill of exceptions was tendered, and unfortunately the Court of Session were of opinion against the ruling of the Learned Judge; they were of opinion that this question might be put, and [834] was an admissible question. The party against whom that decision was come to in the Court of Session necessarily comes here in order to have that judgment considered, because the Court of Session being of opinion that the bill of exceptions was well founded, had no alternative but to direct a *venire de novo*; it was necessary that the case should be tried again, in consequence of the Court of Session coming to this opinion, however unimportant the point might be; the Court of Session, being of opinion that it was an erroneous ruling of the judge before whom the issue had been tried, had no alternative but to direct an inquiry *de novo*, so that there was to be a fresh inquiry upon a point which could not affect the question one way or the other, whether the jury had or had not come to a right conclusion upon the evidence proved before them; but assuming that the jury have (which if they have not would be subject to a motion for a new trial, and in that way, if there had been a failure in the jury trial, the parties might have had an opportunity of trying the case over again),—but assuming that the jury had come to a right conclusion upon the matter before them, here is to be a new trial upon a point of evidence which, in whatever way the witness answered, could, in my opinion at least, not affect the result.

My Lords, it is very unfortunate when cases take that turn, and protracted litigation ensues upon points which have not the slightest bearing upon the result of the case. In this country much depends, in reference to tendering bills of exceptions, upon those who have the conduct of the cause, and though it is competent for counsel to tender bills of exceptions, it is in practice [835] reserved only for cases of great importance, where the real question between the parties is conceived to turn upon it, and where it requires the adjudication of the Court to set them right upon some doubtful point; it is a matter to be regretted that the rule which prevails so beneficially in this country, of reserving that course of proceeding only for cases that really deserve it, is not followed in Scotland, inasmuch as this case is an example of the evil which must flow from the too liberal use of that right by the suitor of tendering a bill of exceptions, and calling in question the ruling of a court of justice. My Lords, this is an instance in which I cannot but think it would have been better for the parties to have taken the course of bringing before the Court the merits of the case as to the propriety of the finding by a motion for a new trial, instead of bringing it by the course of error upon a bill of exceptions.

My Lords, I have no doubt, however, that this was a question which, under the circumstances, it was not competent for the party to put, and that the Learned Judge who tried the cause came to a right conclusion upon the evidence, and the bill of exceptions upon that point ought to be disallowed. Under these circumstances I move your Lordships to reverse the interlocutor appealed from, which decided that the Learned Judge who tried the issue had not properly ruled, and that the bill of exceptions ought to be disallowed.

The House of Lords ordered and adjudged, That the interlocutor complained of in the said appeal be and is hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with [836] directions to disallow the bill of exceptions, to determine all questions of expenses between the parties in the said Court of Session, and to proceed otherwise in the said cause as shall be just, and consistent with this judgment.

DEANS and DUNLOP—HAY and LAW, Solicitors.

[837] APPEAL FROM THE COURT OF CHANCERY, ENGLAND.

SAMUEL BIGNOLD and Another, *Appellants*.—Knight Bruce—Jacob—Girdlestone; THOMAS OSBORNE SPRINGFIELD and Others, *Respondents*.—Attorney General (Campbell)—Pemberton—Blunt [5th August 1839].

[Mews' Dig. i. 334; iii. 226, 250. S.C. 7 Cl. and F. 71; 5 Bing. N.C. 745; 8 Scott 101; and in Court below, *sub nom. In re Norwich Charities*; 2 My. and Cr. 275. Discussed and explained in *Doe d. Governors of Bristol Hospital v. Norton*, 1843, 11 M. and W. 930, 931; and see *Christ's Hospital v. Grainger*, 1848, 16 Sim. 102; *A.-G. v. Exeter (Mayor of)*, 1852, 2 De G. M. and G. 507; s. 133 of Mun. Corp. Act, 1882, taking the place of s. 71 of the Mun. Corp. Act, 1835.]

*Statute 5 and 6 W. 4. c. 76. s. 71. (Construction of)*—*Charity*.—Held, on consulting the judges, and affirming an order in Chancery, that the import of the above section of the above statute is, that the estate, title, and interest of bodies corporate, etc. of boroughs, in charitable estates, held by them in trust, should absolutely cease and determine on 1st August 1836, notwithstanding its being thereby provided that said estate, title, and interest should continue “until the 1st day of August 1836, or until parliament shall otherwise order.”

The 71st section of the act of parliament of the fifth and sixth of King William the Fourth is as follows: “And whereas divers bodies corporate now stand seised or possessed of sundry hereditaments and personal estate in trust, in whole or in part, for certain charitable trusts, and it is expedient that the administration thereof be kept distinct from that of the public stock and borough fund; be it enacted, that in every borough in which the body corporate, or any one or more of the members of such body corporate, in his or [838] their corporate capacity, now stands or stand solely, or together with any person or persons elected solely by such body corporate, or solely by any particular number, class, or description of members of such body corporate, seised or possessed for any estate or interest whatsoever of any hereditaments, or any sums of money, chattels, securities for money, or any other personal estate whatsoever, in whole or in part, in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate, or of such member or members of such body corporate, in respect of the said uses and trusts, shall continue in the persons who at the time of the passing of this act are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office by virtue of which before the passing of this act they were such trustees, until the 1st day of August 1836, or until parliament shall otherwise order, and shall immediately thereupon utterly cease and determine: Provided always, that if any vacancy shall be occasioned among the charitable trustees for any borough before the said 1st of August, it shall be lawful for the Lord High Chancellor or Lords Commissioners of the Great Seal for the time being, upon petition in a summary way, to appoint another trustee to supply such vacancy, and every person so appointed a trustee as last aforesaid shall be a trustee until the time at which the person in the room of whom he was chosen would regularly have ceased to be a trustee, and he shall then cease to be a trustee: Provided also, that if parliament shall not otherwise direct, on or before the said 1st day of August 1836, the Lord High [839] Chancellor or Lords Commissioners of the Great Seal shall make such orders as he or they shall see fit for the administration (subject to such charitable uses or trusts as aforesaid) of such trust estates.”

On the 16th of August 1836 the appellants presented a petition to the Lord Chancellor by their description of two of the inhabitants of the city of Norwich, and also two of the persons who at the time of the passing of the said act of parliament were members of the body corporate called the mayor, sheriffs, citizens, and commonalty of the city of Norwich, on behalf of themselves, and all other the persons who at the time of the passing of the said act were members of and constituted such

body corporate; which petition prayed that it might be declared that, according to the true construction of the said act of parliament, all the said charity estates, funds, and properties did then remain and continue vested in the said petitioners and the other of the surviving persons therein named, or in such of them as were or might be living at the time of making the order to be thereupon made, upon the uses and trusts and for the purposes to which, at the time of the passing of the said act of the 5 and 6 Will. IV., the same were applicable as aforesaid; and that they the said petitioners and the said other persons might be at liberty and might be authorized to administer and apply the same, and the rents, interests, dividends, and annual profits thereof, upon and for such uses, trusts, and purposes, in like manner as the same had been theretofore applied; or in case it should appear to the Court that such is not the true construction of the said act, then that they the said petitioners and such other persons as aforesaid might be appointed trustees for the aforesaid [840] purposes, or otherwise that it might be referred to the master of the vacation to appoint proper persons to be such trustees, with liberty for them the said petitioners and the said other persons to propose themselves as such trustees, and that in the meantime the said petitioners and the said other persons might be at liberty to act in the administration of the said estates and funds, rents and income thereof, and that all proper directions might be given for effectuating the aforesaid purposes, and for duly administering the said estates and premises, and that the costs of and incident to the said application might be paid out of the said trust estates; or that his Lordship would make such further or other order as to his Lordship should seem meet.

On the 19th of August 1836 the respondents (who were respectively members of the council of the present body corporate of the mayor, aldermen, and burgesses of the borough and city of Norwich,) presented another petition to the Lord Chancellor, stating that, in consequence of the lapse of the said 1st day of August, and parliament not having given any order or direction in respect to said estates, there were no longer any trustees to administer the charity, and therefore praying simply that it might be referred to one of the masters of the said Court to approve of some proper persons to be appointed trustees of the said charities; or that his Lordship would make such other order for the administration of such trust estates as to his Lordship might seem just and fit.

On 20th August 1836, the Lord Chancellor made an order to the effect following; viz., That it be referred to the master of this Court in attendance during the vacation to appoint proper persons to be trustees of and for [841] the charity estates and property late vested in or under the administration of the corporation of Norwich, or any of the members thereof, in that character, which are affected by the said section of the said act. And it is ordered, that all deeds, books, papers, and writings in the custody or power of any of the parties, relating to the said charity estates and property, be produced before the said master upon oath, as he shall direct, and he is to be at liberty to state any special circumstances, as he shall think fit. And his Lordship doth reserve the consideration of all further directions, and of the costs of these applications. And any of the parties are to be at liberty to apply to this Court, as there shall be occasion.

Messrs. Bignold and Rackham appealed.

Upon hearing counsel for the parties respectively, on the 19th February 1839, the cause was postponed, in order to have the opinion of the Judges upon the import of the foresaid section. On the 25th June Lord Chief Justice Tindal delivered the same, as follows:—

*Lord Chief Justice Tindal.*—My Lords, in answer to the question proposed by your Lordships to Her Majesty's Judges, viz., Whether the administration of the charity estates and funds, comprised in and described by the 71st section of the 5 and 6 W. 4., c. 76., continued after the 1st of August 1836 in the persons described in the said 71st section, no subsequent act having been passed respecting the same before the 1st August 1836, and no vacancy having been occasioned among such persons before that time? I have the honour of stating our opinion to be, that the administration of the charity estates and funds referred to in the question did not [842] continue, after the 1st August 1836, in the persons described in the 71st section of the act.

It was admitted by the counsel for the appellants in the course of the argument, and very properly admitted, that it is impossible to put any construction on the whole of the clause without meeting with difficulty. But we think ourselves bound to put that interpretation upon it, which, taking the whole of it together, appears to do the least violence to the words employed in it, and at the same time to give a consistent meaning to every part of the section; and keeping this object in view, we think the words in the 71st section, that the powers of the former trustees shall continue "until the 1st day of August 1836, or until parliament shall otherwise order, and shall immediately thereupon utterly cease and determine," are to be construed as if the words had been, "until the 1st of August 1836, or until parliament shall 'in the meantime' or 'sooner' otherwise order;" and that the words "shall immediately thereupon utterly cease and determine," intend that if parliament does not in the meantime otherwise order, the powers shall cease and determine upon the 1st of August; and if parliament did in the meantime otherwise order, then they should cease upon the day which should be thereby appointed and substituted by the legislature instead of the 1st of August. And we feel ourselves warranted in giving this construction to the earlier part of the clause, by the consideration that the last provision in the same clause contains an enactment relating to the same subject matter of legislation, and which is free from all ambiguity whatever, viz., "Provided also, that if parliament shall not otherwise direct before the said 1st day of August 1836," the Lord Chancellor [843] shall make such orders as he shall see fit for the administration of such trust estates; and we cannot understand the legislature to have had in its view an alteration by parliament unlimited in point of time in the former part, but limited in point of time to the 1st of August in the latter part of the same section.

The construction contended for on the part of the appellants is further liable to this objection,—that it leaves the time at which the powers of the former trustees are to cease and determine altogether undefined and uncertain. There might happen, according to that construction, an interval of time of unlimited extent before parliament might think fit "to interfere and otherwise order," and in the meantime it is obvious all would be involved in doubt and uncertainty. And again, there is, as it appears to us, a very strong objection against the reading "and" instead of "or," as contended for on the part of the appellants; that is, again reading the act, "until the 1st of August 1836, and until parliament shall otherwise order;" for this would imply that parliament could have no power to make such an order until after the 1st of August had passed, a construction not only inconsistent with the general authority of parliament, but irreconcilable with the proviso above referred to, which expressly refers to an alteration to be made before the 1st of August.

Upon the whole, we think the administration of the charity estates and funds did not continue in the persons described in the 71st section after the 1st of August 1836.

Lord Chancellor (25th June).—This is a case, in which your Lordships have heard the opinion of the Learned Judges. It is an appeal from an order made in Chancery; and [844] the opinion of the Learned Judges being (in conformity with that order), that the administration of the charity estates did not continue in the persons described in the seventy-first section of the act after the 1st of August 1836, I shall move that your Lordships adopt the opinion so expressed; and the only question will be as to the costs. This being an appeal against an order which, in the unanimous opinion of the Learned Judges, is considered to be a correct order, and the respondents being trustees of charities, I apprehend your Lordships will think it a case in which the order ought to be affirmed, with costs.

Lord Wynford.—My Lords, I quite agree in the judgment of the Learned Judges, and the opinion which they have expressed was that which I had formed upon the question before I heard the judgment which has now been delivered. But I confess that, considering the difficulty in construing the act of parliament, and considering too that this is the first time that this question has come under the consideration of this House, and that it was important to the interests of the municipal charities in this country generally that the question should be determined, I think it would be hard to visit the appellants with costs. In this case, the Learned Judges have



found their way, through all the mazes and perplexities of this act of parliament, in my opinion, to a right conclusion. But when it is admitted, even by the counsel, that the act of parliament was attended with difficulties, I think the appellants should not be visited with costs, and I would, therefore, move as an amendment upon that part of the motion of my noble and learned friend, that the judgment be affirmed without costs.

[845] Lord Chancellor.—I was not in the least aware that upon this point there would be any difference of opinion, otherwise I should have proposed that the farther consideration of the case be postponed, inasmuch as it is in the absence of a noble and learned Lord who had been present during the whole of the argument, and with whom I communicated on this subject before he left the House. But as the noble and learned Lord who has just addressed your Lordships differs in his view of the case, I would suggest that the consideration of the case be postponed.

Mr. Attorney General.—May I be allowed to say, that on behalf of the respondents I am instructed to pray that the costs be allowed? We submit that it would be hard that the costs should fall upon the charity.

The cause stood adjourned till the 5th of August.

Lord Chancellor (5th August).—In this case, which was heard some time since, your Lordships had the assistance of the Learned Judges, whose opinion was unanimous, that the order appealed from was the correct order. My Lords, when the Learned Judges gave that opinion I moved your Lordships to affirm the judgment. One question remains as to costs. My Lords, the order appealed from is an order made in the Court of Chancery. The Learned Judges have delivered their opinion unanimously that the judgment below is correct, and it is matter of course, unless there is some reason to the contrary, that costs should follow the affirmance of the judgment, and particularly in this case where the respondents are trustees of a charity.

[846] Lord Brougham.—My Lords, there can be no doubt whatever upon it. I cannot say that a case might not have arisen in which a contrary practice might be adopted; but in this case there was not any doubt raised upon the construction of the act; the Learned Judges being unanimous shows there was no doubt.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said order therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

BRUTTON and CLIPPERTON—PARKES and PRESTON, Solicitors.

#### [847] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

WILLIAM LECKIE EWING and others, *Appellants*.\*—Knight Bruce—H. Robertson; GLASGOW COMMISSIONERS OF POLICE, *Respondents*.—Pemberton—A. McNeill [16th August 1839].

[*Cf. Heddl v. Leith (Magistrates of)*, 1898, 25 Rettie, 801: *Kesson v. Aberdeen Wrights' and Coopers' Corporation*, 1899, 1 Fraser, 40.]

*Title to pursue*—*Statute 1821 (Glasgow Police)*.—Held (affirming the judgment of the Court of Session) that residents in Glasgow, rateable in police taxes, had no title as such, at common law, nor under the above police act, to sue the police commissioners, on behalf of themselves and others, for misapplication of the police funds.

The appellants reside or occupy property in Glasgow, in respect of which they are liable to the police assessments.

An act of parliament which was passed in the year 1821, for establishing a police for the city of Glasgow, among other things provides for the election of general com-

\* 15 D., B., and M., 389; Fac. Coll. 19th Jan. 1837.

missioners, to whom is committed the power of carrying the purposes of the act into execution. The act also specifies very particularly the purposes for [848] which the general commissioners are authorized to levy assessments upon the inhabitants liable to pay them, as also the way in which the amount of the necessary assessments is to be ascertained. By the 124th section appeal to the Circuit Criminal Court is allowed, and by the 133d section it is declared, that "no action shall be commenced against the magistrates and other commissioners for any thing done in the execution of this act after three calendar months from the time the act is committed," it being "competent to the trades house and merchants house to bring actions against the board of commissioners, or the board against its predecessors in office, in the Court of Session or Exchequer, for misapplying the funds, within twelve calendar months after the offence."

There are two companies for supplying the city of Glasgow with water, established under separate acts of parliament, the one under the name of the Glasgow Waterworks Company, and the other under the name of the Cranstonhill Waterworks Company. A proposal having been made to unite the two companies, by an arrangement under which the Glasgow company should, under authority of an act of parliament to be obtained, purchase up the Cranstonhill company's property and works, a bill was introduced into parliament (session 1834), to obtain an act authorizing this agreement to be carried into effect. This bill was strongly opposed by various public bodies, and among others by the general commissioners of police, who sent up a deputation to London to oppose the bill. A resolution was passed at a meeting of the board on the 13th February 1834, by a majority of twenty-one [849] to four, "That the committee be authorized to co-operate with the public bodies in giving effect to the resolutions of the board, by opposing the proposed monopoly in the supply of water, and to constitute a proportional expense of the opposition." The bill having been successfully opposed in parliament, and the expense incurred by the deputation having been ascertained, the board of police, by two resolutions, dated the 17th and 24th July 1834, ordered payment from the police funds of two sums of money, that is, of £47 7s. and £600, towards their share of the expenses.

The appellants brought a process of suspension and interdict, and afterwards raised an action of reduction and repetition against the respondents, (both bearing to be at the instance of certain private individuals,) setting forth, as their title, that they were "residents in Glasgow, or occupiers of property there, and rated in the police books as liable in the payment of police assessments under the police act, and who have hitherto been assessed accordingly," and concluding for reduction of the two resolutions of the 17th and 24th of July 1834, as in contravention of the police statute, and to have the commissioners who attended the meetings held on those days respectively ordained, "as individuals, conjunctly and severally, to repeat and pay back, or to procure to be repeated and paid back, into the hands of the said police establishment, the respective sums of £47 7s. and £600, which they illegally and wrongfully authorized, sanctioned, and ordered to be paid away out of the said funds as before mentioned, for the purpose of defraying the expense in part of opposing the said water company bill, to the effect that the said funds belonging to the [850] said police establishment may be in the same state as if the said resolutions had not been passed and the foresaid sums had not been paid away." The two actions having been conjoined, a record was made up. The respondents, *inter alia*, objected to the title of the appellants, and the Lord Ordinary pronounced the following interlocutor on the 2d February 1836:—"Sustains the title of the pursuers; repels the objection to the jurisdiction of the Court of Session; finds that the action is not cut off by the statutory limitation of three months; finds that the defenders had no right to levy or apply the sums in question, or any part thereof, in defraying the expense of opposing the bill in parliament, specified in the summons; therefore reduces, decerns, and declares in terms of the first conclusion of the summons; finds the defenders liable in the expenses of this branch of the discussion; appoints an account thereof to be given in, and when lodged remits to the auditor to tax the same, and to report; and *quoad ultra*, appoints the case to be enrolled." \*

\* To the above interlocutor his Lordship appended the following note:—

"Note.—None of the principles or authorities about popular actions apply to this

[851] The respondents presented a reclaiming note to the Second Division of the Court, and their Lordships, upon [852] advising mutual cases, pronounced the following interlocutor on the 19th (signed the 20th) January 1837 :—

“ [853] Recall the interlocutor complained of ; sustain the objections to the title

case ; there can scarcely be conceived to be a better title and interest than that which a person who is taxed illegally has to resist that tax, at least in so far as relates to his portion of it. The 133d section of the statute confers a right of action on certain public bodies ; but giving these a statutory title does not take away any title belonging by law to individuals ; and even as to these bodies, their right is confined to cases affecting the misapplication of funds vested in the commissioners, whereas part of the objection here is, that the defenders went beyond their powers, and assessed for sums, which, for this reason, could not be legally vested in them.

“ Section 124 makes an appeal to the Circuit Court lawful, but the clause plainly does not apply to questions like this ; and, at any rate, the ordinary jurisdiction of the Court of Session to protect against excess of power is not taken away. The two sections which precede, and which follow this one, make it clear that the 124th only applies to proceedings in which the person aggrieved was judicially a party.

“ Section 133 limits actions for things done ‘ in execution of this act,’ to three months, but this does not apply to cases where the complaint is that the defenders went out of the act ; and besides, the act specially challenged took place on the 17th and on the 24th of July, and the action was raised on the 13th October. There were resolutions, no doubt, of February before, to do these acts, which prospective resolutions are not brought under reduction ; but it was unnecessary for the pursuers to challenge, not merely the act which injured them, but all the votes by which it may have been preceded ; if it were, every act might be saved from objection, by being preceded by a resolution above three months before, which, in itself, may do no harm, and of which the party hurt may never hear. In this very case it does not appear how there was any personal interest in any body to interfere, for nothing actually touching any individual was done ; there was merely a barren, general, and revocable resolution, that at some future time an unnamed proportion of the expense would be paid.

“ On the merits the Lord Ordinary has abstained from deciding any thing at present, except the first conclusion of the reduction, because the other matters cannot very well be extricated till the general principle be fixed ; and if his view of this principle be wrong, it is needless to compel the parties to go minutely into the rest of the case.

“ He is not moved in deciding the reductive conclusion by any considerations of expediency ; he goes upon the statute alone, and his general opinion is, that the defenders, as police commissioners, have no particle of power, except what they can show that they possess in virtue of the act of parliament which creates them, and that he cannot discover, by any legal reading or construction of that act, that they are authorized to assess for the purpose of opposing or of advancing any parliamentary bill whatever.

“ The case of the defenders rests on the averments, that the bill in question was hurtful to the inhabitants, and interfered with the existing police act, and that, without their official co-operation, it could not have been defeated. It is, and always must be, one of the misfortunes of permitting such applications of the funds, that any court, in judging of their propriety, must consider the truth of such averments, and that these are scarcely capable of being judicially ascertained. It appears, from this process, that there are persons in Glasgow who hold that the bill was of a beneficial tendency for the people,—that any obnoxious clauses might have been given up or arranged,—that it could have been thrown out without the defenders’ help,—and that, at any rate, their expenditure in obstructing it was extravagant. If the defenders are not to get unlimited credit, these points must be fixed before the propriety of what they did can be determined by this Court ; and how they are to be determined the Lord Ordinary does not know. They are, to a great extent, matters of mere opinion ; however, he assumes, in argument, that they are all clear in the defenders’ favour ; still, he cannot discover that legislation was any part of the commissioners’ business, at least at the expense of the police funds.

of the pursuers, as laid in this action ; repel the reasons of suspension and reduction ; dismiss both actions, and decern ; find expenses of process due ; allow an account thereof to be given in, and remit the same to the auditor, when lodged ; to tax and report."

"The general import of the statute is, that the commissioners are to keep up a proper establishment of officers, and are to see that the city be watched, cleaned, and lighted, and that they may levy funds for the purposes herein directed, 'and for the other necessary purposes of this act, and for no other purposes whatever ;' this gives them ample authority to do any thing, such as even raising or defending actions necessary for the fulfilment of these objects. But, is opposing bills in parliament one of them? If the new bill contained clauses injurious to the public, and repugnant to the existing police act, this may have excited the public to resist ; but what part of the act says or implies that the commissioners may not only assess for administering the statute, but for perpetuating all its parts by obstructing parliamentary change? If a bill were to be introduced for repealing the police act, or for altogether abolishing the police, the Lord Ordinary has no idea that even such an extreme proposal could be lawfully opposed at the expense of the ordinary funds. The commissioners had no property in the police funds or privileges, so as to be entitled, like many other public trustees, to take all measures calculated to maintain or to extend their interests ; they were the mere official servants of the public, under this single and temporary act, so that their preventing a change of the statute could never be part of their implied duty of putting the statute as it stood into execution. If such a power was meant to be conferred, it is odd how it was not mentioned, especially as minuteness is the principle on which the statute is constructed ; there are about fifty or sixty sections, specifying what the commissioners may do ; they are not even allowed to fill up dangerous holes in the street without a clause. It is difficult to believe that, amidst such jealous precision, it was intended that so peculiar and irresponsible a power as that of agitating local bills at the expense of the people, nay, at the expense partly of the very persons opposed to the commissioners in that proceeding, should be conferred without any special words at all. If it had been proposed, in direct terms, to insert a clause in the police act for authorizing the commissioners to assess the people for the expense of opposing bills which they thought hurtful to their police system, its probable fate may be conjectured from the fact, that no such clause can be produced in any statute ; even when parliament means to permit the individual bill which it passes to be assessed for, this is always specially enacted, as it was in this very Glasgow act.

"It is not necessary to notice the defenders' plea under the second section, except for the purpose of showing the length to which their argument leads, and the applications of which it admits in other cases. These sections declare it to be the duty of the commissioners 'to have a general superintendence of their respective districts,' 'and take all measures for preserving the general peace, order, and comfort of the inhabitants thereof ;' from which it is inferred, that wherever comfort is concerned, which it was here, as water and pavement were concerned, assessments may be imposed. For the same reason, churches, and prisons, and hospitals, and theatres, and public baths, and other such things, all most essential, not only to comfort, but to order and peace, may be erected.

"This is an individual case, but the similarity of all police bills makes it one which may be acted upon almost wherever these statutes exist ; and if once the power be recognized, as conferred by implication, it is not difficult to see what use may be made of it. The general burgh police act may be supposed to contain the essence of all the power which parliament thought it necessary for police commissioners to have ; it contains no clause empowering them to assess for bills. But, if such a power be implied in their mere position, then it may be exercised in every burgh in Scotland. Something may be said in favour of the system of establishing boards all over the country, to exercise, at the expense of the public, a discretionary power of promoting, or of thwarting local parliamentary projects ; but something may surely be said against it. The defence that they only interfere to resist schemes touching their existing powers, affords no protection to the lieges, for there is scarcely any local bill which may not be truly said to do so."

The suspenders and pursuers appealed.

[854] *Appellants*.—The appellants have a direct interest, and a good title, to pursue the conjoined actions of reduction and of suspension against the respondents; the object of these actions being to prevent an illegal assessment from being levied upon them in future, and to obtain relief, in the only competent manner, from the effects of illegal assessments which have been already exacted.

It is maintained by the respondents that the actions of reduction and suspension were of the nature of a popular action; that the appellants had no substantial, direct, peculiar, or immediate patrimonial interest in the matter in question, such as to entitle them to pursue. But the answer is obvious; the interest which entitles the appellants to complain of illegal assessments, by which money has already been taken out of their pockets, and in consequence of which they have grounds to apprehend farther spoliations, is a patrimonial interest of the most substantial, direct, and immediate kind.

The just and sound view of the statute seems to be the converse of that contended for by the respondents, as the statute plainly supposes that the rate-payers have a good right and title to complain of illegal or excessive assessments made upon themselves, and gives them every facility for rendering that right available; and it has even made anxious provision for bringing to the knowledge of all the rate-payers in due and sufficient time the whole details of the respondents' conduct in the execution of their power. The annual accounts of the respondents, containing a statement of the receipts and disbursements of the year, are directed to be made out and printed, published in the newspapers, and lodged in the council chambers of the city for six weeks, [855] open to the inspection of every rate-payer without fee or reward; and it is provided generally that the whole books of the commissioners of police, containing all their minutes of procedure, are to be accessible to every rate-payer who may wish to peruse and inspect the same without fee or reward. For what purpose were these anxious provisions made for the information and satisfaction of the rate-payers, unless it was to enable them to judge whether the commissioners of police had properly performed their duties as prescribed by the statute, whether they had not exceeded their powers in levying assessments, or whether they had not improperly employed the assessments levied? If in any of these respects the board of commissioners transgress the statute upon which their powers depend, it is clear that the rate-payers have a good title, as well as a good interest, to object to such illegal proceedings.

In fact, the rate-payers are the only parties who have a title to challenge irregularities or excess of power in the imposing of the assessments; for it will be remarked, that the power of bringing actions against the board of commissioners, conferred by section 133, upon the three public bodies, before the Courts of Exchequer or Session in Scotland, does not relate to the levying of the assessments, but merely to the "embezzling, squandering, or misapplying the funds vested in them by this act."

Under the 133d section of the act there is a general limitation of all actions to be raised against the board of police, as to any thing done in the execution of the act, to three calendar months from the time the act was committed. This is the general rule. But then there is an exception from that general rule introduced in [856] favour of certain public bodies in regard to a certain description of actions, which are rendered competent at their instance, at any time within twelve calendar months after the offence for which such action may be raised shall be alleged to have been committed. These privileged actions must be raised in the Courts of Session or Exchequer, and they must relate exclusively to the embezzling, squandering, or misapplying the funds vested in the commissioners by the act. The privilege has no relation to actions brought in regard to excess of power assumed by the police board in imposing assessments. Such actions, under the former words of the section, must in every case be brought within the three months. Even within the three months it does not appear that the public bodies in their corporate capacity have any right to bring such action.

The privilege in question conferred upon these public bodies seems to be grounded upon the contribution to the police funds annually made out of the city revenues. The privilege consists in these public bodies being allowed to raise their action at any time within twelve months, instead of being limited to three months, and constitutes

an exception to the general rule, and cannot be considered as superseding the ordinary right of action to which the limitation of three months applies.

The rate-payers cannot be held as deprived of their title to resist illegal assessments by the section of the statute in question, because no such right of action is conferred on the public bodies. The Lord Ordinary in his note has most justly observed, "The 133d section of the statute confers a right of action on certain public bodies; but giving these a statutory title, does [857] not take away any title belonging by law to individuals" (*Johnston v. The Stentmasters of Kelso*, 25th June 1800, Fac. Coll. N. 187, Mor. 12426, Ap. 1, Title to pursue, No. 1; *Cowan v. Wigton, Magistrates of*, 23d June 1782, Fac. Coll. 9, 73, No. 46, Mor. 16133; *Anderson v. Magistrates of Renfrew*, 30th June 1752, Fac. Coll. 1, 35, No. 17, Mor. 2539; *Lang v. The Magistrates of Selkirk*, 2d Dec. 1747, Elchies, Burgh Royal, No. 27, and 28th Nov. 1748, Mor. 2515; *Dean v. The Magistrates of Irvine*, 3d July 1752, Mor. 2523; *Gilchrist v. The Magistrates of Kinghorn*, 5th March 1771, Mor. 7366; *The Merchant Company of Edinburgh v. The Governors of Heriot's Hospital*, 9th August 1765, Mor. 5750; *Finlay v. Newbigging*, 15th Jan. 1793, Fac. Coll. 11, 21, No. 10, Mor. 2008; *Wilson v. Scott*, 16th June 1793, Mor. 2010; *Montgomery v. Macausland*, *ibid.*; *Aitchison v. Magistrates of Dunbar*, 4th Feb. 1836, 14 D., B., and M., 421).

*Respondents*.—The present is an action of reduction and repetition, which does not set forth any direct private and patrimonial interest in these appellants, or conclude for any thing to be paid to themselves, nor is it an action in the name of each, setting forth that some portion of the grievance complained of has fallen upon him, and seeking redress to that extent. There is no conclusion for reduction or repetition generally, or to any particular extent or amount, in favour of the appellants, either individually or collectively. It only points at some remote benefit or relief from a burden already imposed, to be derived from a successful issue of the action. It is a sufficient objection to the title to pursue in such an action as this, that by the law and practice of Scotland parties are not entitled to sue, where there is not a personal, distinct, and direct patrimonial interest to maintain the action. A remote, contingent, or possible interest, and far less any such imaginary interest as is here set out, will not sustain an action.

[858] The appellants themselves repudiate the idea, that their action can be maintained upon the principle of the *popularis actio* of the Roman law; no such species of action finds a place in the books, or is recognized in courts of law in Scotland, and to entertain such actions would be quite subversive of what is fully established as the law of that country.

A board of commissioners is here established, with certain powers as to levying and applying monies raised for the purposes of the act, and those funds are vested in them, and placed under their control in terms of the statute. The commissioners are subject, no doubt, to be called in question by the statute, by certain bodies empowered by the legislature to do so, but mere individual rate-payers cannot, by any such action as the present, interfere with or paralyze the management of the board acting under the statute.

There is no principle recognized in the decisions of the Scotch Courts which warrants the observation of the Lord Ordinary, that "there scarcely can be conceived to be a better title and interest than that which a person who is taxed illegally has to resist that tax, at least in so far as relates to his portion of it." The very object of the Glasgow police act, in giving certain independent bodies the right to challenge, was to exclude all attempts on the part of individuals to impede or to frustrate the measures of the commissioners (*Wigton*, 23d June and 1st July 1735, Mor. 1985; *Burgesses of Inverury v. The Magistrates*, 14th Dec. 1820, Fac. Coll.; *Trinity House of Leith v. The Magistrates of Edinburgh*, 6th Feb. 1829, Fac. Coll. No. 66, 7 S. and D. 374; *Burgesses of Lauder v. The Magistrates*, 17th May 1821, 1 S. and B. 17).

[859] Lord Chancellor.—My Lords, the judgment of the Court below in this case was founded on a defect in the title of the pursuers, and did not profess to decide the merits; the decision of the case on appeal, therefore, must depend on the same consideration. The interlocutor appealed from recalling the interlocutor of the Lord Ordinary, sustained the objections to the title of the pursuers as laid in the actions, and dismissed the actions. Those actions were, first, of suspension and interdict,

and, secondly, of reduction and repetition ; in both the pursuers described themselves as residents in Glasgow, and occupiers of property there, and rated in the police books as liable in payment of police assessments under the police act, and as having been assessed accordingly ; and in both they professed to sue for themselves and for all those who had adhered to them, and whose names and designations were to be specified in a minute in the proceedings. The complaint is against the commissioners appointed under the police act for the city of Glasgow, for having applied sums of money, raised under the powers of that act, for purposes alleged not to be authorized by that act ;—that is, in contributing towards the expenses of an opposition in parliament to a bill respecting the water companies to supply that city with water. The letters of suspension and interdict prayed that the defenders, the commissioners, might be interdicted from applying any of the monies raised or to be raised under the powers of the police act to those purposes, and from levying any sums in whole or in part for such purposes ; and the summons of reduction and repetition concluded that the resolution and act of the commissioners for those purposes might be rescinded [860] and declared void, and that the commissioners, who were parties to the payments already made, might individually repay to the police fund the monies so alleged to have been misapplied.

Lord Cockburn, the Lord Ordinary, by his interlocutor of the 2d of February 1826, sustained the title of the pursuers, and repelled the objection to the jurisdiction of the Court of Session. This interlocutor was, upon a reclaiming note to the Second Division, recalled, and the objections to the title of the pursuers, as laid in the action, were sustained.

The title of the pursuers to sustain these proceedings may be considered, first, without reference to the particular provisions of the police act ; secondly, with reference to such provisions. It is admitted that what is known under the denomination of a popular action forms no part of the law of Scotland ; and the Lord Ordinary, in his appended note, says that none of the principles or authorities about popular actions apply to this case. The title claimed by the pursuers to sue in this mode and for this purpose is a question purely of Scotch law and practice, and must be decided by the precedents adduced.

The appellants (the pursuers) first rely upon the case of *Johnston v. The Stentmasters of Kelso* [25th June 1800] (*ante*, p. 857). In that case one of the inhabitants of Kelso brought an action before the sheriff against the treasurer of the stentmasters for production and examination of their accounts, in which he failed, and he then, in his own name, raised an advocacy and declarator before the Court of Session. The pursuer's title was objected [861] to ; but he contended that every burgess had an interest to investigate the ground of taxation and amount leviable against himself. The Court, as is said, considered the pursuer's title sufficient ; but there was less room to investigate this minutely, as the defenders were thought clearly right on the merits. This, then it must be observed, was not a decision upon the point of title, besides the object of the suit was very different from that now under consideration ; the case, therefore, may be altogether rejected.

The next case relied upon by the appellants is *Finlay and Others v. Newbigging and Others*, 15th Jan. 1793 (*ante*, p. 857). In that case Finlay, a member of a corporation, disputed the application of a sum of money raised upon the members of it, and having refused to continue the annual payment enforced upon him, the corporation resolved to set him aside from the trade, and that he should not be called to any meeting whilst he continued in arrear ; whereupon he, and others in the same situation, brought a process of declarator against the deacon and the members of the corporation. In this case the propriety of the application of the funds was discussed, and so far might have been applicable to a discussion upon the merits of the present case ; but as to the actual question of the pursuer's title it seems likewise to have no application. The pursuers complained of a personal injury in their exclusion from the corporation ; the form of action and its objects were totally distinct from that now under consideration.

The next case is that of *Wilson v. Scott* [16th June 1793] (*ante*, p. 857). [862] That was a bill of advocacy, complaining of the judgment of the magistrates of Glasgow, who, upon the complaint of members of a corporation, had held the application of certain funds illegal, and directed the officers to repay them. The Court of Session

repelled the reasons of advocacy, and remitted the cause *simpliciter* to the magistrates. In that case the only question could have been as to the jurisdiction and judgment of the magistrates, and not the original jurisdiction of the Court of Session, which is the point in this cause.

The same observation applies to the next case relied upon,—*Macauland v. Montgomery* [16th January 1793] (*ante*, p. 857). Upon a complaint to the magistrates of Glasgow by Montgomery of an order by the trades house for the payment of a sum of money, of which it was alleged there had been an improper application, the magistrates pronounced an interdict prohibiting the payment; whereupon the deacon, conveners, and others, complained of the judgment of the magistrates by bill of advocacy, and at the same time brought an action of declarator to ascertain the powers of the majority of the trades house in the management of its funds. The Court of Session continued the interdict of the magistrates, and, in the declarator, decided the question of right upon a ground quite peculiar to that particular case. The merits of the judgment of the magistrates was the only matter in question. Their jurisdiction in the first instance, and that of the Court of Session afterwards, was not in dispute; that case, therefore, has no application to the present, upon the point now under consideration.

The case of *The Merchants Company and Trades of [863] Edinburgh v. The Governors of Heriot's Hospital* [9th August 1765] (*ante*, p. 857), is more applicable; in that case the defenders, being trustees of a charity for poor fatherless boys of burghesses and freemen of Edinburgh,—the pursuers being the merchant company and incorporations of the city,—a process was brought against the governors, concluding to have it found that the governors had no power to feu the charity lands, or, if they had, that the next feuar might be put under certain restrictions. Objections were made to the title of the pursuers, the Lords sustained the pursuers' title to carry on the process; but they being of opinion in favour of the defenders upon the merits, no opportunity was offered of questioning this decision upon the point of title; this case was as early as 1765.

In *Aitchison v. the Magistrates and Town Council of Dunbar* [4th February 1836], (*ante*, p. 857), the majority of the town council, describing themselves as burghesses and town councillors, instituted a suit in the Court of Session concluding for reduction of an act of the town council, in which the pursuers were the minority. It was objected, that as burghesses they could not sue, having no private or patrimonial interest in the subject; for the pursuers it was not disputed that the rule of law was against their title to sue as burghesses, but it was contended that, as members of the town council, they were entitled to demand the judgment of the Court of Session, as to the legality of the act of that body. Upon that distinction the Court sustained the pursuer's title the Lord Justice Clerk [864] saying (14 D., B., and M., 425), "The present question has nothing to do with the right of individual burghesses to complain of acts of the magistrates, because the actions were brought at the instance of four constituent members of the town council. The Court of Session is the only tribunal competent to reduce an illegal act or declare its illegality." Not only, therefore, is this not a case in support of the title of the present pursuers, but it is a case in which the reverse was admitted at the bar, and assumed in the judgment.

Three cases were principally relied upon by the respondents (the defenders): the first that of the Burghesses against the Magistrates of Inverury, 14th December 1820 (*ante*, p. 858); several burghesses instituted an action against the magistrates, who were charged with misapplying part of the burgh funds, and concluding that they might restore the amount to the burgh funds. The Lord Ordinary (Pitmilley) dismissed the action for want of title, finding "That the burghesses, though they have a remote interest in the funds and property of the burgh, have no patrimonial right in the funds and property, so as to confer on them a title to call the magistrates to account in the manner concluded for; and that their interests in the funds in question which as stated in the conclusions of the libel, leads them only to conclude that the money shall be placed to the credit of the royal burgh as articles of charge against the present magistrates, is not such a patrimonial interest in the funds as can entitle them to insist in this action." This was affirmed by the Court, when it was observed from the bench, "The [865] Court never sustains an action at the



instance of a party who cannot state a direct or immediate interest in the result, which plainly cannot be alleged in this case, where the pursuers ask for no judgment available to themselves, but complain of acts done to the prejudice of the burgh."

This decision was recognized and approved in the case of the Trinity House of Leith and others against the Magistrates of Edinburgh, 6th February 1829 (*ante*, p. 858), in which the pursuers, on the ground that they were interested in the completion of the work, instituted proceedings against the parliamentary commissioners for improving the harbour of Leith. It was held that they had no title to pursue, the Lord Justice Clerk saying (Rep. in F. C. 19th January 1837, p. 336), "If we act as in the case of Inverury I can find no ground for doubt. The principle is there laid down clearly and distinctly that indirect interest of this description will not be tolerated by this Court."

In the case of *Lauder (Burgesses of Lauder v. Magistrates*, 17th May 1821), in 1821, (*ante* p. 858), the question was raised in an action of declarator as to the right of the burgesses in certain property. The pursuers were burgesses; the claim was not only for themselves but for other burgesses; and it was held that although each burgess might sue for his own individual interest, yet as the action at the instance of the burgesses was raised by them as a body, it must be dismissed, as they were not a corporation, and the action was the more irregular as it concluded for decree of declarator in favour of all the burgesses, while they were [866] not all pursuers. The Lord Justice Clerk, alluding to this case, says (Rep. in F. C. *ut sup.*), "It is quite clear, when they say they sue not only for themselves but for others, as a sort of body, the law cannot sanction any such thing. That was decided in the case of *Lauder*." All these cases are subsequent to any which can be relied upon by the appellants.

In England, where parties are numerous, some are permitted to sue in behalf of themselves and others, but they must themselves have such an interest as entitles them to sustain the suit. In *Bromly v. Smith*, 1 Simons, page 8, the plaintiff had a personal interest in the land for the cultivation of which the rates had been raised. The judgment in the *Attorney General v. Heelis*, 2 S. and St., page 75, proceeded upon the same ground, and Sir John Leach, V. C., has aptly marked the distinction in that case.

If then by the general law of Scotland, and according to the practice of the Court of Session, the title under which the pursuers have instituted this suit is not such as will enable them to support it, certainly the provisions of the police act for Glasgow increase their difficulty; that act provides certain remedies which would not be necessary if it were competent for any rate-payer to maintain such an action as this now in question. By the 124th section any person aggrieved by any order or other proceeding of the commissioners is entitled to appeal to the first Circuit Court of Justiciary to be held at Glasgow; and by the 133d section no action is to be commenced against the commissioners for any thing [867] done in execution of the act after three months, and it is made competent to the town council, the merchants and trades houses of the city, to bring actions against the commissioners before the Court of Session or the Court of Exchequer, for misapplying the funds, at any time within twelve months. I quite agree with the Lord Ordinary that these provisions cannot take away any jurisdiction which the Court of Session might have, but if there be serious doubt as to such jurisdiction, these legislative provisions for particular remedies are not to be rejected in the consideration of the question of jurisdiction.

My Lords, it appears to me, for these reasons, that the interlocutor appealed from is correct, and I therefore move your Lordships to dismiss the appeal, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the

Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL—DEANS and DUNLOP, Solicitors.

[868] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

ALEXANDER MORRISON and Others, *Appellants*.\*—Knight Bruce—H. J. Robertson; GLASGOW COMMISSIONERS OF POLICE, *Respondents*.—Sir William Follett—A. McNeill [16th August 1839].

*Title to pursue—Statute 1821 (Glasgow Police)*.—1. Held, as in preceding case of *Ewing v. Inglis* (affirming the judgment of the Court of Session) that rate-payers, as such, had no title to pursue commissioners of police, on behalf of themselves and others, for misapplication of funds.

2. Parties (being also commissioners of police) having sued as rate-payers, in a complaint against the general body of commissioners, in which character the Lord Ordinary decerned against them, and having in that character reclaimed to the Court, and the Court (adhering to the interlocutor) having found that they could not so sue,—Held (affirming as aforesaid) that it was not competent to ask the judgment of the Court, on the ground that, as a minority of the commissioners of police complaining of the acts of the majority, they had a sufficient title notwithstanding.

Mr. Morrison and other rate-payers, some of them being also commissioners of police, brought a suspension of a resolution of the board of commissioners to [869] pay the expenses of successfully opposing a water bill in parliament, similar to that in the preceding case. The Lord Ordinary, following the judgment of the Court in *Ewing v. Inglis*, repelled the reasons of suspension. The suspenders reclaimed. At the advising in the Inner House, their counsel directed the attention of the Court to the circumstance that some of their number were designated in the suspension as commissioners of police. In that character, therefore, they now insisted that they were entitled to sue as a minority complaining of the acts of the majority.

The Court disregarded the attempt to alter the title to insist at that stage of the process, and repeated their judgment as in *Ewing v. Inglis*.

Morrison and others appealed, and founded on the case of *Aitchison v. Magistrates of Dunbar*, 4th February 1836 (14 D., B., and M., 421); while the respondents maintained that the instance being radically defective, could not be cured *medio processu*.

Lord Chancellor.—My Lords, the decision in this case must necessarily follow that of *Ewing v. Inglis*. An attempt was indeed made to distinguish this case from that. It was stated that some of the pursuers are commissioners of police; and it was therefore contended, upon the authority of *Aitchison v. the Magistrates and Town Council of Dunbar*, (upon which I have before observed), and the case of *Goddard v. the Leith Dock Commissioners*, in 5 Shaw and Dunlop, 355, that they were entitled to take advantage of their title as such. [870] It is, I think, quite unnecessary to consider those cases, or how far the present case falls within them; because, although it is true that some of the pursuers are described in the summons as general commissioners of police for the city of Glasgow, it is quite clear, after looking through the summons and the other proceedings, that the title to pursue is not founded upon the possession by those pursuers of that character, but is founded exclusively upon their liability, together with the other pursuers, to police assessments. This case, therefore, is precisely the same as that of *Ewing v. Inglis*; and I, therefore, move your Lordships to pronounce the same judgment, dismissing the appeal, with costs.

\* D., B., and M., 1128; Fac. Coll., 13th June 1837.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered: That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

ARCHIBALD GRAHAME—DEANS and DUNLOP, Solicitors.

• [371] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

GABRIEL HAMILTON LANG of Overton, Writer in Glasgow, *Appellant*.\*—Lord Advocate (Rutherford)—James Anderson; ALEXANDER LANG, residing in Glasgow, *Respondent*.—A. McNeill—MacDowall [16th August 1839].

[Discussed in *Lumsden v. Lumsden*, 1843, 2 Bell, App. 120; *Adam v. Farquharson*, 1844; 3 Bell's App. 303, 313; *Carrick v. Buchanan*, 1844, 3 ib. 432; *Ogilvie v. Airlie (Earl of)*, 1852, 15 Dunlop, 252; 2 Macq. 266, 269; *Gilmour v. Gordon*, 1853, 15 Dunlop, 589; and cf. *Udny v. Udny*, 1858, 20 Dunlop, 798, 799; *Glassford's Trustee v. Glassford*, 1864, 2 Macph. 1321, 1331; *Drummond v. Hay*, 1872, 10 Macph. 453, 455, 457.]

*Entail—Prohibitory Clause*.—The prohibitory clause in a deed of entail provided "that it shall at no rate be allowable to the said (institute) 'nor any of the substitutes above named,' to sell off or dispose upon, any part of the lands and subjects before transmitted, nor to contract debt, or do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded."—Held (reversing the judgment of the Court of Session) that there was no sufficient prohibition against altering the order of succession.

*Irritant Clause*.—A deed of entail contained prohibitions to sell, contract debt, etc.; the irritant clause voided "all such debts and deeds."—Held (reversing the judgment of the Court of Session) that there was no effectual irritancy against sale.

Question, Whether a party who takes under an entail as heir male of the body of the institute is affected by prohibitions directed against "the substitutes above named"?

The late Gabriel Lang of Overton on 25th September 1766 executed a deed of entail of his estate in favour [372] of his only son Gabriel Lang (grandfather of the appellant), and various substitutes. The deed of entail provided and declared, *inter alia*, "That it shall at no rate be allowable to the said Gabriel Lang, my son, nor any of the substitutes above named (see *post*, p. 883) called to the succession of the lands and others before conveyed, to sell off or dispose upon any part of the lands and subjects before transmitted, nor to contradict debt, or do any other deed, whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded. And if they do in the contrary, it is declared, in the first place, that all such debts and deeds shall be intrinsically void and null, and of no force, strength, or effect; and, in the next place, that the contravener, and descendants of his or her body, shall *ipso facto* forfeit the benefit," etc.

The appellant, the eldest son of Alexander Lang (entailer's grandson), the party last in possession of the estate, having served nearest and lawful heir in general to him, raised an action of declarator (23d May 1836, in which he called as parties his brother and the other then existing substitutes,) to have it found and declared by

\* 1 D., B., and M., new series, p. 98; Fac. Coll. 23d November 1838.

decree of Court, that notwithstanding the entail he had right and power to make up titles in fee simple or otherwise, to alter the succession under the entail, and to sell the estate and dispose of the price at his pleasure. The record being closed, upon condescendence and answers, the Lord Ordinary pronounced the following interlocutor:—"27th June 1837. The Lord Ordinary having heard the counsel for the parties on the [873] closed record and whole process, repels the defences, and declares and decerns in terms of the conclusions of the libel: Finds no expenses due." \*

\* "*Note.*—The opinion of the Lord Ordinary is with the pursuer, both as to the want of a sufficient prohibition against altering the order of succession, and the defect of the irritant clause, as not properly applied to the prohibition against sale. He has a firmer reliance, however, upon the second than the first of those grounds of decision.

"The prohibitory clause, where it is thought to be deficient, is very much in the style of the statute of entails, in so far as it runs the prohibition against contracting debts, or exposing the estate to forfeiture or eviction, into that which is supposed to be directed against altering the order of succession, with very little attempt at separation; and it is almost identical in its phraseology with that in the entail of Lochbuy (23d June 1807,) which was found to be in all respects effectual. In these circumstances, it is impossible not to see difficulties in this part of the case. But on the whole matter, the Lord Ordinary is of opinion, that there is still ground enough for holding, that the prohibition is in this case insufficient to prevent altering the order of succession.

"The argument from the example of the statute, in consolidating or running into each other the different clauses, which it is admitted must all substantially exist in a perfect entail, is not thought to be entitled to much weight. The statute by no means professes to give a formula for the construction of such clauses; and it has been definitely settled, by a series of concurrent decisions, for more than a century, that there must be a distinct and independent clause for each of the essential prohibitions; and that the defect of separate expression cannot be supplied either by an extensive construction of words, plainly referable to one such prohibition only, or by inference, however probable, as to the intention of the entailer. The series of exact precedents upon this point begins with the case of Campbell and Wightman, 17th June 1746 (Mor. 15505), and ends prior to the case of Lochbuy with that of Hooime of Argaty, 8th July 1789 (Mor. 15535).

"The case of Lochbuy no doubt then appears as an exception; and if it had appeared to have been fully considered, and had not been discredited by subsequent decisions, might be thought to have established a precedent, by which such a case as the present must necessarily have been ruled. To the Lord Ordinary, however, it does appear both to have been pronounced in circumstances which detract somewhat from its original authority; and to have in point of fact been so largely discredited by more recent decisions, as to be no longer to be relied on. In the first place, it was adjudged at the same time with the case of Roxburghe, and without any separate argument from the bar drawing the attention of the Court to the manifest distinction of the two cases—but apparently on the supposition that both depended on the same principle. Now the Lord Ordinary thinks the case of Roxburghe (which was affirmed on appeal) in all respects an unimpeachable judgment, while he is humbly of opinion, that the main ground on which it rested was entirely wanting in that of Lochbuy; and accordingly, he apprehends that, in all the subsequent decisions, this ground has been so distinctly recognized, that a rule may almost be said to be at last established to which this case of Lochbuy can in no way be reconciled. He refers especially to the cases of Brown (Eastfield), 25th May 1808—of Henderson, 21st November 1815, and of Grant, 9th March 1826, (with the unreported cases therein cited,) in all which the entail was found to be defective, as well as to that of Lord Buchan, 9th February 1837, where it was held to be sufficient, and that of Speid, 21st February 1837, where the whole law on the subject was very fully considered, and the issue (though turning on a point different from what occurs here) was against the validity of the deed.

"Now the rule which the Lord Ordinary humbly thinks is to be extracted from all these recent cases, as well as from the whole series prior to that of Lochbuy, is this,—that wherever the prohibition against altering the order of succession is only

[874] The defender having reclaimed, the Court, after ordering printed cases, pronounced this judgment:—[875] “The Lords having heard counsel for the parties, and advised the cases, alter the interlocutor of the Lord [876] Ordinary submitted to review, sustain the defences, assoilzie the defender, and decern.”

The pursuer appealed.

to be inferred from the circumstance of the description of acts primarily prohibited, as leading to adjudication, apprising, forfeiture, and eviction, being terminated by representing them as also calculated to prejudice, disappoint, defeat, or evade the succession of the several substitutes, or the tailzie generally; in all such cases, the prohibition will be insufficient to prevent a direct alteration of the order of succession,—the true meaning of all such clauses, and of the words with which they conclude, being merely to prohibit acts, whose primary effect and character it is, that they afford ground for adjudication or forfeiture,—and where it is only in consequence of this, that they are described as leading also to the disappointment of the order of succession, the just and real construction being, that no acts are truly prohibited by such clauses, except such as would warrant adjudication or forfeiture, and thereby defeat the rights of the succeeding substitutes. On the other hand, there will be an effectual prohibition against altering the order of succession, though these words are not expressly mentioned, and though the words held to be equivalent are introduced in sequence and connexion with another prohibition, provided the description of the acts previously prohibited is complete, before the words, relied on for this last purpose, are introduced, and especially provided those last words are exclusively applied to another class of acts, deeds, or things, from those primarily characterized as leading to adjudication, eviction, or forfeiture.

“This distinction, it is humbly conceived, will be found to run through the whole series of cases from 1746 to 1837, without a single exception, but that of Lochbuiy alone. In every one of them where the prohibition against altering the succession was found ineffectual, the words touching the prejudice or disappointment of the substitutes formed parts only of the description of one and the same class of acts or deeds, which had been previously characterized as leading to adjudication or forfeiture, and was a mere continuation of that description; while in all these cases (except Lochbuiy,) where the prohibition was found effectual, the words touching the disappointment, etc. of the succession, are distinctly applied to a separate class of acts and deeds, which are nowhere described as leading to adjudication or forfeiture, and of which the only description in the entail is, that they may interfere with, prejudice, or frustrate, the succession of the substitutes. When the prohibitions, therefore, are separately applied to such acts and deeds, it would seem impossible to doubt, that alteration of the order of succession is as effectually prohibited, as if this had been said in express words, since there is no other quality or consequence ascribed to the acts in question, on account of which they could be included in the prohibitions.

“Nothing can illustrate this better than a comparison of the clauses in the case of Roxburghe, with those which occur in the subsequent decisions already referred to, where an opposite judgment was given as to the validity of the prohibition. In the Roxburghe entail there is first, an express prohibition, ‘to contract debt, or to do any deeds, whereby the said estate, or any parts thereof, may be apprized, adjudged, or evicted;’—thus satisfying and concluding the description of that class of deeds; and then there immediately follows ‘nor yet do any other thing in hurt or prejudice of the foresaid tailzie and succession in haill or in part.’ Now upon the principle already stated, it was rightly adjudged that there was here a sufficient prohibition against altering the order of succession. Since, after exhausting the acts and deeds that might lead to apprising or eviction, the prohibitions are distinctly extended to a class of ‘other things,’ which are no otherways described than as being ‘in hurt and prejudice of the foresaid tailzie and order of succession.’ The only subsequent case in which a similar judgment was given is believed to be that of Lord Buchan, 9th February 1837, and it was precisely of the same description. There was there a clear prohibition of ‘contracting debt whereby the lands might be apprized or adjudged,’—and then against ‘doing any other fact or deed in prejudice of the said tailzie, and of the persons above-named or their foresaids.’ In short, after prohibiting acts leading to adjudication or apprising, there is here also a distinct prohibition

[877] *Appellant*.—The entail of Overton contains no effectual prohibition against altering the order of succession. [878] Prohibition to alter the order of succession was not the primary object of the clause. Its primary object was to prohibit acts whereby the estate might be evicted by adjudication or otherways; disappointment of the hopes of succession was merely introduced as the consequence of such eviction.

against other acts, not leading of course to any such result, but only described as being in prejudice of the tailzie, and the substitutes called to the succession.

“ Contrast now with these the series of cases in which it has since been found that there was no effectual prohibition, and see whether it be possible to account for the difference, except upon the plain and reasonable distinction which has now been indicated. There is, first, the Eastfield case, 25th May 1808, within a year after that of Roxburghe. The prohibition there was merely ‘not to contract debt, or to do any other deed whereby the lands may be appriised, adjudged, or in any way evicted in prejudice of this present tailzie, or those who in virtue thereof are to succeed;’ thus specifying only one class of deeds, the first and leading character of which is to bring an adjudication or eviction, and as a consequence of which alone these deeds are farther described as likely to prejudice the tailzie and the rights of the substitutes. The case of Henderson, 21st November 1815, is exactly of the same description. There the prohibition is against ‘contracting debts, or doing any fact or deed, civil or criminal, whereby the said lands may be anyways adjudged, evicted, or forfeited, or may be any way affected in prejudice and defraud of the subsequent heirs of tailzie successively, conform to the order and substitution above specified;’ there being here again but one class of acts prohibited, viz., acts inferring adjudication, eviction, or forfeiture, and consequently calculated to prejudice and defraud the substitutes appointed to succeed in their order; but no mention of any other class (as in Roxburghe and Buchan) inferring no forfeiture or adjudication, but merely prejudicial to the rights of the substitutes. The case of Grant and Tytler, 9th March 1826, (F.C.) was a clearer case perhaps than any of the others, but it rested on the same principle, the only prohibition alleged to strike at deeds of alteration being against any ‘deed or act, civil or criminal, which might be the ground of adjudication, eviction, or forfeiture of the said lands, or which might any ways affect or burden the same.’ But the case of Dickson (Blairhall) 6th July 1816, recited in this of Tytler, and not elsewhere reported, is perhaps the strongest of all against the sufficiency of the alleged prohibition, either in the present case or that of Lochbuy. After a very express prohibition against contracting debt, it is added: ‘nor shall they do or suffer any other thing whereby the said lands may be anyways affected or adjudged, or the heirs of tailzie deprived of the same or interrupted in the enjoyment thereof.’ And after a special prohibition against treason: ‘nor do any other fact or criminal deed or action whatever, whereby the lands may be evicted, forfeited, or escheat, or the heirs of entail in the order foresaid disappointed of their right of succession thereto.’ Yet the Court found there was here no valid prohibition against altering the order of succession, the reference to such an effect being held to have been introduced merely as a consequence of the adjudication or forfeiture primarily attaching to the only acts truly meant to be prohibited.

“ If there be any weight however in these authorities, and in all the earlier series, it does seem altogether impossible to justify the decision in the case of Lochbuy, which it has been seen was adjudicated without special argument, under the very unaccountable assumption that it was not to be distinguished on the merits from that of Roxburghe. In Lochbuy the prohibition was almost in the words of the present case; ‘to contract debts, or do any other deed whereby the lands might be adjudged or evicted from the succeeding members, or their hopes of succession thereto in any way evaded.’ Now there is here, as in all the other cases, but one class of acts prohibited, the primary characteristic of which is that they might induce adjudication and eviction of the lands to the disappointment of the succession of the succeeding substitutes, the structure of the clause being totally different from that of Roxburghe or Strathbrock, and identical in this respect with the cases first cited, though far less favourable for the prohibition than that of Brown, Henderson, or Dickson, inasmuch as the words used in these cases as to the prohibited acts being to the prejudice and defraud of the substitutes, or their being disappointed thereby of their right

The only acts struck at are those by which the succession may be defeated or frustrated through the eviction of the estate. Deeds altering the order of succession are deeds executed expressly with that intent, deeds directly defeating the destination; the deeds prohibited in the present entail are not such, they are merely those whereby the rights of the substitute heirs may be partially or wholly disappointed, according as they may or may not be subsequently acted on. They are deeds which do not in themselves alter or defeat the succession, but which may give rise to other deeds having the effect of attaching the estate, and so indirectly depriving the subsequent heirs of their hopes of succeeding, *i.e.* evading their succession to the extent or measure to which the said attachments may [879] operate, not necessarily defeating or frustrating entirely their right of succession. The practical result of the cases which have hitherto occurred on this point, with the exception of the case of Lochbuy, which, as is justly observed by the Lord Ordinary, though not actually reversed has been substantially overruled, is clearly that which is set forth in his Lordship's note (*Campbell v. Wightman*, 17th June 1746, Mor. 15505; *Sinclair v. Sinclair* (Carlowrie), 8th November 1749, Mor. 15382; *Nisbet v. Young*, November 1763, Mor. 15516; *Stewart v. Hooime* (Argaty), 8th July 1789, Mor. 15535; *Brown v. Countess of Dalhousie* (Eastfield), 25th May 1808; *Henderson v. Henderson* (Earlshall), 21st November 1815, Fac. Coll.; *Dickson* (Blairhall), 6th July 1816; *Grant v. Tytler* (Burdyards), 9th March 1826, Fac. Coll.; *Rowe v. Monypenny* (Strathbrock), 9th

of succession, are far better fitted to describe a direct alteration of the order of succession than those which occur here or in Lochbuy, which are merely against acts by which their hopes of succession might be 'in some measure evaded,' an expression which is obviously much more appropriate to some partial and indirect injury, by contraction of debts or other burdens of that kind, than to a total and direct frustration of their rights by a deed of alteration. The Lord Ordinary cannot persuade himself therefore that this case of Lochbuy is now of binding authority, and being the only precedent to which the defenders can refer in support of this part of their argument, he has not hesitated to reject that argument.

"2. The defect in the irritant clause is conceived to be still plainer, or, at least, the difficulty is not increased by an apparent conflict of authority. If the rule laid down in the case of Dick (14th January 1812), that where a word of flexible signification is used in a fixed and limited sense in one part of a deed of entail, it shall be held to have that and no more extensive sense when it occurs in any subsequent and relative part of the same deed, was a sound and correct rule; and if it be still the law of Scotland, as was found in the late case of Speid, (21st February 1837) that clauses importing fetters are to receive the narrowest and most rigorous construction, (and the Lord Ordinary fully adopts both maxims) it does not appear doubtful that the irritant clause in this case is not properly applied to the prohibition against sale. The leading prohibition is expressly against selling or disposing; and then this is followed up by a continuous prohibition (as already noticed) against contracting debt or doing any deed by which the lands might be adjudged or the succession of the substitutes evaded. The irritant clause follows immediately after, and in reference and connection with these prohibitions, declares merely, that if any of the heirs 'do in the contrary, all such debts and deeds shall be null and void;' and the question is whether this must not be limited to the debts and deeds specifically mentioned in the close of the prohibitory clause? or may be extended by a large construction of the word 'deeds' to the preceding prohibition against sales and dispositions also? If the matters were otherwise doubtful, the Lord Ordinary would hold himself bound by the case of Barclay and Adam, decided in this Court 8th February 1821, and affirmed on appeal 18th May of the same year. It is only reported in Shaw's Appeal Cases, (vol. i. p. 25) but appears to have been almost identical with the present. There was a distinct prohibition there against sale, and also against contracting debt, altering the order of succession, or doing any deed whereby the lands might be evicted, etc. But the irritant clause provided only that 'all such debts, deeds, and contractions should be null,' and it was held clear that this did not apply to a sale. Debts and contractions being plainly synonymous, the only irritancy truly expressed in that case was merely of debts and deeds, which are the very words which occur here, and the Lord Ordinary can make no distinction."

February 1837, (see *post*, p. 898); *Brown v. Macgregor*, 2d March 1837; *Little Gilmour v. Caddell*, 5th July 1838; *Braimer v. Bethune*, 18th January 1839; all as in Fac. Coll. under respective dates).

The prohibition against selling is not effectually fenced by the irritant and resolute clauses. These clauses are framed on the principle of enumeration of the acts prohibited. They enumerate the debts and deeds specially mentioned in the prohibitory clause, but they do not enumerate sales or alienations. Hence the prohibition against sales and alienations is not properly fenced. But, on whatever principle these clauses are framed, they are susceptible of a construction either exclusive or inclusive of sales and alienations. They must therefore be construed as exclusive of sales and alienations, which is the construction in favour of freedom from fetters (*Dick v. Drysdale*, 14th January 1812, Fac. Coll.; *Barclay v. Adam* (Blairadam) (18th May 1821, 1 Shaw's Appeal Cases, 24; *Speid v. Speid* (Ardovie), 21st February 1837, 15 Shaw and Dunlop, 618; *Rennie v. Horne*, 13th March 1838, 3 Shaw and Maclean's Appeal Cases, p. 142).

*Respondent*.—The prohibitory clause is conceived in such terms as sufficiently to prevent alteration of the [880] order of succession. It is important to observe that the words used are in substance the same as those in the statute 1685, c. 22. The estate may be affected so as to alter the succession in other ways besides selling and contracting debts; and yet these other modes are not required by the statute to be expressly described in order to be effectually prevented. It is sufficient that the deed have the effect of frustrating or altering the succession. This is clearly all that was meant or intended by the framers of the statute.

But then it may be said the statute did not profess to deal with entails in questions *inter hæredes*,—alteration of the succession operates only *inter hæredes*,—therefore some expression should have been used to indicate the entailor's intention to prohibit an alteration of the succession, as distinguished from acts creating a defeazance of the entail, in consequence of rights acquired by third parties. If that be so, then it is important to observe that the words used in this entail are not precisely similar to those in the statute. The framer of the deed would clearly have adopted them, had it not been the intention of the entailor to provide against an alteration of the succession otherways than by the intervention of third parties. A donee in tail may alter the order of succession, and yet not do a deed whereby the succession under the entail is frustrated and interrupted, *i.e.* actually put an end to; but he cannot alter the order of succession without, in some measure, evading the hopes of succession of the heirs of entail. But again, in this view of the statute, the whole doctrine of strictness of interpretation is inapplicable. It is to those clauses which prevent heirs of entail from dealing with third parties in reference to the estate,—to those clauses [881] which deprive heirs of entail of the ordinary rights of ownership, that this doctrine is alone applicable; these, and these only, require the statutory formality of being fenced with irritant and resolute clauses, which clauses create what are called the fetters of an entail. Other provisions are mere conditions of descent, affecting only the heirs who take under and are bound by them, but not their creditors or those who may deal with them, and hence they ought to receive effect *inter hæredes*, according to the intention of the entailor (Erskine, b. 3, t. 8, s. 23). Even if the words used may be made as well to comprehend acts which require to be restrained by fetters as an ordinary condition of descent, it is not the less clear that the testator has expressed his intention to impose a simple condition of descent. That expressed intention cannot be legally counteracted, although the words may be susceptible of another meaning, unless it can clearly be shewn that the testator limited his intention to that other meaning. Limitations *inter hæredes*, as distinguished from statutory fetters, must be construed *ut res majus valeat quam pereat*. It would be utterly inconsistent with this rule to say, that the expressed intention of an entailor to create a limitation not subject to strict interpretation is to be disregarded, merely because one consequence of the breach of a statutory fetter would be to defeat that limitation.

The present case is identical with that of Lochbuy (*MacLaine v. MacLaine*, 23d June 1807, Fac. Coll.) decided upwards of thirty years ago, and acknowledged as authority since its date. They both fall under that class of cases of which the case of Roxburghe (*Kerr v. Innes*, 23d June 1807, Fac. Coll.; affirmed, 8th June 1811, Lords Journals,



vol. 48, p. 376) is the [882] leading one. In the cases of Roxburghe and Lochbuy, as in the present case, the parties are prohibited from doing some other act in prejudice of the succession, besides the acts previously prohibited, whereas in the other class of cases, viz. those of Argaty and others, (referred to in the appellant's argument,) there is no separate announcement of any other act, but the prejudice to the succession is stated exclusively as the result of the acts previously prohibited. If the cases are examined with a view to this observation, the distinction will be at once apparent.

The deed of entail contains an irritant clause, applicable as well to sales as to debts, etc. The statute has fixed the meaning of the word "deeds" to comprehend every one of the acts which it requires irritant clauses to prevent. The mere mention of the word "debts" will not alter the meaning so fixed. If the words used had been, "all debts and such like deeds, or deeds of a similar character," then it might have been plausibly contended, that the entailer had himself created a limitation upon the word "deeds"; but the words used are "such debts and deeds," that is, such debts and such deeds as have been previously prohibited, thereby including every deed to prevent which the irritant clause was necessary. It may be conceded that a court is entitled to give an interpretation in favour of freedom, where the expressions used will admit of that interpretation as well as of an interpretation against freedom; but here an interpretation in favour of freedom can only be given by forcing the construction, or rather by transposing the sentence, that is to say, by transferring the word "such" from its actual position in the sentence to a different position, by placing it, not as it was placed [883] by the entailer in connexion with the word "debts," but by removing it from that place, and placing it in connexion with the subsequent word "deeds."

In the case of Blairadam (*ante*, 879,) an enumeration was clearly intended, and therefore it was justly held that there had been an omission, but here there was clearly no such intention; neither has the testator in this case, as in the case of Dick, (*ante*, 879,) fixed a specific meaning upon the word "deeds" in the prohibitory clause, so as to render it necessary that it should be received in the same meaning in the irritant clause.

Lord Chancellor.—My Lords, in this case of *Lang v. Lang* the prayer of the summons was, that it might be declared "that the pursuer has full and undoubted right and power to make up and complete, in his person, valid titles to the said lands and others, in fee simple or otherwise, and to alter the order of succession." The question arose on a settlement, which contained the provisions I will state to your Lordships, after settling the estate on a certain succession of parties. Though there is a question raised as to how far the party is within the description, in the view I take of the case, I do not feel it necessary to call your Lordships' attention to that question, because it formed no part of the decision below.\* There are other grounds on which I think the case can be safely disposed of. The prohibitory clause is in these words: "Providing also, as I hereby expressly provide and declare, that it shall at [884] no rate be allowable to the said Gabriel Lang my son, nor any of the substitutes above named, called to the succession of the lands and others before conveyed, to sell off or dispoise upon any part of the lands and subjects before transmitted, nor to contract debt, or do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded; and if they do in the contrary, it is declared, in the first place, that all such debts and deeds shall be intrinsically void and null, and of no force, strength, or effect," etc.

My Lords, in the course of the discussion of this case, as to how far these clauses raised an effectual prohibition against altering the course of succession, the terms of the statute were very much referred to. It does not appear to me that any great assistance can be derived from reference to the terms of the statute, for that merely describes the general rule,—(it does not affect to describe the form in which the thing

\* It was contended, that as the prohibitions were directed against "the substitutes above named" (*ante*, p. 872,) they did not extend to the appellant, who took as heir male of the body of the institute.

is to be done,)—that in settlements to be made in pursuance of that statute there shall be clauses irritant and resolute, which shall have the effect, among other things, of preventing any acts being done whereby the succession shall be altered, leaving the question entirely open, as to how that shall be carried out. Consequently the question, as to what clauses shall have the effect to prevent any thing being done which may alter the purposes of the settlement, is to be arrived at from a consideration of the decisions, rather than from the terms of the statute. The question really is, how far this case falls within the acknowledged rule, which, in fact, does not [885] appear to be disputed, viz. that there must be a distinct prohibition as to the particular matter which is brought under consideration, and that the prohibition of any particular act is not to be inferred from expressions supposed to include it, or as the consequences of some other prohibition.

This being the rule, it appears to me to be quite clear that the cases of Roxburghe and Lochbuy are distinguishable. In the case of *Sinclair v. Sinclair*, (*ante*, p. 879,) which was so early as 1749 (8th Nov.), a prohibition against altering the order of succession, granting wadsets, or the doing any other fact or deed that might anywise affect, burden, or evict the lands, or whereby the right and benefit of succession by virtue of the tailzie might be prejudged any manner of way, or whereby the lands might be evicted, adjudged, apprized, etc., was held not to include a prohibition against selling, although the consequences of selling would clearly fall within the mischief intended to be guarded against, and although there were expressions which, separated from the other parts of the sentence, would have described it. The cases of *Campbell v. Wightman*, in 1746 (17th June) (*ante*, p. 879,) and *Nisbet v. Young*, in 1763 (Nov.) (*ante*, p. 879,) proceeded upon the same principle. In the *Argaty* case (*Stewart v. Hooime*, in 1789 (8th July), *ante*, p. 879,) the expressions were less comprehensive than in some of the subsequent cases. I therefore pass over that case, and shall afterwards observe upon the cases of Lochbuy and Roxburghe.

[886] I now proceed to the Eastfield case (*Brown v. Countess of Dalhousie*, 25th May 1808), in 1808, (*ante*, p. 879,) in which the prohibition was against contracting debt, or doing any deed whereby the said lands might be apprized, adjudged, or in any manner of way evicted, in prejudice of the tailzie, "or of those who by virtue thereof shall be then to succeed." This was held not to include a prohibition against altering the order of succession. The Earlsall case (*Henderson v. Henderson*, 21st November 1815), in 1815, (*ante*, p. 879,) is stronger. The prohibition was against selling, or contracting debts, or doing or committing any fact or deed, civil or criminal, whereby the said lands and estate or any part thereof might be in anywise adjudged, evicted, or forfeited anyways from them, or might be affected in prejudice and defraud of the subsequent heirs of tailzie and provision successively, conform to the order and substitution above specified." Now, altering the order of succession would be most accurately described as "a fact or deed whereby the estate would be affected in prejudice of the heirs of tailzie," but the prohibition was held not to include alteration of the succession, because these terms were so involved in the prohibition against contracting debts as to express rather a consequence of any such act, than a distinct prohibition against altering the succession. In *Brown v. M'Gregor* in 1837 (6th March), (*ante*, p. 879,) the same principles were acted upon by Lord Corehouse as Lord Ordinary. The terms used in *Little Gilmour v. Caddel* in 1838 (5th July), (*ante*, p. 879,) were not similar to those [887] used in the present case; but all the Judges of the Inner House recognized the principles upon which the preceding cases had been determined; and Lord Corehouse said, "I hold it to be a point as much settled as any point in the law of entail, that an entail must contain a substantive prohibition against alienation, a substantive prohibition against contracting debt, and a substantive prohibition against altering the order of succession. There is no set form of words in which these three prohibitions require to be expressed, nor is a separate and distinct clause of any given style necessary for each several prohibition, but the three substantive prohibitions must be all there, and all of them expressed."

The last case which has occurred is consistent with all those which I have before observed upon,—*Braimer v. Bethune* in 1839 (18th January), (*ante*, p. 879). The prohibition was, that it should not be lawful to alienate and contract debt, "nor to do or commit any fact or deed, civil or criminal, whereby the said lands and estate, or any part thereof, may be anywise adjudged or evicted from them, or forfeited, or may

be anyways affected in prejudice and defraud of the subsequent heirs of tailzie and provision successively, conform to the order and substitution above specified." Altering the order of succession was, no doubt, a fact or deed whereby the estate was affected to the prejudice of the heirs of tailzie; but it was held that such fact and deed was not prohibited. Here, then, is a succession of cases for above ninety years, in which the same principle has been acted upon; and how is the present case to be distinguished [888] from them? There is no substantive prohibition against altering the order of succession. There are, indeed, terms to be found in the prohibition against contracting debt, which, if used by themselves in a separate sentence, might have been sufficient to express such a prohibition; but which, when intermixed with other parts of a sentence addressed to a different purpose, are, according to all these cases, incapable of being selected and used for the purpose of expressing a new and distinct prohibition.

The present case appears to be clearly governed by the long train of decisions to which I have referred, and particularly the cases of *Earlshall*, and *Braimer v. Bethune*.

Against all these authorities one case only can be quoted (for the Roxburghe case (*Kerr v. Innes*, 23d June 1807; affirmed 8th June 1811) (*ante*, p. 881.) is clearly distinguishable,) and that it the Lochbuy case (*MacLaine v. MacLaine*, 23d June 1807), in 1807 (*ante*, p. 881). If that case had been now the subject of appeal, and no subsequent decisions had taken place impeaching it, I should not have hesitated between adhering to an intelligible rule which for nearly a century has regulated the law of property in Scotland upon this point, and a single decision contrary to all preceding decisions on the particular point, and inconsistent likewise with a rule established, not only by cases in Scotland, but by many decisions of this House, viz. that clauses imposing fetters are to be construed with strictness. But when we find that the Lochbuy case was decided in 1807, and that all the cases to which I have referred after that of *Argaty* have been subsequently decided, no weight can [889] be given to it as an authority; and one cannot but feel surprised that, after it had been so repeatedly overruled, it should have been made the ground of the decision in the case now under consideration. The case of Roxburghe, which is supposed to have governed that of Lochbuy, is clearly distinguishable from that case and from the present. The objection in this case is, that the expressions relied upon, as prohibiting alteration in the order of succession, are so involved in the prohibition against contracting debts, etc. that they cannot be separated,—that they express rather a consequence of one prohibited act than a distinct prohibition of another. That objection, however, has no place in the Roxburghe case, in which the prohibition against contracting debt, etc. is first completed and exhausted; and then a new sentence is added; viz. "nor zitt to do any other thing in hurt and prejudice of the aforesaid tailzie and succession in haill or in part." I do not therefore hesitate to say, that I entirely concur in the opinion of the Lord Ordinary upon this point.

Being of this opinion upon this point, it is not necessary to say much upon the other, viz. as to whether the irritant and resolutive clauses are so expressed as to apply to the prohibition against selling. The prohibition is against selling, or contracting debt, or doing any other deed, and the irritant clause is as to all such debts and deeds,—taking up the very words of the prohibition so far as regards contracting debts, but passing over the prohibition against selling. The cases of *Blairadam* (*Barclay v. Adam*, 18th May 1821), and of *Rennie v. Horne* (13th March 1838), (*ante*, p. 879,) in this House, appear to me to be conclusive.

[890] I abstain from expressing any opinion upon other points, the above being sufficient to enable your Lordships to dispose of this appeal. I therefore move your Lordships that the interlocutor appealed from be reversed.

Lord Brougham.—My Lords, I entirely agree with my noble and learned friend in the opinion he has expressed. I had no doubt during the whole progress of this case that the interlocutor of the Lord Ordinary (Lord Jeffrey) gives a correct view of the case, and the law relating to it; and that the reversal of that interlocutor by the Lords of the Inner House was wrong, and ought to be reversed. My Lords, if we go to the statute, and endeavour to shape our course by any opinion to be deduced from that statute, (namely, the act of 1685,) we shall find that we are wholly at sea, that we have no compass or guide, and that we must resort, as my noble and learned friend has justly observed, to the law as expounded by the decisions, the statute itself afford-

ing no decisive rule one way or the other in the great majority of the cases which occur. This has been so frequently before remarked, that I need not illustrate the proposition by any instances, further than to say, that if the law of entail were to be taken merely from the statute, I venture to say that half a dozen persons sitting down to write a digest of Scotch law drawn from the statute alone, without opening any book of decisions, would make, every one of them, a different code of the Scotch law of entail: that I will venture to say, at all events, is the probability of the case.

My Lords, looking then to the rule of law upon this subject, as it is to be gathered from the decisions, it appears to me to be clearly in favour of the interlocutor [891] of the Lord Ordinary; nothing can be more clear than that there must be a substantive prohibition against selling, against alienating or disposing, against contracting debt, and against altering the order of succession. The question is, have we here a substantive prohibition against that act being done? There must, besides, be an irritancy of the act if attempted to be done, and there must be a resolution of the right of the contravener who has done that act. All these things are absolutely necessary to make it a valid entail, and two of those things are here wanting. There is no absolute prohibition against altering the order of succession, and in my humble judgment there is no irritancy in respect of altering the order of succession if that shall be attempted. When I say there must be a substantive prohibition, and a substantive irritancy, and a substantive resolution, I mean of course this, that each must be self-subsisting,—standing and existing by itself; it must not be merely brought in by way of inference from some other provision directed against some other act. Thus, you cannot by a side wind, and in dealing with the consequences of what you are prohibiting, prohibit at the same time burdening with debt or altering the order of succession. If, for example, you only state burdening with debt or altering the order of succession, as consequent on the act of selling or disposing or alienating, when you are principally and substantively dealing therewith, that will have no effect against those acts; it is not enough to say, “he, my heir of entail, shall not sell, whereby the estate may be incumbered or evicted, or the future succession defeated.” That is not a substantive prohibition either against burdening or altering the order of suc[892]-cession, it is a substantive prohibition against selling; and the fact of altering the order of succession is only brought in consequentially, and under the cover of the other, as connected with and arising out of it. Such is now the clear rule as to prohibitions, and so it is with respect to an irritancy. There must be an irritancy, not only of the act of sale, but an irritancy of the disposition, whereby the order of succession laid down in the destination clause is varied, and the rights of some heirs of entail defeated, or, as we should say, some remainder-men disappointed in favour of others. The irritancy must be levelled at the act of altering the order of succession; it is not sufficient that it should be levelled at it as a consequence and implication from the act of sale; it must comprehend distinctly an act which shall touch or affect the order of succession.

Now, my Lords, have we here a prohibition and an irritancy self-subsisting, and not being a consequence arising out of some other prohibition and irritancy, or have we not? That is the whole question. On looking into the entail it is perfectly clear we have not. The expression used is, “that it shall at no rate be allowable, etc., to sell off or dispoise upon any part of the lands and subjects before transmitted, nor to contract debt, or do any other deed,” (now “contract debt” rides over the whole, then what follows) “whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded.”

But then it is said this sentence, no doubt, contains a prohibition to contract debt whereby the lands may be adjudged, and whereby the hopes of succession may be [893] evaded; but it contains, besides that, another substantive prohibition to do any other deed whereby the hopes of succession may be in any measure evaded, and this latter prohibition necessarily includes alteration of the succession. That I admit, is one mode of construing it; and if that were the only mode of construing it, it might be fairly contended that there is a prohibition against altering the order of succession, as well as against contracting debt.

But is there not another mode of construing it? most manifestly there is. Observe the words used:—“or contract debt, or do any other deed whereby”—that is, by which debt or by which deed eviction may take place, and an alteration of the order

of succession may take place. It is not then a substantive prohibition against altering the order of succession, it is a prohibition against contracting debt whereby that order of succession may be altered, as well as whereby the lands may be evicted. Now, my Lords, I take it to be clear that if there are two constructions open, one of which makes this clause against altering the succession a substantive, and the other only an auxiliary clause,—one of which makes it a complete and separate fetter, and the other makes it not a complete and separate fetter,—you are bound by the principles of the Scotch law of entail to prefer that construction which is in favour of the freedom of the heir. The rule of the Scotch law is, that heirs of entail in succession are fiars; that is the cardinal point; that is the very corner stone of the law of entail in Scotland. The heirs of entail in succession in Scotland are every one of them perfectly free, unless in so far as they are fettered, whereas with us the tenant in [894] tail is fettered except in so far as he is made free. If I make A. tenant for life, with remainder to B. and his first and other sons, that is a strict settlement in favour of A.; A. has only a life interest in the estate, unless I enable him to do certain things by adding a power. But in the Scotch law of entail the rule is, that each heir of entail takes a fee simple, unless in so far as he is fettered, and the proof that he is fettered is thrown upon those who would fetter him, consequently if there are two modes of construction of any given clause, (one of which leaves him free and the other fetters him,) the construction to be given to that clause is in favour of leaving him free, just as much as if there were only one construction, and that construction in his favour.

Then with respect to the second point, Lord Jeffrey says he thinks it clearer than the first. The second point is this: there is an irritancy, and it is a substantive and independent and effectual irritancy. The words used are, "That all such deeds and debts shall be intrinsically void and null, and of no force, strength, or effect." If it had been "all deeds," that would have included (as well as debts) deeds, aliening, disposing, and otherwise altering the order of succession. But what deeds are covered by it? "All such deeds and debts;" that is, the deeds and debts referred to in the last antecedent clause, the clause I have been dealing with, viz. "not to contract debt or do any other deed whereby the said lands and subjects may be adjudged," which as we all know by the law of Scotland means "prejudiced." Now my Lords, that being the case, I hold those words to mean deeds in the nature of incumbrances, and that they do not apply to sale, to [895] disposition, to alienation, and alteration of the order of succession. This is an irritancy simply levelled at the last antecedent.

My noble and learned friend has already dealt with the cases on the subject, which dispenses with my going through them, except as regards the case which stands next for your Lordships' decision; and as I am obliged to leave the House on other business at present, I shall merely state in passing how I think the two cases differ, because I should recommend to your Lordships, as I know my noble and learned friend is about to do, to reverse the interlocutor in this case of *Lang v. Lang*, but to affirm that in *Monypenny v. Campbell*, a case of great importance, but quite distinguishable from the present case. I mention *Monypenny v. Campbell* as a case prior, in point of decision, to this of *Lang v. Lang*. *Lang v. Lang* was in 1838. The Strathbrock case is in opposition to the Lochbuy case, which case is clearly the only one in accordance with the decision of the Court in *Lang v. Lang*, and against the decision of the Lord Ordinary. The decision in the case of Lochbuy is in the face of all the previous decisions, particularly the case of Strathbrock. It is most decidedly against that case, and I agree with my noble and learned friend in holding it not to be law. It is a painful thing to a court to be reduced to the necessity of saying that a case is not law which has never been reversed, and which has been so far acted upon that it has been adopted as a cardinal decision in this very case of *Lang v. Lang*; it is the only leg upon which that decision can stand. It is a very unpleasant thing to be reduced to the necessity of saying that a case which has been adduced in the Court below to support the present [896] decision is not law; but if your Lordships say that that is law you must say that the Strathbrock case is not law, as well as a crowd of cases. It may, in some instances, be difficult with opposing decisions to find our way, but we have no such difficulty here; for the question is,

whether one case is to be taken as law and a series of cases not law. I have no hesitation in saying I think the Court is wrong here, and that the Lochbuy case is not law.

I have only to add with respect to the Strathbrock case (that which stands next for judgment), that it is perfectly distinct from the present. If there had been only the words "to contract debt or do any other deed whereby the said lands and subjects may be adjudged," that would have been consequential. It would have been the Lochbuy case wrongly decided, and *Lang v. Lang* wrongly decided. But the words are perfectly different; they are "that they shall not contract debt for which the samen may be apprized and adjudged," and then comes a totally different clause, "or do any other fact or deed in prejudice of the said tailzie." If the words had been "to contract debt or do any other deed, whereby the said lands may be adjudged or evicted from the succeeding members of tailzie or the tailzie prejudiced," it would have been the same case as *Lang v. Lang*; it would have been the same case as Lochbuy; but it is totally different, the words "or do any other fact or deed" are in a postponed clause to the words "or to contract debt for which the samen may be apprized or adjudged." The prohibition of acts or deeds creating an alteration of the order of succession is distinguished and kept apart from the other, it is not dependent, ancillary, or consequential, but a distinct and substantial prohibition. It therefore is a perfectly different [897] case from *Lang v. Lang*, and affords no authority for it. It is a case, according to strict construction, in conformity with the Roxburghe case, the words in which are, "to contract debt or do any deeds whereby the said estate or any part thereof may be apprized, adjudged, or evicted, nor yet to do any other thing in hurt or prejudice of the aforesaid tailzie and succession, in hail or in part." The Roxburghe case sanctions and governs the Strathbrock case, and is the rule for deciding it. But, for the same reason, these cases do not interfere with *Lang v. Lang*, although they were decided, the one thirty years, and the other one year before *Lang v. Lang*. It follows, therefore, that the interlocutor in *Lang v. Lang* may be reversed, and that in the Strathbrock case consistently affirmed, the one being contrary to the current of all decisions, with the exception of the Lochbuy case, which we hold not to be law, and the other being according to the current of all the decisions, but particularly the decision in the Roxburghe case.

For these reasons, my Lords, I entirely agree with my noble and learned friend in the motion he has made to reverse the judgment of the Court below in the present case, as I shall equally concur in his intended motion to affirm the judgment in the case of *Monypenny v. Campbell*.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed.

ARCHIBALD GRAHAM—DEANS and DUNLOP, Solicitors.

#### [898] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

ALEXANDER MONYPENNY, W. S., Trustee under the Settlements of the late David Steuart Erskine, Earl of Buchan, *Appellant*.—Pemberton—Cowan;  
WILLIAM CAMPBELL, of No. 9, Great St. Helens, London, Son of John Campbell, deceased, and his Administrator, and DONALD HORNE and JAMES ROSE, W. S., Mandatories of said William Campbell, *Respondents*.  
—Lord Advocate (Rutherford)—Knight Bruce—MacDowall [16th August 1839].

*Entail (Prohibitory Clause)*—The following words, in the prohibitory clause of a deed of entail, were inserted immediately subsequent to prohibitions against selling and contracting debt, etc., viz. "or to do any other fact or deed in prejudice of the said tailzie, and of the persons above named, and their fore-saids." Held (affirming the judgment of the Court of Session,) that they were sufficient to prevent an alteration of the succession.

Question—Whether it is necessary to fence with irritant and resolute clauses a prohibitory clause against altering the order of succession? (See p. 909.)

The late Earl of Buchan was infeft in the estate of Strathbrock under a deed of entail, dated 4th November 1664. The deed of entail contains, *inter alia*, [899] the following clauses:—"It shall noways be leisome nor lawful to any of the heirs of taillie and provision above specified to sell, dispoone, and wadsett the lands, baronie, and others above written, or any part thereof, or any annual rents or yearly duties to be uplifted furth of the samen, or to set tacks thereof for longer space than their own lifetime, or to contract debt for which the samen may be apprised or adjudged, or to do any other fact or deed in prejudice of the said taillie, and of the persons above named, and their foresaids; and if any heir of taillie and provision above specified shall in any time coming failzie herein, or do any thing contrair to this my destination and appointment, then and in that case the person or persons sua failzieing and doing in the contrair hereof, and the heirs of their bodies, shall amit and lose their right and haill benefit to this present bond of provision and infeftment following hereon, and of the haill lands, baronie, and others above written, and the samen shall in all time thereafter pertain, belong, and accress to the next person for the time who, by and in virtue of the said tailzie and provision, would have succeeded to the said lands and estate, failing the said persons, contraveners, and the heirs of their bodies, and all dispositions and deeds whatsoever made or done contrair to the said provision and destination, with all that shall follow thereon, shall be *ipso facto* void and null, without any declarator, and shall noways affect nor burden the said lands, baronie, and others above written, or any part thereof, as if the same had never been done, with and upon the whilk reservations, reversions, provisions, and conditions respectively above men-[900]-tioned, I have made and granted thir presents and no otherways."

On 12th June 1822 the late Earl of Buchan executed a trust conveyance, *inter alia*, of said estate, in favour of the appellant, with a view to exclude his Lordship's nephew, the present Earl, from the rights accruing to him as next heir of entail. The respondents, creditors of the present Earl, having regularly adjudged his Lordship's power and faculty, brought an action, founded on their adjudication, of reduction, *inter alia*, of said trust deed, as being *ultra vires* of the granter, in which they called the present Earl and the appellant as defenders. The present Earl of Buchan did not appear as a defender in the Court of Session. The record being closed upon summons and defences, the Lord Ordinary, on 11th July 1837, pronounced the following interlocutor:—"The Lord Ordinary having considered the record, and heard counsel thereon, Imo, In respect of the decision of the Court on 9th February 1837, in an action at the instance of Mrs. Susan Rowe against the same defender,\* and in reference to the original tailzie of the estates now libelled on, finds that the said tailzie contains an effectual prohibition against frustrating the order of succession which the late Earl of Buchan could not gratuitously contravene. 2do, Finds that the disposition executed by the late David Earl of Buchan, on 20th January 1819,† and [901] also the trust disposition executed by the said Earl in favour of the defender, Mr. Alexander Monypenny and others, dated 12th June 1822, are contrary both to the prohibitory and irritant clauses of the original tailzie of Strathbrock, libelled on, and that the charters and sasines following on these deeds, or either of them, cannot have more force or effect than their warrants. Therefore reduces, decerns and declares in terms of the libel: Finds the defender qua trustee liable in expenses, and remits the account thereof, when lodged, to the auditor to tax and report. Six words delete before signing."

The appellant reclaimed to the First Division of the Court, when the following judgment was pronounced (22d Dec. 1837):—"The Lords having considered this note, and heard counsel, adhere to the interlocutor reclaimed against, so far as relates to the lands and barony of Strathbrock, and with this qualification, refuse

\* The Court had previously pronounced judgment to the same effect in an action at the instance of this party, which was withdrawn from a supposed defect in her title. (See 15 D., B., and M., 500.)

† The disposition here referred to was a disposition and procuratory of resignation, on which titles were made up by the late Earl in fee simple before he executed the trust deed; these titles were also brought under reduction.

the prayer of the note. Of new, find expenses due, and remit to the auditor to tax the account thereof, and to report."

*Appellant.*—There is no valid and effectual prohibition against altering the order of succession. The cases of Earlsall, Blairhall, Craigievar, Argaty, Eastfield, and Burdsyards completely establish this proposition (see *ante*, p. 879). The case of Lochbui (see *ante*, p. 881) cannot be reconciled with these decisions, of which the cases of Eastfield, Earlsall, Blairhall, and Burdsyards were subsequently decided.

The case of Roxburghe (see *ante*, p. 881) differs essentially from the present. In that case it will be remarked, there is a [902] complete separation and disjunction of the concluding part of the prohibitory clause from all that precedes it, by the words "nor zitt" marking in a definite manner the introduction of some new and different thing from what had gone before. There is a special thing prohibited in addition to what is previously prohibited, and that too in a separate clause disjoined from what goes before by the words "nor zitt," namely, the doing any thing in hurt or prejudice of the foresaid taillie and succession, in haill or in part. The thing which is substantively prohibited from being done, is, the hurting or prejudicing the foresaid taillie or succession; this, it was held, was as strong as if the clause had prohibited any thing by which the succession might be frustrated or interrupted. The clause, construing it strictly, and referring to the statute as a guide for what is requisite, is a clause, 1st. Against selling; 2d. Against contracting debt; 3d. Against doing any deed whereby the estate may be appraised, adjudged, or evicted; and 4th. Against hurting and prejudicing the order of succession. The last part is not left indefinite, so that if it stood by itself it might be said to refer to selling or contracting debt, or any other act by which the taillie might be prejudiced; it is not expressed in general words; it is so expressed, as, when perused, to impress on the mind that a different class of things is prohibited from what had previously been made the subject of prohibition. It is directed against deeds done to the hurt and prejudice of the succession, deeds frustrating or interrupting the succession, just as the preceding portion of the clause is directed against selling, contracting debt, etc. It is a prohibition against altering the order of succession, not indeed in these words, (which is not necessary, there [903] being no *voce signatae* required to be used,) but in words which express in clear and appropriate terms that particular mode of disappointing or depriving the heirs substitute of their right to the entailed estate. Applying these observations to the prohibitory clause in the Strathbrock entail, it will be seen at once it contains no effectual prohibition against altering the order of succession. The concluding part of the clause is not separated from the prior parts of it by any properly disjunctive words, as in the case of Roxburghe. It commences with "or," an appropriate introduction to what is merely to render what preceded more comprehensive, by reaching every indirect or possible form in which the taillie, or the persons above named and their foresaids, might be prejudiced by a contravention of the preceding prohibitions; and, accordingly, there is not a single word used which does not admit of, and naturally suggest, that construction. There is no word used that suggests to the mind some other specific class of acts by which the taillie and the heirs called might be prejudiced; on the contrary, in the concluding part of the clause there are only general words,—there is no particular act or class of acts set forth as prohibited,—there is nothing more than what forms an appropriate sequence, introduced for the purpose of more effectually securing the taillie, and the persons before named, against the classes of prohibited acts previously enumerated.

But, again, it is an undoubted rule, in construing the fetters of an entail, that if the words used be susceptible of two interpretations, that is to be adopted which is against the fetters. Now, there is this further essential difference between the Roxburghe case and the present. In the Roxburghe case the words are [904] "apprized, adjudged, or evicted." The word "evicted" is omitted in the present case. There are other ways by which an estate may be affected indirectly besides appraising or adjudication: *e.g.*, an estate may be evicted for feudal delinquencies, and accordingly the statute expressly declares it necessary to provide against such eviction, and uses the very word which is used in the Roxburghe case. Coupling this consideration with the further consideration that the words in the latter clause in the present case are not, as in the Roxburghe case, "in prejudice of



the succession," but simply "in prejudice of the taillie," it is clear that the words used in the present case may apply at least as aptly to acts of eviction as to acts of alteration of the succession. In this question, then, which is one of freedom, it necessarily follows, according to the rule above stated, that the words must be so applied as to give such freedom. In reality the appellant does not require the aid of this rule in favour of freedom, because it seems to follow as matter of course, that if the conveyancer had been instructed to prevent alteration of the succession, as well as the indirect methods of affecting or prejudicing the taillie, he would have added the expression used in the Roxburghe case, which clearly must have become a noted precedent in conveyancing at the time this entail was framed.

In the second place, the irritant clause in the entail of Strathbrock is defective; the whole entail is thereby rendered inoperative; and so it was competent to the truster to settle the estate in any way he thought proper. It will be observed, that by the irritant clause it is provided, "that all dispositions and deeds whatsoever made or done contrair to the said provision and [905] destination, with all that shall follow thereon, shall be *ipso facto* void and null." The appellant apprehends that this clause is clearly defective from uncertainty. Suppose the words, "and destination," had been omitted, there would no doubt be a voidance declared of all dispositions and deeds made or done contrary to the said provision, but then the question at once arises, what provision? The irritant clause refers to the prohibitory clause. Its object is to irritate the deeds done in contravention thereof, but the prohibitory clause contains various provisions. It contains a provision against selling, disposing, and wadsetting,—a provision against letting leases exceeding a certain limited duration,—a provision against contracting debt; and, according to the argument of the respondents (which the appellant here assumes to be well founded, for otherwise he has no interest to inquire into the validity of the irritant clause), a provision against altering the order of succession. Now, to which of these does the word "provision" apply? It is evidently impossible to answer; but then it may be said, that the term "provision" applies to the whole of the prohibitory clause, to every thing therein provided, and that consequently there is a complete irritancy declared of all dispositions and deeds in contravention of any of the prior prohibitions. This plea the appellant humbly conceives not to be tenable; but it seems unnecessary to go into any argument, either in refutation of it, or in support of the appellant's objection to the clause in respect of uncertainty, because the same question occurred very lately in the case of Speid (21st Feb. 1837, 15 D., B., and M., 618), where the [906] whole law upon the point was fully considered in reference to an irritant clause conceived in terms so nearly resembling the present, so far as regards that point, that it is clear the judgment in it must be taken as a direct precedent in the present case. It has, however, been said that all dispositions are here declared to be null and void; that the deeds under reduction are dispositions, and that, all such deeds at least, are effectually irritated. But in this remark it seems to be overlooked that the dispositions which are declared to be null and void are dispositions "contrair to the said provision." This being the case, the question cannot in the slightest degree turn upon the word "disposition," but must evidently rest entirely upon the legal import of the word "provision;" and if that word is not definite and precise in its application,—if it cannot be held to apply to all the prohibited acts of selling, contracting debt, and altering the order of succession, nor to any of them in particular, it is obvious, the word "dispositions" is of no more definite signification, and that the same uncertainty exists as to it, that is, whether it points at dispositions of sale, dispositions in security, or dispositions directly altering the order of succession.

But again, if the word "destination," which is also used, has any definite meaning, and could apply directly to any one prohibition, it could only be to a prohibition against altering the order of succession, supposing the entail to have contained such a prohibition. As regards other prohibitions it is liable to the same objection of ambiguity and uncertainty as the word "provision." Therefore, it follows, that at all events the irritant clause is ineffectual, in so far as respects selling or contracting debt. If, however, the irritant clause be either wholly [907] defective, or would apply only to the prohibition against altering the order of succession, then, upon the authority of the cases of Hoddum (3d July 1832, reversed 18th April 1835; 1 Sh. and M'Lean's Appeal Cases, p. 594; Lords' Journals, vol. 67, p. 114) and Speid, the deeds

under reduction are unchallengeable, because the necessary result of these cases is, that an entail defective in one particular is ineffectual in all other respects.

*Respondents.*—The present case is identical with that of Roxburghe; the entail in each of them is conceived in terms which announce a distinct and explicit prohibition to alter the succession, and this being so, it is utterly unimportant that the disjunctive used in the one case is “nor yet” and that in the other “or.” The omission of the word “evicted” might afford an argument, if the act under consideration had fallen under the denomination of acts alluded to on the other side. Whatever may be its effect as to such an act, when the point comes to be considered it is obvious that the Roxburghe case has clearly fixed the application of the subsequent prohibition to an alteration of the succession which may be effected without eviction.

It is altogether contrary to the law, as hitherto known in Scotland, to say, that an entail defective in one particular is altogether defective (Cathcart, 5 Wilson and Shaw, 315). The irritant clause in the present case is sufficiently applicable to alterations of the succession, if irritant clauses were necessary for this purpose. In order, however, to prevent alterations of the succession, as distinguished from the statutory acts which may indirectly have that effect, irritant [908] clauses are not required. A prohibitory clause alone is necessary to authorize reduction of gratuitous or *mortis causa* deeds, such as are here in question (Erskine, b. iii. tit. viii. sec. 23).

The judgment in the case of Hoddum (see *ante*, p. 907) as regards this point was drawn up *per incuriam*, and is not authorized by the opinion delivered in this House when that cause was heard.\*

Lord Chancellor.—What I have already said in the case of *Lang v. Lang*, nearly exhausts the first part of this case, namely, as to the effect of the prohibition against altering the order of succession.

There was but one different ground on which it was attempted to distinguish this case from the Roxburghe case, and that was, that the prohibition in the Roxburghe case, besides contracting debt, included the case of forfeiture for feudal delinquencies, which it was said was not so in the present case. Now, supposing the word “evict,” which is used in the Roxburghe case, to apply to acts creating forfeiture, it does not follow that there are not words sufficient in the clause in the present case to entitle us to give the same construction in both; I cannot entertain a doubt as to the expressions [909] in the two cases being so substantially the same as to require the same decision.

Assuming then that there is an effectual prohibition against altering the succession, an objection was taken that there are not proper irritant and resolute clauses applicable to such prohibition, to which it was answered that in cases of simple destination such clauses are not required; be that as it may, I think it clear that in this case there are such clauses sufficiently applicable to the purpose. The term “deed” is only to be found in the prohibition against altering the succession; the resolute clause applies to any thing done “contrair to this my destination and appointment,” and that which is avoided or declared null is “all dispositions and deeds whatsoever made or done contrair to the said provision and destination.” If, therefore, clauses irritant and resolute against altering the order of succession are necessary, they are, I think, to be found in this entail. The question is not here, as in the case of *Lang*, whether there are clauses properly fencing the other prohibited acts. I think, therefore, that, upon the points raised, the interlocutors appealed from are correct, and that these interlocutors should be affirmed, and the appeal dismissed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be

\* The Lord Chancellor here intimated that he considered the error in drawing up the judgment to have arisen from the report of the speech, i.e. that in the following sentence (1 Sh. and M'L., p. 626) viz. “to reverse the decree in this case, and declaring the entail insufficient to prevent the heirs of entail from selling, disposing, burdening, etc. in terms of the conclusions of the summons,” the term, “etc.,” introduced into the speech, has led to the insertion of the declaration in the judgment, extending over all the conclusions of the summons.

Lord Brougham subsequently stated that it was by no means his intention the House should, in the Hoddum case, decide more than that there was no irritant clause in the entail, *valeat quantum*.

and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party [910] entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL—DEANS and DUNLOP, Solicitors.

[911]      APPEAL FROM THE COURT OF SESSION, SCOTLAND.

THOMAS DUNCAN, Writer in Perth, Treasurer to, and on behalf of, the Trustees for the Turnpike Road from Perth to Dundee, through the Carse of Gowrie by Inchture, *Appellant*\*—Attorney-General (Campbell)—Lord Advocate (Rutherford); JAMES FINDLATER, Coal Merchant and Innkeeper in Perth, *Respondent*.—Pemberton—James Anderson [23d August 1839].

[Mews' Dig. x. 100; xv. 139; S.C. 6 Cl. and F. 895. Discussed in *Mersey Docks Trustees v. Gibbs*, 1886, L.R. 1 H.L. 116, and *Harris v. Great Western Ry. Co.*, 1876, Q.B.D. 528; and see Scotch authorities cited 3 Scots R.R. at p. 333.]

*Reparation—Road Trustees—Public Officer*.—Held (reversing the judgment of the Court of Session) that road trustees on a public road are not liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees.

*Practice—Issue*.—Under an issue, Whether a particular act has been done to the "loss, injury, and damage" of a party, it is left open to try the question of the damage, and the liability of the party causing the damage to make compensation.—Per Lord Chancellor, confirming the opinion of Lord Eldon, Chancellor. (See p. 926.)

*Practice—Pleading—Preliminary Defence*.—In an action directed against the clerk and treasurer of road trustees, acting under the statutes, for injury sustained by alleged negligence on the part of persons employed by them, [912] the summons concluded against the said trustees and their said clerk for payment of a sum as compensation. It was pleaded for the trustees, that the "injury, such as it was, not having arisen from misconduct on the part of the trustees, or of any person for whom they are in law responsible, or from any cause for which they are legally responsible, the defender is entitled to absolvitor." When the record was closed, an issue was sent to a jury, to try whether the act complained of had been done to the loss, injury, and damage of the pursuer. The House of Lords reversed the interlocutor directing the issue, the Lord Chancellor observing, that, "as the ground of defence appears upon the summons itself, and in the defences as originally made, the cause was, before the interlocutor directing the issue, in a state which would have enabled the Court to dispose of it." (See p. 936.)

The turnpike roads within the county of Perth during the year 1835 were under the management of trustees, whose powers and duties are regulated by the general road act for Scotland, 1 and 2 W. 4, c. 43, and also by a local act, 2 W. 4, c. 82.

The general road act provides (sec. 10), that "it shall be lawful for the trustees acting under any turnpike act to appoint clerks, collectors, treasurers, superintendents, surveyors, and other officers, with reasonable salaries or allowances for their trouble:" (sec. 16) that "the trustees may sue and be sued in name of their clerk or

\* 15 D., B., and M., 1304; S.C. 16. D., B., and M., 1150.

treasurer; provided always, that all expenses of process or proceedings so incurred by such clerk or treasurer shall be reimbursed and paid out of the trust funds of the turnpike road for which he shall act: " (sec. 101) that " if the surveyor of any turnpike road, or any contractor or other person employed on such road, shall lay on any part of any such road any heap of stones or other materials for the repair [913] thereof, and shall permit the same to remain longer than necessary for the breaking and spreading of such materials, or shall lay on any such road any matter or thing, or shall knowingly permit to remain on any part of any such road any matter or thing which may endanger the safety of any passenger, or shall dig any pit, or make any cut on any turnpike road without sufficiently fencing the same, such person shall for every such offence forfeit and pay a sum not exceeding £5, over and above the damages occasioned thereby, and expenses; and it shall be lawful for any person travelling along any turnpike road to prosecute for such sum, damages, and expenses in manner herein-after provided." By sec. 109, the trustees or the procurator fiscal, or any person authorized by the trustees, are empowered to prosecute for payment of toll duties, penalties, or fines due under the statutes; the enactment declaring, " that it shall be lawful for the said trustees to allow the expenses of such prosecutions to be defrayed out of the funds of the trust." Sec. 117 provides, that " if the repairing or maintaining of any turnpike road shall be neglected, or such road so badly kept that travellers are injured, impeded, or obstructed in using the same, any person having paid toll duty thereon, and finding caution to pay expenses of process, may present a petition and complaint against the trustees of such road to the Court of Session, and the said court is hereby authorized to receive the same, and to adjudge and determine therein in a summary manner, without abiding the course of the roll; and to pronounce such orders and decrees as to the repairing and keeping of the road, or otherwise, as the justice of the [914] case shall seem to them to require, having due regard to the funds of the trust; and particularly to determine whether the road is in such a state of repair as to justify the levying of the toll duties or any proportion thereof levied by the said trustees; and also to determine as to the expenses of such complaints and proceedings thereon; and if any such complaint shall be found to be without probable cause, the complainer shall be found liable, over and above the expenses of process, in a penalty of £20, to be paid to the trustees for the purposes of the trust; and it shall not be lawful to present any such complaint, or institute any proceedings on any of the grounds above mentioned before any other court, or in any other manner than as aforesaid." Sec. 118 provides, that " all civil causes, and prosecutions for expenses, toll duties, penalties, forfeitures, and fines imposed by this act or any local turnpike act, or for any damages incurred, or any wrongs done or injuries suffered in any matter thereto relating, or for any thing done in pursuance of any of the powers by this or any such act given and granted, shall be commenced within six calendar months after the penalty, etc. shall have been incurred, or wrong done, or injury suffered."

The statutes expressly authorize the trustees to raise certain funds in the shape of toll duties, which are specially appropriated by the statutes. The local act (sec. 16) enacts, " that at any of the stated general meetings of trustees it shall be lawful for the said trustees to direct the tolls arising at the gates or turnpikes erected or to be erected on the said roads to be applied towards making, repair-[915]-ing, upholding, and improving the aforesaid roads and bridges thereon respectively, in such manner as the said trustees shall think fit; and paying the expense of management, interest of the money borrowed, advanced, and owing at the time; and the surplus shall be appropriated annually to extinguish the principal of the money so borrowed, advanced, and owing, and to no other purpose whatsoever."

James Findlater, coal merchant in Perth, while driving a gig at night along the turnpike road between Dundee and Perth, near Inchture, came in contact with a large heap of stones placed partly on the footpath, and partly on the road. There was no light set up or watchman posted, or any other precaution taken to warn travellers as to the state of the road. The stones had been placed there by persons in the service of a contractor employed by the road trustees, for the purpose of filling up a drain which had been dug across the road. The gig was overturned, and the son of Findlater, who was along with him, received so much injury in consequence of the accident that he died soon after; Findlater was also himself considerably injured.

Findlater brought an action in the Court of Session against the road trustees, libelling that the obstruction on the road had been occasioned by the operations carried on by the road trustees "or their surveyors or contractors, or other person or persons for whom these trustees were and are responsible;" and that the trustees, "or their workmen or others employed by them as aforesaid, did knowingly and most culpably permit that aforesaid part of the north side of the road to remain in this state of danger till the follow-[916]-ing day, and did not use any means by which passengers travelling at night could be led to believe or suspect that there was any obstruction upon the said road."

The road trustees were sued through their treasurer, Thomas Duncan, and the summons concluded against "the said trustees and the said Thomas Duncan as the clerk and treasurer, or the clerk or treasurer, of the said road trustees, and as representing them," for payment of £500 as solatium for the loss of his son, and £500 as compensation for the injury sustained by himself. They pleaded, 1st, that the pursuer was not entitled to damages on account of his son's death; 2d, that the pursuer's injuries did not entitle him to damages; 3d, that, "at any rate the overturn and consequent injury, such as it was, not having arisen from misconduct on the part of the trustees, or of any person for whom they are in law responsible, or from any cause for which they are legally responsible, the defender is entitled to absolvitor."

The libel being in form an action of damages, the cause was by interlocutor (appealed against) transmitted to the issue clerks. The defender moved the Lord Ordinary to remit the cause to the Court of Session roll, to determine the legal liability of the trustees as raised by his plea in the first instance. The motion was refused on the ground, that if the plea was well founded effect would be given to it at the trial. The issue, as originally framed by the issue clerks, was alternative as against the trustees or those employed by them; the Lord Ordinary limited it to the trustees, but on application to the Court the alternative form was restored, and the following was the form of [917] the issue sent to trial:—"Whether the pursuer and his son, while travelling in a gig along the said road, near the west half-way house, were overturned through the fault or negligence of the said trustees, or others in their employment, to the loss, injury, and damage of the pursuer? Damages claimed: for reparation, and as a solatium for the loss and deprivation suffered by the death of the pursuer's son, £500; for compensation and reparation for injury sustained and expenses incurred by the pursuer in the premises, £500."

At the trial the Lord President directed the jury, in point of law, "that road trustees on a public road are liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under authority of the trustees." The jury found for the pursuer as follows: viz. damages for loss of his son £500, for injury received by himself £300.

The appellant excepted to the above direction.

The First Division of the Court, having advised the cause upon the bill of exceptions, after an oral debate, and cases, disallowed the bill of exceptions by the following interlocutor (19th June 1838):—"The Lords, having advised the cases for the parties, disallow this bill of exceptions, and find the defenders liable to the pursuer in the expenses incurred by him in the discussion on this bill, and appoint an account thereof to be given in, and remit to the auditor to tax the same, and to report." The First Division thereafter applied the verdict as follows (22d June 1838):—"In respect of the verdict found by the jury, on the issue in this cause, the Lords decern [918] against the defenders for payment of £500 in name of damages to the pursuer, as reparation for the deprivation suffered by the death of his son, and for payment of £300 as reparation for injury sustained by the pursuer himself: Find the defenders liable to the pursuer in the expenses incurred by him in this action. Appoint an account thereof to be lodged, and remit to the auditor to tax the same, and to report."

The road trustees appealed.

*Appellant.*—It has been conceded that the appellants are not personally responsible; in making this concession the only ground of action is virtually abandoned. The trust funds are created by statute; no right, claim, or remedy can be maintained

against the statutory funds, unless such right, claim, or remedy can be supported from the statute. The statutes from beginning to end are perfectly silent as to any claim against the trustees, or the funds under their management, on the part of individuals who suffer accidents by the negligence of surveyors or contractors, or persons employed on the road, while, on the other hand, they expressly affirm and recognize a right of action against these surveyors and other persons when guilty of such faults or negligence as lead to injury; and a form is prescribed by which those parties may be proceeded against in a summary manner. The absence of the slightest notice of a valid claim against the trust, with this recognition of a right of action against the parties offending, affords the clearest grounds for holding that the legislature never contemplated any such proceeding as that now adopted. The [919] terms used in the statutes in providing the remedy are, in point of legal construction, exclusive of any other manner of proceeding than that therein pointed out.

The statutes are in perfect consistency with the general principles of law applicable to such questions. The general maxim is, *culpa tenet suos auctores*. This maxim has been extended to infer vicarious liability only in cases where public policy imperatively requires that it should be so extended.

It is contended, however, that the law of Scotland establishes the judgment appealed from, and certain cases are cited to support that proposition. These cases do not apply. The question is not, how the law of Scotland has dealt with the maxim *qui facit per alios facit per se*; the question is, what is law of Scotland under the existing turnpike statutes; and none of the cases referred to can have the slightest application to this question. The appellant's argument in the Court below (as it is now) was almost entirely founded upon the particular enactments in the road statutes relating to this question, and yet it will be seen that the judges when delivering their opinions do not once allude to the statutes or any of the enactments in them. But even independently of the statutes the rule of law in Scotland in reference to the maxim *qui facit per alios*, is clearly adverse to the claim of the respondents (*Linwood v. Vans Hathorn*, 11th March 1817. Fac. Coll.).

There being no authority in the law of Scotland adverse to the plea of the appellants, and this being a case as to the construction of a British act of parliament, it is conceived English cases must be of perfect authority, the more especially as the meaning and import of similar [920] expressions in statutes relating to either or both countries must necessarily have been intended by the legislature to be the same (*Humphreys, Man. and Ryl.* 187; *Hall*, 2 Bing. 156; *Harris v. Baker*, 4 Maul. and Sel. 28; *British Plate Glass Manufacturers*, 4 T. R., 794; *Bolton*, 4 Dowl. and Ryl. 195; *Everett v. Cooch*, 7 Taunt. 1).

The appellant's defences and pleas in law, the form of the issue, the direction of the judge, the exception to that direction, and the judgment itself now appealed from, completely negative the argument attempted to be raised, to the effect that the appellant is excluded from urging the question of liability. This being a cause appropriated to the jury roll, the appellant had no opportunity of raising the question of liability before going to trial.

*Respondent.*—By the law of Scotland a master is civilly responsible for the negligence of a servant in the exercise of his calling (*Fraser* and other cases in *Shaw's Digest*, voce *Reparation*, Nos. 286. 288. 290. 292, 293, 294, 296, 297, 298, 301, 302). The circumstance that he is servant to a trustee or body of trustees makes no difference. Even although the trust should be public, the rule is the same, e. g. magistrates of a burgh are liable for the escape of a prisoner (*Ersk. b. iv. tit. 3. s. 14.* and notes by *Ivory*). The law of Scotland recognizes the broad general principle, that public funds raised by taxation are responsible for wrongs done to individuals in the execution of the public purposes to which such funds are appropriated (*Innes*, 1 Feb. 1798, Mor. 13189). There are various cases in which this principle has been enforced against road trusts, to the effect of attaching funds under the administration of [921] road trustees (*Gunn*, 28th Feb. 1820, 2 Murr. 194; *M'Lauchlan*, 14th May 1827, 4 Murr. 216; *Millar*, 17th July 1828, 4 Murr. 563). The same view of the law has been taken by the Court under police statutes (*Nimmo*, 8th July 1832, 10 S. and D. 844; *Kelly*, 22d Jan. 1833, 11 S. and D. 287; *Mitchell*, 1 Feb. 1838, 16 D., B., and M., 409). Such being the rule of law in Scotland, it is irrelevant to

inquire into the law of England, even supposing that a different principle existed in that country. But the English cases founded upon by the appellant do not bear at all upon the present question. The object in these cases was, to render the parties against whom the suit was directed personally responsible for injury sustained by individuals, being the necessary consequence of works authorized by the legislature to be performed by them. The respondent, however, has not averred that there was misconduct on the part of the trustees which renders them personally responsible. There is no question raised on that point. The case of the respondent is, that in consequence of the negligence of those employed under the trustees the funds of the trust are responsible. [Lord Chancellor.—Can property be liable for damages without some party being found liable?] The parties guilty of the negligence may be liable for the consequences; the trustees will have their action of relief against them, but according to the principle recognized in Scotland in such cases, the party suffering the damage is entitled *ante omnia* to be indemnified from the trust funds.

It is said that the remedies given by the general turnpike act and the relative local statute are exclusive of any proceeding against the trust funds. It is humbly conceived that this is not so; on the contrary, the true principle applicable to both statutes seems to be, that [922] the public or their trustees draw a fund from the lieges for the purpose of maintaining good and safe roads, and consequently if they or their managers fail in this respect, the trust funds, or in other words the public, must, in the first instance, be answerable for the consequences, whatever claim of relief may remain against those by whose direct act an injury may have been done. The purposes for which the toll duties may be applied are large and comprehensive, and must be taken as including the police of the roads; i.e., maintaining them in a state free from obstructions. The statute imposes a penalty upon any party employed on the road for particular acts of negligence, but that penalty is over and above the damages which a party thereby injured may obtain against the fund which is legally responsible therefor.

The objection taken in the bill of exceptions is not within the record. The pleas in law do not raise the question of liability of the trust funds; the only question raised by the issue was damage or no damage, through the misconduct of those employed by the trustees. It is a mistake to say that the appellant had no opportunity of maintaining the irresponsibility of the trust funds as a defence. If such a defence had been originally made it would, if well founded, have entitled the respondent to absolver before going to trial. Under the thirty-third section of the judicature act and relative provisions of the statute 1 Will. 4. c. 69., the appellant might have obtained the judgment of the Court upon any question of law or relevancy going to exclude the action. Such a defence, however, comes too late in a bill of exceptions (*Kerr v. Inglis*, 6th July 1832, 10 S. and D. 774; *Batty v. Shaw*, 5 W. and S. 462; *Laidlaw*, 11th March 1831, 9 S. and D. 571), [923] the purpose of which is to have the direction of the judge upon matters of law arising out of the record reviewed. [Lord Chancellor.—The Lord President clearly thought that the question of liability was embraced in the issue.] The issue cannot be held to embrace a question not raised by the pleas in law.

Lord Chancellor (8th July).—My Lords, this case on the merits is one of very great importance, and I should be very sorry to be called upon to advise your Lordships upon it, without taking some time to examine into the cases which have been referred to. The point upon the merits is one startling to the ears of an English lawyer, namely, that for damage sustained by the conduct of persons in the execution of a public trust, the party sustaining the injury has a remedy, not against the immediate author of the injury, or against the trustees personally, but that he has a direct remedy against the trust fund, by suing, not the trustees, but the officer of the trustees who has the custody of the trust funds. It is admitted that the effect of this judgment, if it stands, will be, not to give a remedy against the trustees, who may be supposed to be the authors of the injury, but against the trust fund; and if that is exhausted in the payment of the damages, that it must be supplied by a taxation upon the public.

There is no such principle in the law of England, and though certain cases have occurred in the Court of Session apparently producing this effect, I have not heard any principle referred to which would have originally supported that decision. If

that principle had been part of the law of Scotland, your Lordships may be assured the industry and learning of the counsel would [924] have furnished your Lordships with some instances of it; they have furnished instances in which the particular thing has been done, but no principle has been referred to, which, if brought under the consideration of the court, would have given weight to the adjudication. A number of years has elapsed since the first case in 1798 (see *ante*, p. 920) was decided, and it does not appear that any case has come up to your Lordships House upon the subject till the present, at least none in which the point has been expressly raised and decided. Your Lordships were told there was a case pending in this House (Mitchell, 1st Feb. 1838, 16 D., B., and M., 409), raising precisely the same question, against the commissioners of police of Edinburgh. I have had inquiry made while the argument was proceeding, and if it had been a case in which the question was likely to be raised, or further information could be obtained from the discussion, I should have thought it right that that case should be argued before this case was disposed of; but I find that that case is set down to be heard *ex parte*, and that your Lordships are not likely to derive much information from it; and it would not be fair, that a case to be heard *ex parte* should influence your Lordships in deciding this case, which has been fully argued on both sides. There is one point of this case with respect to which I may now state in what view it occurs to me. It is contended that the appellant cannot raise this question in the present state of the case, because it is said that the point was not raised by the pleas in law in the courts below, consistently with the judicature act, which requires that the party should state the whole grounds of his defence. The pleas in this record are [925] certainly as large as can be well conceived. The third plea appears to be a general plea of not guilty, opening to the party sued every possible ground upon which he could make out that he was to be discharged from the obligation sought to be imposed upon him by the pursuer; it is, that the injury complained of "not having arisen from misconduct on the part of the trustees or any person for whom they are in law responsible, or from any cause for which they are legally responsible, the defender is entitled to absolver." Thus, (leaving out that part which does not immediately refer to the present subject,) the proposition is, that the injury complained of was not sustained from any cause for which the defenders were legally responsible; it is in short a plea of not guilty, alleging that there is no cause of action.

Then upon that plea an issue was directed, and another question arises upon the terms of the issue, namely, whether it did not involve a proposition of law. The question sent to trial before the jury was, "Whether the pursuer and his son, while travelling in a gig along the said road, near the west half-way house, were overturned through the fault or negligence of the said trustees or others in their employment, to the loss, injury, and damage of the pursuer?" not simply whether the injury arose from the negligence of persons in the employment of the trustees, and what damage had been sustained in consequence of such injury, but whether it has been sustained "to the loss, injury, and damage of the pursuer."

Now it is said that, according to the acceptation of those terms in Scotland, it makes no difference in the import of an issue, whether the inquiry be if the act [926] done be simply to the damage, or whether it be further inquired if it be to the loss, injury, and damage of the party suffering. I do not find that it has been so understood; it is not so stated by the Lord President, nor by the judges before whom the cause was brought, and it would not be so understood in this country. A very peculiar case (*Blakemore v. Glamorganshire Canal Navigation*, 1 My. and Ke. 154) upon this subject occurred in my own recollection. I was counsel in the case; a complaint was made by a party who had a mill supplied by water; the water was taken to supply the Glamorganshire Canal, and the proprietor of the mill complained that the canal company had exceeded the power given to them under the act, and had deprived his mill of a portion of water to which he was entitled. It came on before Lord Eldon (17th and 23d Dec. 1824), upon a motion to dissolve an injunction which had been obtained *ex parte*; there was no doubt upon the point, whether the works carried on by the company were authorized by the act; but Lord Eldon directed this issue (see 1 My. and Ke. p. 169), "Whether the widening and deepening of the basin in the pleadings mentioned," etc. "did, or will to the damage and injury of the plaintiff, diminish the supply of surplus water" to the plaintiff's works: "Lord



Eldon stated that his object in using those words was not only to ascertain what damage had been sustained, but whether it was such damage as that for which the defendants were responsible,—whether it was *damnum absque injuria*, whether it was to the injury of the party, whether it was injurious, in the sense which a court of justice puts upon the word.” He left it open to try the question [927] of the damage, and the liability of the party causing the damage to make compensation; and so I must understand the meaning of the terms here. I find that the Lord President lays down, as a proposition of law, that which according to the construction put by the respondent he had nothing to do with. If the respondent’s construction of the issue be correct, the jury had nothing to do but to ascertain the fact whether the injury was sustained in consequence of the act of the trustees, and the amount of the damage; but the Lord President lays it down, “that road trustees on a public road are liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of the labourers or surveyors or other persons employed by the trustees, or by the officers of the trustees when engaged in any operation performed under the authority of the trustees.” Upon that ruling the bill of exceptions was tendered, and in the argument on the bill of exceptions it was never contended that this ruling was immaterial, that it was not within the province of the judge to lay down the law, or that it was immaterial how he laid it down. It is clear that it was not so argued in the Court below from the opinions of the judges, which are printed in the cases; but whatever is the meaning of the issue, if the judge in laying down the law lays down an incorrect rule for the jury to act upon, which is likely to have an effect upon the finding of the jury, the party against whom the verdict passes will have a right to complain that a rule was laid down which might influence the verdict under which he was suffering. I therefore cannot but think that your Lordships have the question to decide whether the rule of law laid down by the Lord Presi-[928]-dent at the trial of the issue is a correct rule of law, applicable to cases arising in Scotland, and you have also necessarily to consider whether the rule applying to the liability of trustees, which seems to have been adopted in Scotland for a considerable number of years, and which is directly contrary to any rule we have here, is a rule that ought to continue to prevail in Scotland, particularly when it arises under an act which clearly directs the application of all the tolls which may be received under the act. At the same time, in reference to this latter consideration, I do not think that the statute precludes this question, because, in directing the application of monies raised, it must be understood as dealing with those monies after paying all lawful demands out of the funds, all the expenses of the officers, and so on, which must be paid out of the funds; that is, the law throws the liability upon the funds, and it does not go so far as to say that they are not to be liable to pay this. The legislature can hardly be said to have had in view such an application of the funds; if the funds are legally applicable to the purpose, the statute does not so overrule the application of them, as to say that nothing shall authorize the laying such a burden upon the funds. For the purpose of considering the general question, I propose to your Lordships that the farther consideration of this case should be postponed.

Farther consideration adjourned.

Lord Chancellor (23d Aug.).—My Lords, in this case there has arisen a conflict of opinion in this country and in Scotland, upon a point arising under acts of parliament, very much depending upon the construction of those acts, and, as to which, the earliest decision referred to [929] in Scotland is of the year 1798 (see *ante*, p. 920), notwithstanding which the authority of the English decisions, as applicable to the rule to be hereafter followed in Scotland, has been objected to, as an attempt to overrule Scotch law by the weight of decisions in England. Nothing can be more important than to preserve the integrity of Scotch law in cases in which that country has law distinct from that of England.

The titles to property, and the rights and interests of individuals in Scotland, are regulated by the laws of that country, and, undoubtedly, all such laws ought to be maintained. But in cases in which there is no peculiar law of Scotland applicable to the subject matter of a contract between parties, when questions arise to which no preceding principle of law can be satisfactorily applied, there is great inconvenience,

and a degree of reproach to the law itself, in the adoption in the two countries of different and inconsistent rules in the administration of justice; and this can never be more strongly felt than in cases in which the questions arise from enactments by the legislature which are common to both.

In looking through the papers in this case, and upon referring to the authorities quoted, I have in vain sought for any rule or principle of Scotch law, applicable to this question, which would lead to the adoption of a course of decision peculiar to that country. So far from finding any principle in the law of Scotland for making the liability of persons for the acts of others acting under their presumed authority greater than it is in this country, I find the rule laid down in *Lin-wood v. Vans Hathorn* (Fac. Coll., 11th March 1817), by a majority of the judges, much more restrictive of such liability than the rule adopted in the case of *Bush v. Steinman* (1 Bos. and Pull., 404). Let it, however, be assumed that such liability is regulated by the same rule in both countries; when questions first arise upon those acts of parliament which create trusts of money levied for public purposes, in both countries the courts have a common principle upon which to engraft such rules as it might be advisable to adopt in administering justice upon questions arising under those acts. In England it has been held by repeated decisions that trustees of a turnpike road are not liable for damage arising from the acts of those employed in carrying into effect works under the provisions of the statutes. The cases of *Baker v. Harris* (4 M. and Sel., 28), in 1815; *Hall v. Smith* (2 Bing., 156); *Humphreys v. Mears* (Man. and Ry., 187), in 1827; are conclusive upon that point. In all these cases it was held that the trustees, doing only that which by the statute it was their duty to do, and being guilty of no personal default, were not answerable for damages sustained by the acts or neglect of persons employed by them in the active execution of that duty.

Another class of cases establishes another rule under those statutes; namely, that trustees exceeding the authority which the statute gives them are personally liable for the consequences of the act done, but that keeping within that authority they are not liable for any damage which these acts may occasion to any other person; the person injured, if he cannot find a remedy in the [931] provision of the statute, is without redress. That was the decision in the *British Plate Manufacturers v. Meredith* (4 T. R. 794), and *Bolton v. Crouther* (4 Dow. and Ry., 195).

In the former class of cases the actions were in some, if not in all the instances, against the clerk or person provided by the statute for the purpose of being sued on behalf of the trustees; so that if the plaintiff had obtained judgment the remedy would have been against the trustees as such, and not against them individually. The opinion of the court in all those cases having been in favour of the defendant, it was not necessary to consider the effect of the judgment as against the trust fund; but the opinions of the judges, as reported, shew that they considered the course of proceeding adopted by the plaintiff to apply to the defendants in their official capacity, and not to infer personal liability. Lord Wynford, in *Hall v. Smith*, says, "We think that under these circumstances the commissioners are not responsible for the accident that has happened, and that the actions cannot be maintained against their clerk."

The first case referred to as having arisen in Scotland is *Innes v. The Magistrates of Edinburgh*, 6th February 1798 (Mor. 13189). In that case the injury, which the pursuer had sustained, arose from a defect in the streets created in the progress of works for rebuilding the university, under the direction of trustees, and he sued such trustees, and also the magistrates. The court held the trustees not liable; the liability of the magistrates was indeed estab-[932]-lished, but upon grounds which have no application to the present case, as it rested upon the supposed duties of the magistrates of Scotch burghs. At that time then, the rule, now considered as part of the law of Scotland, had not been established.

The next case appears to be that of the *Airdrie Road Trustees*, in 1820 (2 Mur., 194. 215), in which the jury found not that the trustees were liable for the original act of a stranger, (Waddell,) but that they did improperly allow or permit the stones to remain on the road for two or three weeks. This verdict was sanctioned by the court, but a new trial was directed as to the liability of Waddell, the wrong-doer; and as nothing further appears as to that case it is probable that it was afterwards settled. Now, whether this finding against the trustees was right or

wrong, it does not much apply to this case; it found a culpable neglect or omission of duty in not removing the stones, which is very different from finding a liability from the unauthorized act of any person employed in the works.

The case of *M'Lauchlan v. The Wigtonshire Road Trustees*, in 1827 (4 Mur. 216), was what we should call in this country a *nisi prius* case; it was also a case like the last, of imputed negligence, in not effectually stopping up an abandoned road; and the claim was against the trustees personally; the Chief Commissioner saying, "The trustees are individually liable, and have no funds to pay the damages if found due." In *Millar v. The Road Trustees* (17th July 1828, 4 Mur. 563), that point was not taken. The case of *Aitkin v. Peeblesshire Road Trustees*, in 1836, (mentioned [933] in the respondent's case,) was compromised. The two last cases are instances in which the liability of trustees was assumed, but neither of them has the weight of decision, except in so far as in the former the opinion of the Chief Commissioner was expressed to that effect.

Several cases have been referred to of suits instituted against the Commissioners of Police of Edinburgh, and particularly one at the suit of Mitchell. I abstain from making any observations on those cases because much may depend upon the act of parliament under which those commissioners act; and because the latter case is now under appeal before this House; and it would, therefore, be improper to prejudge the merits of that case.

Such is the state of decisions in England and in Scotland upon this subject. The learned judges of the First Division state that the law has been fully established in Scotland; and upon that authority, and from what appears from the reported cases, there cannot be any doubt that there has been for some time past a course recognized in Scotland in conformity with the decision in this case; but when the cases which have occurred there are examined, it does not appear that there has been any solemn decision of the Court of Session establishing the law before this case. If the decisions had been of much earlier date, and of much more weight, from repeated recognitions by the Court of Session, it might still have been the duty of this House to correct an error which this House might find to have led to such a course of adjudication, but in the present case the House has not any such difficulty to overcome.

Independently, therefore, of authority, it remains to be considered what are the merits of the case upon the [934] statutes under which trustees act. It was contended, in the course of the argument, that the defenders had not properly raised the point upon which they now insist in the pleadings. I think, however, that the issue as framed raises the whole case; the terms are, "Whether the pursuer was overturned through the fault or negligence of the trustees, or others in their employment, to the loss, injury, and damage of the pursuer?" That word "injury" raises the question, as it implies responsibility in the defenders.

In a well-known case in the Court of Chancery (referred to, *ante*, p. 926) Lord Eldon directed an issue, in very similar terms, for the purpose of raising the question of right on the part of the plaintiff, and of liability on the part of the defendant. Under the issue in the present case, if the jury had been satisfied of the loss, and of the negligence of the trustees, or those employed by them, they would not have found a verdict in the affirmative, unless satisfied that the pursuer was entitled to redress as against the defenders; and so the learned judge must have understood the issue from the manner in which he expounded the law to the jury. The law was there laid down by that learned judge, that road trustees on a public road are liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of the trustees when engaged in any operation performed under the authority of the trustees. This is so stated in the bill of exceptions, by which all parties are bound, and if the law be inaccurately laid down the verdict found under such direction and exposition of the law cannot stand.

[935] Now, the law as laid down would amount to this, that road trustees (that is, the road funds under their control, for such is stated to be the character of the suit,) are liable for an injury happening to a passenger, from the improper conduct of any person when engaged in any operation performed under the authority of the trustees. That the conduct of such person was not in due execution of the purposes of the act constitutes part of the proposition, for otherwise it would not be improper.

The result, therefore, of such a rule of law would be, that (however improper the conduct of any person employed by the trustees or their officers, though wholly unauthorized by the trustees, and though unconnected with their employment,) all damage arising from such conduct would be to be compensated out of the funds of the public in the hands of the trustees,—a proposition not supported, by any principle of law, regulating the liability of trustees for the acts of their servants.

How much greater latitude is to be adopted in claims against the present trust fund will be best seen by referring to the statutes. The general turnpike act by the tenth section authorizes the trustees to appoint superintendents, surveyors, and other officers. This must include a contractor, by whom the work is to be carried on. So far then the trustees were acting under the powers of the statute. The 16th section authorizes suits against the trustees in the name of their clerk; the 101st section gives a remedy against any surveyor or contractor who may leave any materials improperly on the road, by means of a penalty of £5 in addition to the damages sustained. The particular statute, under which the defenders are trustees, authorizes the levying certain tolls and duties. The 4th section appoints trustees, very many in [936] number, including justices of the peace and other official persons, guardians of infants, curators of fatuous persons, and mandatories of female proprietors. The 16th section directs the tolls to be applied in repairing and improving the roads, and in paying the expenses of management and interest of money borrowed, advanced, and owing at the time, and that the surplus should be appropriated annually to extinguish the principal of the money so borrowed, advanced, and owing, and to no other purpose whatsoever.

It is impossible to suppose that the framers of these statutes contemplated that any part of these tolls and funds would be diverted from the purpose for which they were to be raised, in order to compensate for damages to arise from any improper act of any person whilst employed under the authority of the trustees. Such an application of the tolls and funds would not be in accordance with the 16th section, unless it could be shown that the law was clearly such, at the time the statute passed, as to justify the supposition that such an application had not been enumerated, because known to be incident to the execution of the trust.

But why should the trust funds be so liable? If the thing done be within the powers of the statute, the party sustaining any damage from it cannot be entitled to compensation unless the statute itself provides it, and for this reason, that upon this supposition the act creating the damage would be lawful; if then the thing done be not within the powers of the statute, either from exceeding these powers or from the manner of doing it, why should the public funds bear the burden of indemnifying the guilty party? Many cases may be supposed in which the trustees may be so far actors in the transaction [937] creating the damage as to render their property liable, but none in which the trust funds ought to be applied in satisfaction of the party injured.

Finding, therefore, the rule of law clearly established in England, and nothing in the law of Scotland which authorizes a contrary course of decision, I cannot hesitate to say that I think this is a case in which the practice in Scotland has been erroneous, and ought to be set right; and this, I think, ought to be effected in this case, by reversing all the interlocutors appealed from, the first of which is that which directed the issue, because, as the ground of defence, which I think ought to prevail, appears upon the summons itself, and in the defences as originally made, the cause was, before the interlocutor directing the issue, in a state which would have enabled the court to dispose of it. However, after the course of practice which has prevailed in Scotland, I do not think that the defender is entitled to any costs of the suit, and of course there can be no costs of this appeal.

Lord Brougham.—My Lords, I entirely agree in the view my noble and learned friend has taken of this case,—a case of no ordinary importance, whether we regard the law of that part of the kingdom where it was decided, or the rights and liabilities of trustees, bodies of men acting oftentimes in very difficult circumstances. I also entirely agree in the doctrine, that this, a Scotch law question,—referring to Scotch practice, decided in a Scotch court, and coming to your Lordships as judges of appeal from that court,—is to be disposed of by you as if you yourselves were judges in a Scotch court,—that the principles of Scotch law, whether to be found in text writers or in [938] the statute book, or in the decisions of judges in Scotland,

must be the guide by which your Lordships should be governed. But though this would show that if there be any principle of Scotch law to support the present decision, if there be any authority in the text writers, if there be any decided cases, or if there be any dicta of judges heretofore laying down one rule, that rule must be followed in this case by your Lordships in preference to any opposite or different rule, which we might be disposed to adopt in the same question, arising as a question in courts in this country; yet I hold it to be equally clear, (as clear as any proposition can be,) that if, on the contrary, the Scotch law be silent upon this, if there be no cases decided, and no authority either of judges or of text writers at variance with the principles which would be adopted by the English law, and which would govern the decision of the English courts had the question arisen here,—we are bound to lean to the doctrine which would regulate us in our own courts, in order to avoid the manifest inconvenience, in the first place, of two nations who are living together in the intercourse which so happily subsists between our Northern brethren and ourselves, being governed in respect of our trade or other matters arising out of that intercourse by different laws; and in order to avoid, in the second place, the opprobrium which must arise from two systems of law being found to exist, without difference of circumstances, in two such countries upon directly opposite principles.

Now, in the present case there may either be decisions bearing directly upon the point, or there may be decisions which may govern the case, although no decision have yet taken place upon it; that there is [939] no case of a date prior to 1820 relating to turnpike trusts, and trusts of a similar description, is admitted; that therefore there is no rule of law solemnly recognized and laid down by the court as to the liability under such trusts, is not denied. But it may be that some general principle exists extending the liability of persons further, through their agents, than the law of England allows that liability to exist here. When we come to examine that, however, we find that it is quite otherwise, and that this liability, according to the general principles of Scotch jurisprudence, is more restricted than according to our principles of jurisprudence. The case of *Bush v. Steinman* (ante, p. 930) in the Court of Common Pleas was a decision which gave perfect satisfaction in Westminster Hall,—a decision perfectly consonant to a crowd of other cases,—and yet that case of *Bush v. Steinman* I take upon me to say would not have been so decided in Scotland.

The case was this: a person had employed a builder to do work for him; that builder employed a sub-contractor, that sub-contractor employed a person to bring the materials; the person who was to bring the materials, not the contractor in the first instance, or the sub-contractor in the second instance, but a person three off from the gentleman who had given the orders so to have the work done for him, brought the materials, and laid them down in a negligent and careless manner, so that an individual had his carriage damaged thereby; that individual brought his action against the gentleman who had employed the contractor to do the work, and the consequence was that he recovered damage. A motion [940] for a new trial was made, and the facts as they had appeared on the trial were these: that the person farthest off, that is D., being employed to furnish materials by C., he being the sub-contractor of B., who was employed to build the wall, and which B. had been employed by A., had been guilty of the negligence out of which the injury arose; and under these circumstances the court held that A., the person who employed B., which B. employed C., which C. employed D., was liable for the negligent laying down of the materials by D., though he, A., was neither the person who laid down the materials, nor the person who employed D. to lay them down, nor the person who contracted with C. the employer of D., but only the person who had set the whole going by contracting with B. to do the work, which had been done by D., the injury being owing to D.'s negligence. Consequently the rule may be stated thus: I am liable for what is done by the man whom I employed, nay, for what is done by the person whom he employs, nay more, for what is done by the person whom the other employs, as if I had done it myself; and for this reason, that I in effect employ him to do it; I set the whole in motion, and it was for my benefit as well as by my orders it was done.

I am, therefore, of opinion that neither by the Scotch law, by decided cases, by direct authority varying with the circumstances of the case, nor by general principles applicable to the question, which the Court of Session has laid down, can this

judgment be sanctioned. Such being my opinion, and entirely agreeing with my noble and learned friend, I hold it to be my duty to set right the practice which has prevailed in Scotland, this not being the only case. It will reverse the decision in the case in [941] question; it will also destroy and abrogate the authority of the previous cases which proceed upon the same principle; it will set right the administration of the law, and make it inconsistent with no decision up to the period of 1820; and it will make it consistent with the general principle of Scotch law, and make the Scotch law in this matter not only consistent with its own general principles, with respect to the liability of agents and other persons, but it will likewise make it entirely consistent with the law of England.

I also agree with my noble and learned friend that all the interlocutors appealed from ought to be reversed, and I also agree with him as to costs. The costs of the appeal of course cannot be given, and it would be highly expedient and proper toward the parties that the pursuer should not be saddled with the costs in the Court below; he has not been so, and I apprehend he ought not to be.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal, of date the 10th of March 1837, and the 19th and 22d of June 1838, be and the same are hereby reversed, with this declaration, that neither party shall be liable to the other party in expenses in the said Court of Session.

RICHARDSON and CONNELL—DEANS and DUNLOP, Solicitors.

#### [942] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

EDWARD HOGGAN, Writer to the Signet, *Appellant*.—Pemberton—Sandford; ELIZABETH CRAIGIE, Daughter of George Craigie, sometime residing at Clan-Gregor Castle, *Respondent*.—Attorney General (Campbell)—James Anderson [23d August 1839].

[Cited, with approval, in *Lyle v. Ellwood*, 1874, L.R. 19 Eq. 107; and see *Yelverton v. Longworth*, 1864, 2 Macph. (H.L.), 58, 72; *Leslie v. Leslie*, 1860, 22 Dunlop, 1016, 1017.]

*Marriage*.—Circumstances held sufficient to constitute a marriage (affirming the judgment of the Court of Session). Per L. C. It is not necessary to prove the contract itself; it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place. Upon this principle, the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage.

*Marriage (promise cum copula)*.—Question as to the application of the rule of law in reference to promise *subsequente copula*, in cases in which cohabitation has also preceded the promise. (See p. 971.)

Question as to the effect of a release of a promise of marriage intervening between the promise and a subsequent *copula*. (See p. 974.)

An intimacy had subsisted between the appellant and respondent, which resulted in the birth of a child in September 1832. The appellant, subsequent to this event, granted the respondent a letter settling £10 per annum on her during life. In January 1834 the respondent discovered symptoms of pregnancy. On the 8th March 1834 the appellant delivered to the respondent the following document:—“Dear Elizabeth, [943] Under existing circumstances I feel anxious to provide for you after my decease, as far as in my power, and with that view I shall, at my decease, leave a declaration acknowledging you as my lawful wife, which will secure to you the annuity payable from the Widows Fund of Writers to the Signet. It is of the utmost importance that this intention should not be made known, as utter ruin, in that event must fall on me, and were I to show or give you possession of the declaration, I would then be compelled to announce the fact to the Collector of the Widows Fund within three months, under forfeiture of the annuity. The declaration, therefore, shall only be delivered at my decease, in the event of the most strict secrecy being adhered to regarding this communication; and I hereby declare, that in the event of the contents of this letter being made known to any other person or persons,

\* 15 D., B., and M., 379; S.C. 16 D., B., and M., 584.

except your father and mother, the letter shall be of no avail, and shall in no manner of way be held as binding, or used as a document against me. I am," etc. This document was antedated 25th January 1824. On receipt of this document the respondent wrote and presented to the appellant the following:—"1834, March 8th. Dear Edward, I do hereby declare to take you for my lawful husband, in terms of the document which you have made out, and that I will not make it known to any but my father, mother, and those friends which I wish to be on terms of intimacy with. But should the fact become known, and I have no hand in it, I will not hold responsible, nor forfeit my claim. I will do all to conceal it. Yours," etc. In reference to this latter document it was averred on record by the appellant "that on perusing it, as it appeared to him to have been written for a sinister pur[944]pose, he instantly, and in the pursuer's (respondent's) own presence, threw it into the fire and burnt it."

On the 29th March 1834, the appellant delivered to the respondent the following additional document:—"29th March 1834. Dear Elizabeth, It is most assuredly my intention to provide for you to the utmost extent my means will permit, during the remainder of your life, while we are separate from each other. If I made any statement last night to your sister to the contrary, it was not my intention. Whatever allowance is made is gratuitous on my part, and any abuse or attempt to compel me to increase these payments will be attended with a contrary effect. I propose giving you £50 this year, in full of all expenses of maintenance, payable at two terms, and the remaining years to be regulated by circumstances. The doctor and nurse's expenses to be paid. Yours truly." In the first paragraph of this document after the words "remainder of your life" there was originally written "while unmarried," but the appellant, at the request of the respondent, substituted the words which conclude the paragraph as above. The above documents were the result of repeated applications by the respondent and her parents to the appellant to acknowledge the respondent as his wife. The respondent having obtained an opinion of counsel, advising her to obtain a publication of her marriage, the appellant on 1st April 1834 delivered to her the following additional document: "I hereby declare most solemnly before Almighty God, that I never granted a letter to any one, such as I have given to you, and cannot now grant any letter with such an obligation to any other person, as I consider myself bound by my letter." The appellant averred on record in reference to this document [945] that it "was written in order to satisfy the respondent about her annuity."

On the 2d of April the respondent applied to Mr. Robert White, W.S., as her law agent, and, in consequence, after consulting counsel, a summons of declarator of marriage was prepared. An arrangement then took place, the nature of which was very differently described by the contending parties: by the respondent it was stated that the appellant had agreed, in writing, to acknowledge her status in the most unequivocal manner; the appellant, on the other hand, averred that the only obligation on his part was, that he should make an adequate provision for the respondent by means of annuity. In terms of said arrangement (whatever might have been the true nature of it), the parties proceeded to the house of Mr. White together, on the 22d April 1834. The respondent went into Mr. White's house, and the appellant waited for her in the street. The respondent afterwards rejoined the appellant, when she informed him that she had obtained from Mr. White the summons and the letters above mentioned. The parties afterwards went to South Queensferry in a street coach, and lunched there. While there, the respondent showed the appellant the papers she had received from Mr. White; upon which the appellant observed, that Mr. White must be in possession of other documents. The respondent then transcribed and delivered to the appellant the following letter, addressed to Mr. White: "As Mr. Hoggan and I have now arranged the matter, I withdraw all proceedings, and request you to deliver the whole papers, originals, copies, and drafts, still in your possession, connected with this business, to the bearer, who will settle your account. I am," etc. The parties then agreed to cross the ferry, and before [946] going, the appellant addressed the following letter to the respondent's mother: "To prevent the unnecessary and very unpleasant exposure which must have taken place had the intended action gone on, Elizabeth and I have arranged and agreed to put a stop to all proceedings; and I hope, from the arrangements which I have made, there will be no cause to regret. We shall return to Edinburgh

to-morrow or next day." The parties having spent the night together at the North Queensferry, they proceeded on the following day in a post-chaise to Burntisland, and the following is the respondent's statement of what took place there: "Having left Edinburgh unexpectedly, she had no trunk or secure place in which she might put the papers she had received from Mr. White, and the letter dated 22d April 1834, which had been written and delivered to her at Queensferry. The whole consequently remained in her reticule. In the course of the evening, having gone out of the parlour for a few minutes, she left the defender there, and the reticule with the papers in it lying on a chair. On her return she observed that the defender had gone out, and that the reticule was not in the room. She became alarmed, and searched the apartments carefully for the reticule and papers, but could not find them. During her search the defender returned to the room, and on being asked if he knew where the reticule was, he presented it to the pursuer, who instantly observed to him that none of her papers were there. Upon this he admitted that he had destroyed all her letters and papers, not, as he alleged, for the purpose of defrauding her, but merely in order to obtain the delay of some months in the publication of their marriage, for which he had so [947] anxiously besought her parents. He warned her, at the same time, that if she mentioned the destruction of the documents, he would cast her off entirely." The appellant denied this version of the transaction; he admitted that the letters, etc. were destroyed, but he averred that this was done with the respondent's express consent and approbation.

After moving about for some time to different parts of the country, and for a short time separately, the appellant took a house for the respondent in Edinburgh; but, on the morning after the respondent had entered the house, the appellant having peremptorily refused to acknowledge her as his wife, or to permit her to be addressed as such, she removed to the house of her parents. The present action of declarator of marriage was then instituted.

Upon closing the record a proof before the commissaries was ordered in support of the averments therein respectively, and the same having thereafter proceeded before the commissaries, the respondent, in the course of it, called Mr. Robert White, writer to the signet, as a witness, to whose admissibility the appellant objected; and she likewise called as witnesses George Craigie, her father, and Ann Craigie, her sister, to whose admissibility the appellant also objected. The commissary-examinator made avizandum with these objections to the Lord Ordinary, and his Lordship repelled in *hoc statu* the objection to the admissibility of the said Robert White as a witness, reserving the effect of what might be brought out in his examination in *initialibus*, and made avizandum with the debate on the objection to the admissibility of the said George Craigie and Ann Craigie, the father and sister of the pursuer, as witnesses. Mr. White having thereafter [948] been examined in *initialibus*, the appellant repeated his objection to his admissibility; whereupon the commissary allowed the examination of the witness in *causa* to proceed, and appointed the same to be taken apart, to be sealed up to lie in *retentis*, subject to the future orders of the Lord Ordinary. His Lordship repelled the objection taken to the examination of Mr. White in *initialibus*, and appointed his examination, as sealed up, to be opened and produced in process.

In the course of Mr. White's deposition as a witness in *causa*, he was interrogated, on the part of the respondent, on what ground, and for what purpose, she had requested him to give her up the documents before referred to, but the appellant objected to the interrogatory as incompetent, and the commissary-examinator allowed the question to be put and answered, but to be taken on a paper apart, and sealed up to lie in *retentis*, subject to the future orders of the Lord Ordinary.

On considering the objections taken by the appellant to the examination of the said George Craigie and Ann Craigie, the Lord Ordinary remitted to the commissaries to allow their examination to proceed, and in *hoc statu*, to seal up their depositions, that they might lie in *retentis*, subject to the future orders of the court.

The proof for both parties having been concluded, the Lord Ordinary appointed the parties to prepare and lodge mutual minutes of debate upon the competency of opening up the sealed depositions, and minutes of debate having been given in, the Lord Ordinary pronounced the following interlocutor:—"26th Nov. 1836. The Lord Ordinary having considered the minutes of debate, in respect of the special circumstances of this case, as established by the documents in process, and the proof



already taken, [949] repels the objections offered by the defender to the admissibility of the pursuer's father and sister, as witnesses: and also repels the objection to the question put to the witness, Robert White, and appoints the sealed packets referred to in the minutes to be opened, and to form part of the process." \*

\* "Note.—The Lord Ordinary, upon again considering the objection to the examination of the pursuer's father and sister, is rather confirmed than otherwise in his former opinion. The general rule unquestionably is that witnesses so circumstanced must be rejected, and the Lord Ordinary fully concurs in the opinion that actions like the present do not necessarily demand any relaxation of that rule. When a pursuer founds upon an alleged private and irregular marriage, it would be most dangerous to permit her to urge as a matter of right the secrecy of the transaction, as in itself a sufficient ground for obtaining the testimony of her near relations, the very persons who have the strongest motives for colouring or perverting the truth, and who, on the supposition of her averments being unfounded, are presumably the very persons with whose assistance the measures of the pursuer have been contrived. But the rule is not without exception. Even in the latest cause, mainly founded on by the defender, that of *Stewart v. Menzies* (*post*, p. 957), the Court, in expressing their opinions, took for granted that circumstances might emerge in the course of the proof warranting the examination of the witnesses objected to on the ground of relationship, and accordingly, on the strength of such circumstances, a brother of the pursuer was afterwards examined.

"Now, it does appear to the Lord Ordinary that the present case falls within the exception.

"It is established by the documents in process, at least by copies, of which the accuracy is admitted, that the defender did address several letters to the pursuer, which, to say the least of them, are of a very equivocal character. Independently of the sense attached to them by the defender, by profession a man of business, the construction put upon them by the pursuer, the comparatively inexperienced individual to whom they were addressed, especially if that construction was known to the defender, is a point which may be of very great importance. In this view it is essential to ascertain the whole circumstances relative to the acceptance by the defender of the pursuer's letter of the 8th of March, the terms of which are, for the first time, admitted in the minute. The defender, in his deposition as a haver, admits that he received that letter and burnt it, but the addition to that testimony that it was so burned in the presence of and with the consent of the pursuer, is clearly not conclusive evidence. The only information attainable upon all those matters is to be sought for in the examination of the pursuer's near relations, to whom, by the most positive injunctions of the defender himself, the pursuer's confidence was to be confined. In these circumstances it does appear to the Lord Ordinary that their testimony cannot be rejected without the greatest injury to the pursuer, while on the other hand the defender has by his own acts placed himself in a situation most justly barring all attempts on his part to shut out the only light which can be obtained on the subject. In canvassing the weight due to the testimony of those witnesses, regard will of course be had to the peculiarity of their situation, but in the meantime the Lord Ordinary cannot refuse their testimony.

"The second point relates to the question put to Mr. White as to the pursuer's reasons for asking from him the letters and documents, or, as the question is put in another form, his reasons for redelivering them. In general a statement made by a party would be inadmissible; but this is not exactly a fair mode of stating the point. It is admitted that those papers and documents were got up from Mr. White by the pursuer, for the purpose of being delivered to the defender, who was waiting in the neighbourhood of Mr. White's office. It is admitted by the defender that the delivery of those documents to him was not gratuitous or unconditional. He avers that the condition was the conveyance to her of a provision for life, while the pursuer avers it to have been the granting of a letter explicitly declaring her to be his wife, and thus superseding the necessity of the first action of declarator, and of the various documents on which it was founded.

"Both parties aver that a letter was written binding the defender to the condition, such as it was. That letter is not forthcoming. The defender has not examined

[950] Against the above-quoted interlocutor the appellant presented a reclaiming note to the First Division of the Court, and upon advising the same, their Lordships of this date pronounced the following interlocutor:—"The Lords having advised this reclaiming note, and heard counsel for the parties, refuse the desire of the reclaiming note, and adhere to the interlocutor reclaimed against; find the pursuer entitled to the expense of [951] opposing the reclaiming note, and remit the account thereof to the auditor to tax the same and report, and remit to the Lord Ordinary to proceed farther, as shall be just."

The cause was then debated on the merits, and avizandum having been made with the debate and whole process, the following interlocutor was pronounced by the Lord Ordinary:—"7th March 1837. The Lord Ordinary having heard parties procurators at great length, and thereafter considered the proof adduced, productions and whole process, finds facts, circumstances, and qualifications proved relevant to infer marriage between the pursuer and defender: Finds them married persons, husband and wife of each other, accordingly: Therefore, ordains the defender to adhere to the pursuer, and to cohabit with, treat, cherish, and entertain her as his wife, in terms of the conclusions of the libel, and decerns: Finds the defender liable in expenses; and allows an account thereof to be given in, and to be taxed by the auditor: Farther, and in regard to the conclusion for aliment in case of non-adherence on the part of the defender, appoints the cause to be enrolled, that parties may be heard thereupon." \*

the pursuer as a haver, and on the other hand she states that it was burnt along with the other documents, which the defender admits he put into the fire at Burntisland, and, in the absence of any proof of its existence, there does seem to be some probability in this statement. The parties then being at issue in regard to the condition on which these papers and documents were to be delivered up, it rather appears to the Lord Ordinary that the expressions used by the pursuer to her agent, on asking for the papers, while the defender was waiting in the street to receive them, fall to be considered as part of the *res gesta*, as a circumstance taking place in the course of the transaction, which may be competently received."

\* "Note.—The question will be found to depend in a great measure, if not entirely, upon the import of the writings which passed between the parties in March 1834. The Lord Ordinary has felt it to be one of considerable difficulty;—a difficulty arising from the very equivocal mode of expression used, and, as he cannot help thinking, intentionally used by the defender in these letters. They are certainly not the letters of a person intending to declare, without subterfuge or ambiguity, a present intention to contract marriage, merely qualified with the condition that it should be kept secret. They have as little the appearance of letters unequivocally intimating to the party to whom they are addressed that the connexion had been, and was to continue illicit, and undertaking merely an obligation for a pecuniary provision. There is, however, yet another object which the writer might have had in view, viz., to create an impression on the mind of the party receiving them, that they amounted to a declaration of marriage, while the mode of expression left the means of escape, if he found it convenient to deny their effect. The Lord Ordinary has found himself compelled to adopt the last supposition as the true one. But the mere circumstance of the defender's intention in this particular, is not conclusive. The questions will still remain,—1st, Whether the letters did admit of being construed as present declarations; 2dly, Whether the pursuer did receive and construe them as such; and lastly, Whether the defender knew that that construction was put upon them by the pursuer. For if these questions are answered in the affirmative, the defender will be bound, and cannot be allowed to plead the concealed and fraudulent intention with which the writings were framed, in defeat of the meaning put upon them, and known by him to be so put upon them, by the other party.

The first letter, bearing date the 25th January 1834, but of which the true date is admitted to be the 8th of March, is strongly indicative of some such intention as that already alluded to. In fact, it is impossible for the defender to give to it, according to his own view, any reasonable or consistent meaning. It sets out, no doubt, with stating his anxiety to provide for the pursuer, and promises to leave, at his decease, a declaration acknowledging her as his lawful wife. It then assigns.

[952] The appellant having reclaimed to the First Division, their Lordships ordered cases, and thereafter [953] pronounced the following interlocutor:—"17th Feb. 1838. The Lords, having resumed consideration of [954] this reclaiming note, with the revised cases and whole procedure, and having heard counsel for the parties, [955] adhere to the Lord Ordinary's interlocutor of 7th March 1837, and

as a reason for not giving her instant possession of the declaration, that he would be compelled to announce the fact to the Collector of the Widows' Fund. Looking at the terms of the existing Statute on the subject of that Widows' Fund, it may well be questioned how far this last representation was correct. But what is of more importance, it is nearly certain that the defender must have been satisfied at the very time, that the obligation, according to his construction of it, was absolutely worthless. The defender is a writer to the Signet, and could not be ignorant on a point which, even amongst the comparatively uninitiated, may be now considered as a matter of notoriety, that unless marriage is contracted during lifetime, the mere declaration left at death will not confer the character of widow. If the defender then had a private object in this letter, different from that of an admission of marriage *de presenti*, it was not so much the object of defrauding the Widows' Fund, as that of defrauding the young woman he was addressing, not only of her belief of marriage, but of her hopes of a provision; but while this letter does not present any very clear or consistent meaning, if strictly construed, it might, when read more loosely, very easily create the impression that it admitted the existence of the marriage at the time, while it merely postponed the granting of a document in evidence of that existing marriage, in consideration of the defender's motives for keeping the marriage secret. Though far from being explicit, it is a letter which might have been written by a party, who, knowing and admitting that he was married, stipulated only for the delay of the delivery of a document, which would at once enable the other party to declare it. And with reference to this last construction, the circumstance of the antedating of the letter is not immaterial. It is admitted that this was done to please the pursuer; and as she was then pregnant, there was an intelligible object in the antedating of the letter, if it referred to an existing marriage; while, according to the view of the letter taken by the defender, the antedating is utterly inexplicable and unmeaning.

"But that letter must not be taken singly,—it must be combined with the rest of the correspondence. It was followed by the letter from the pursuer of the same day, commencing, 'Dear Edward, I do hereby declare to take you for my lawful husband, in terms of the document which you have made out,' etc. One fact regarding this letter is admitted, viz., that it was delivered to the defender, although he denies that he retained it, but avers that he objected to it, and threw it into the fire in the presence of the pursuer. Upon these last points there is no evidence on either side,—certainly no conclusive evidence. For the Lord Ordinary cannot view in that light, the inferences drawn respectively by the parties, from the statements made to counsel, and the correspondence which took place relative to the opinions of those counsel. The admitted fact, however, of such a letter being written and delivered to the defender, is evidence of the meaning attached by the pursuer to the preceding letter of the defender, and is also evidence of the communication by her to the defender of the meaning so put upon it; and it would rather appear to the Lord Ordinary that the defender was bound to produce something more conclusive than his own mere averment of his rejection of that letter. As the correspondence did not stop there, the continuance of it clearly allowed the opportunity of placing this matter beyond the reach of doubt. But it so happens that the remaining part of the correspondence fortifies the presumption that the pursuer's letter had not been repudiated by the defender, and is, according to every probability, nearly irreconcilable with his statement upon this subject.

"The next letter, that of 29th March 1834, begins, 'Dear Elizabeth, It is most assuredly my intention to provide for you to the utmost extent my means will permit during the remainder of your life, while we are separate from each other,' and it is admitted that the last member of this sentence stood originally 'while unmarried'; and was altered to the present form of expression, on the application of the pursuer, and that the alteration 'was made to please her.'

refuse the desire of this note; [956] of new find expenses due, and remit to the auditor to tax the account, when given in, and to report."

[957] *Appellant*.—The father and sister of the respondent were not, according to the law and practice of Scotland, admissible as witnesses in her behalf. The principle of the law of Scotland in regard to relations in the degree of father or

"Now, it appears to the Lord Ordinary that this was just the occasion on which the defender, if he truly had rejected the pursuer's letter of 8th March, must have adhered to the expressions originally used. It was the very opportunity for taking off, by a written qualification or denial, the effect of any erroneous construction put upon his former letter by the pursuer. Yet, instead of taking that opportunity, he agrees to the substitution of a certain form of expression, which, contrasted with that struck out, amounts very nearly to complete evidence of acquiescence in the view taken by the pursuer in her letter of the 8th March, of their relative situations. As it is admitted, then, that the pursuer's letter of the 8th March was written and delivered to the defender, as there is no evidence of his rejection of it, but, on the contrary, the adoption by him of a phrase in the letter of the 29th, nearly irreconcilable with such rejection, there is a preponderance of evidence in support of the presumption that her letter of the 8th had been received and retained without objection.

"Next comes the letter of the 1st April:—'I hereby declare most solemnly before Almighty God, that I never granted a letter to any one such as I have given to you, and cannot now grant any letter with such an obligation to any other person, as I consider myself bound by my letter.'

"The defender seems to think that this letter may be easily disposed of. According to his view, it merely stated that he considered himself bound to abide by, and fulfil the obligation which he had granted by the letter dated in January; which again, according to him, meant nothing more than to enable her to go against the fund of the Society of Writers to the Signet for the annuity, the question being here, not whether this was a proper or improper purpose, but whether it has not plainly the meaning of the letter. The Lord Ordinary must demur to this reasoning. In the first place, the words are not merely that he will not grant, but that he cannot grant such an obligation to any other person, words which clearly imply an indissoluble or irrevocable engagement. Secondly, the previous correspondence admitting, at least by possibility, of this last construction, it being proved that such a construction had been put upon it by the pursuer, and there being a strong presumption that he had acquiesced in that construction, the solemnity of the adjuration in the letter of the 1st of April enters deeply into the question as a question of evidence of intention. That the defender should call God to witness a legitimate but secret engagement, and which for this last reason might require and justify such an appeal, was perfectly natural and proper. But is any man to be allowed to state in a court of justice that his meaning was only to call Almighty God to witness his engagement to provide for his associate in an illicit intercourse, through the medium of what he himself admits to be a gross fraud? Can it be supposed that the pursuer could have viewed it in that light? Is it not, on the contrary, quite clear that the pursuer was entitled to consider an obligation so solemnly attested, as importing in the first place a legitimate engagement, and at all events an irrevocable engagement, neither of which conditions it will be observed can be possibly applicable to it, as explained by the defender.

"Such, then, being the letters, it only remains for the Lord Ordinary to consider the evidence of the pursuer's father and sister, whose examination has been authorized by the Court in the special circumstances of this case. It is needless to state that witnesses so circumstanced must be presumed to have a strong bias, and that their testimony, if unsupported, *à fortiori* contradicted, must be received with great hesitation. The testimony of these witnesses, however, seems to stand clear of any imputation on the score of appearance of partiality, and is in all its essential particulars consistent with the inferences which the Lord Ordinary has thought himself entitled to draw from the letters themselves. By the testimony of both these witnesses, it is clear that they conceived and expressed that belief to the defender, that it was the secrecy of the marriage and not the postponement of it, which they under-

mother is, that in respect of their presumed partiality they are not to be credited in questions of contract. There is plainly no case to which this principle can apply more strongly than a case of status. *Penuria testium* is not held to render the evidence of such witnesses admissible in questions of irregular marriage, more than in any other sorts of contract; this exception is recognized only in questions of age

stood to be his object in the letters. And it is equally clear, according to their evidence, that that view was admitted or at least acquiesced in by the defender. Upon the whole, then, the Lord Ordinary has formed the opinion that the letters, combined with the parole proof by the pursuer's father and sister, afford sufficient evidence of a *de presenti* declaration of marriage.

"As to the remaining part of the parole proof, and the whole proceedings of the parties after the raising and abandonment of the declarator of marriage, there seems to be a great difficulty in connecting them with the correspondence hitherto considered. This arises from the defect of the evidence of the conditions on which the action was abandoned. The defender alleges that it was in consideration of his becoming bound to grant the pursuer a pecuniary provision, while it is averred by her on the other hand that she agreed to abandon the action and give up the documents on which it was founded, solely in consideration of his engaging to give her an absolute and unequivocal acknowledgment of her status as his wife.

"As a mere question of probabilities, the Lord Ordinary has no hesitation in avowing his belief of the latter statement. Even in the most trivial question of pecuniary obligation, a party, a professional person, who contrived to transact with his adversary, an inexperienced young woman, under the cautious seclusion of her parents and legal advisers, could not well complain of any unfavourable construction being put on his conduct. But these unfavourable presumptions are incalculably stronger in the present case, where the defender must, from the nature of his connexion with the pursuer, have had a great influence over her, and where, having got her into his power, and having obtained, through her means, possession of all the documents considered to be of importance, he induced her to abandon, by her own unadvised act, that legal proceeding which she had commenced under the sanction and counsel of her natural guardians and legal advisers. But whatever may be the probabilities, the Lord Ordinary is of opinion that there is no sufficient proof of the terms on which the pursuer agreed to give up the action of declarator.

"And it may be observed that this circumstance goes far to exclude the second or alternative view of the case maintained by the pursuer, viz., that the continued connexion between the parties after they left Edinburgh on the 22d of April 1834, when combined with the letters of the defender, must at any rate constitute a marriage, by the force of the promise followed by copula.

"These letters, viewed as a declaration *de presenti*, were beyond the reach of any recal or surrender by the parties; but if viewed as constituting merely a promise, that promise admitted of being retracted on the one hand, or abandoned on the other; and no copula, following on such retraction or abandonment, would be of any relevancy in a question of marriage. Now, here it is admitted that the letters were given up, and as there is no sufficient proof of the terms on which according to the pursuer, they were so given up, viz., in consideration of an absolute acknowledgment, it does appear to the Lord Ordinary, that there is here a defect in one indispensable link of the pursuer's chain of evidence.

"A remark of the same kind is applicable to the whole of those subsequent proceedings, in so far as they are founded upon substantively, as affording a proof of marriage by cohabitation, and habit and repute. The doubtful nature of the terms on which the pursuer agreed to abandon the action of declarator, throws a corresponding obscurity over the true nature of the connexion which afterwards subsisted between them. That connexion did not continue under circumstances to make it in itself conclusive. It is proved, no doubt, that they lived together as man and wife, and were so considered in the lodging-houses where they resided. But it is also proved that this took place under assumed names, a circumstance which goes far to neutralize the inference of marriage. As the assumption of the appearance of marriage may be easily accounted for, from a consideration of decorum and convenience, and may be ascribed to such considerations when the true names are con-

and propinquity, or in the trial of crimes (*Dalziel v. Richmond*, 10th June 1790: *Ball v. King*, 21st January 1797; *Stewart v. Menzies*, 5th Feb. 1835; all in Fac. Coll.). It was incompetent to admit as evidence the statement made by the respondent to her agent, Mr. White, respecting her motives for demanding re-delivery of her documents from him. To render hearsay admissible at all to this [958] effect, it must be quite clear that the statement to be proved is made in circumstances in which there is no reason to suspect its truth, where no intelligible motives for deception can be supposed, and where consequently the statement made may, with reasonable certainty, be taken as throwing the light of truth upon the act to which it immediately relates. The declaration of a party, as explanatory of his acts, is therefore admitted to be proved, when it is adverse to his interest in the cause, and the statement of a third party, explanatory of an act, may in like manner be taken where it was made without interest in or anticipation of the cause in which it is offered to be proved and without any motive to misrepresent the truth. But the declaration of a party himself in his own favour never can be so proved, for it is impossible in any such case to have a reasonable certainty that the declaration is not false, and contrived with a view to the very case, in support of which it is afterwards offered to be proved. In the present instance it will be observed, too, that the declaration was not made till after the controversy had arisen, upon the merits of which it is brought to bear.

The respondent has not proved any *de præsenti* acknowledgment or declaration of marriage on the part of the appellant (Kennedy, 19th June 1747, Mor. 10457. Brown's Supplement, vol. v. p. 789; *M'Innes v. More*, House of Lords, 25th June 1782. Mor. 12683; *Taylor v. Kello*, 16th Feb. 1787, Mor. 12687; *Anderson v. Fullerton*, 13th Nov. 1795, Mor. 12690; *M'Lachlan v. Dobson*, 6th Dec. 1796, Mor. 12633; *Stewart v. Menzies*, 6th Dec. 1833, 12 S., D., and B., 179; Ferguson on Consistorial Law, and authorities there referred to). The respondent has not shewn that either of the parties had marriage in view throughout their intercourse, yet in such circumstances even a [959] regular and formal celebration *in facie ecclesiae* has been disregarded (*Jolly v. M'Neill*, 20th June 1828, 3 Wilson and Shaw, 85).

A promise of marriage has not been proved. This point must depend exclusively upon the construction of the appellant's letters, or rather of the antedated letter of the 25th January 1834, containing the alleged promise of which the subsequent letters are

cealed; on the other hand, the assumption of feigned names is not absolutely conclusive the other way, as it is quite consistent with the notion of a really existing marriage, which the parties wish to keep secret. It certainly does not appear to the Lord Ordinary, that there is here any such inconsistency as to raise doubts of the true meaning of the letters forming the main ground of the pursuer's action. Even the expressions which she is said to have used at Dumfries admit of an easy explanation, when it is considered that her object was to obtain an unequivocal acknowledgment of her marriage; and that, after the abandonment of the action, and the delivery of the documents she had every reason to believe that she was at the defender's mercy. Neither is it to be thrown out of view, that there are some other circumstances in these subsequent proceedings, which the defender will find it difficult to explain. The taking of the house in Warriston Crescent, and the intimation of it to the pursuer's mother, are not very easily reconcilable with the notion of a mere continuance of an illicit connexion. Inferences still more strong may be drawn from the letter addressed to the pursuer's mother from South Queensferry, on 22d April, on their way from Edinburgh, and also from the letter of 1st May 1834. addressed by the defender to the pursuer in Glasgow.

"These letters are written with the defender's habitual caution; but no person, on the mere reading of these letters, and in the ignorance of any private views on his part, could for a moment suppose that they implied anything but a legitimate connexion between him and the party to whom the first of these letters related, and to whom the second was actually addressed. But the Lord Ordinary finds it unnecessary to remark farther on the evidence of the proceedings of the parties after they left Edinburgh. His opinion is formed on the letters of the month of March, corroborated as they are by the testimony of the two Craigies; and for the reasons already given, that opinion is in favour of the pursuer."

founded on as merely confirmatory. The promise contained in the letter of 25th January is, that "I shall, at my decease, leave a declaration acknowledging you as my lawful wife;" and is accompanied by an explicit intimation, that "the declaration shall only be delivered at my decease, in the event of the most strict secrecy being adhered to regarding this communication." Lord Stair defines marriage "to be the conjunction of man and woman, to be consorts for all their life, with a communication of rights, divine and human; so the essence thereof consists in the conjugal society, the special nature of which society appeareth by the state, interest, and terms that the married persons have thereby." The promise given by the appellant was of something exclusive of this essence of marriage, viz., a declaration not to be delivered till after his decease, by which the conjugal society could not be constituted (Stair, b. 1, tit. 4, s. 6; *Cockburn v. Logan*, 19th July 1670, Mor. 12386, Smith, 26th Nov. 1755. Mor. 12393; *Harvey v. Crawford*, 19th Feb. 1732, Mor. 12388; *Anderson v. Fullerton*, 13th Nov. 1795, Mor. 12690).

Supposing there was a promise of marriage, it was effectually recalled by the appellant before any subsequent copula took place between the parties (Stair, b. 1, tit. 4, s. 3; Ersk. b. 1, tit. 4, s. 3). The [960] promise was renounced by the respondent herself, by the transaction by which she agreed to redeliver his letters to the appellant.

The legal presumption of matrimonial consent having passed at the time of a copula subsequent to the promise, is excluded by the fact of such intercourse having also preceded the promise (*White v. Hepburn*, 18th Nov. 1785, Mor. 12686; *McDowall*, Feb. 1796, reported in *Ferguson's Consistorial Law*, 163-178; Summary of Cases, Ersk. b. 1, tit. 6, s. 4, p. 120, note 139, Ivory's edition).

The promise was so qualified as to be incapable, by any fiction, of being converted into the *de praesenti* consent essential to marriage, at any period during the lifetime of the parties.

The appellant and respondent never cohabited together as man and wife.

*Respondent.*—Under the circumstances of the case, the respondent's father and sister were admissible as witnesses. To maintain this proposition, there is no occasion to impugn the doctrine of the law of Scotland, that persons occupying so near a relationship are inadmissible as witnesses. The question presently under discussion does not turn upon that general rule. It falls under one of its best established, and most favourably received exceptions, namely, that the facts which these relations were called to prove, are of an occult nature, *in re domestica*, and as to which there exists an unavoidable *penuria testium*. Consistorial causes stand in no other situation than ordinary causes, farther than this, that they are of that nature, that the transactions to be spoken to are most likely to be occult, and a [961] *penuria testium* is most likely to exist in regard to them (Stair, b. 4, tit. 43, s. 8; Bankton, b. 4, tit. 30, s. 15; Ersk. b. 4, tit. 2, s. 26; *Barber v. Stewart*, July 1732, Mor. 16742; *Young v. Arrot*, 8th Dec. 1738, Mor. 16743; *Stirling v. Hamilton*, 11th July 1704, Mor. 16708, and 13th July 1706; *Cumming v. Cumming*, 5th March 1748, Mor. 16756; *Boyd v. Gibb*, 20th Jan. 1770, Mor. 3989 and 9583; *Nicolson v. Nicolson*, 6th Dec. 1770, Mor. 16770, and Hailes, Dec. 371-418; *Martin v. Mackissan*, 8th Feb. 1816; *Bell v. Bell*, 14th April 1819, 2 Murray 130; *Spence v. Howden*, 12th July 1819, 2 Murray, 167; *Stewart v. Menzies*, *ut supra*). That the penury of testimony is the result of the tortuous act of the appellant is a circumstance of itself sufficient to authorize the testimony in question. But although the witnesses had been inadmissible the appellant waived the objection by himself cross examining them (Corporation of Sutton Coldfield, 1 Vern. 254; Bland, 3 Bro. P.C. 620). The conversation between the respondent and Mr. White formed part of the *res gestae*, was explanatory of the conduct of the parties, and was therefore competent to be given in evidence (Starkie's Law of Evidence, 2d edit. vol. i. p. 36).

The letters amount to a *de praesenti* declaration of marriage, more especially when explained by the relative parole proof. The letters in March and April taken by themselves, amount to a *de praesenti* declaration. However cautiously they may be conceived, they were undoubtedly written and delivered by the defender to the pursuer as such. It is of no consequence what the characters were which the parties chose to employ in expressing their consent. If it be once made out what they intended to mean by the characters employed, effect will be given to the meaning and intention, rather than to the literal reading of the words. The respondent is quite ready to

concede, in the [962] fullest extent, a proposition which the appellant labours to establish, viz. that however clearly expressive the words might be of marriage, where it can be shewn that neither of the parties had marriage in view, the Court would not give effect to the words. But the proposition overthrows the argument which it is sought to support; because on the same principle, the respondent would say *multo magis*, if it appear that the parties understood each other as meaning to declare a marriage, it would be valid and effectual whatever ambiguity or equivocation might lurk about the mode of declaring it. The appellant was not entitled to assume that his intercourse with the respondent previous to the date of the letters was illicit. On the contrary, the presumption is, that it was in consequence of a lawful connexion (per Lords Chancellor (Eldon) and Redesdale, in *Cunninghams v. Cunninghams*, 2 Dow, 502, 506, and 511). The letters explain the previous footing on which the parties lived, and also give a character and a consistency to their subsequent intercourse. This much is clear, that when the letters of March and April were interchanged, the parties were not conspiring together to effect any sinister purpose. In what they did and wrote they were unquestionably serious. The respondent was serious in acknowledging the appellant to be her husband, and the appellant was serious in acknowledging the respondent to be his wife, or what is the same thing, in leading her to believe that he so acknowledged her. Every statement made and every act done by the defender was a confirmation or iteration of the declaration made by the letters. To what other source than to the declaration in the letters, or rather to the [963] marriage which the letters declare, can the repeated admissions or acknowledgments of the appellant, that the respondent was his "wife," be ascribed? In what other capacity can their cohabitation be viewed than that of marriage? Were there any doubt about the terms of the letters, or about the meaning which the parties conveyed to each other by the letters, it would be removed by what followed on them. Every word the appellant spoke, or deed the appellant did, carried to the respondent a confirmation of the acknowledgment contained, or which she believed, and which the appellant knew she believed, to be contained, in the letters. It was the evincing to her, as well as to others, the consent of marriage, which made the contract (*M'Adam v. M'Adam*, 21st May 1813, 1 Dow, 189; *Honyman v. Honyman*, 3d March 1831, 5 W. and S. 133, 139, 144; *Stewart v. Menzies*, 6th Dec. 1833, 12 S. and D. 183).

There was no discharge or renunciation of the promise. The appellant possessed himself of the letters surreptitiously, and against the will or consent of the respondent, and it is impossible to hold that that amounted to a discharge or renunciation of the previous promise or obligation of marriage. But the parties slept together on the night of the 22d, and it was not till the 23d that the appellant got possession of the documents in the manner described. A marriage by promise and copula had therefore been effectually constituted before the appellant possessed himself of the letters; and it was beyond the power of either of the parties to recall it. It was indissoluble, except by death or divorce; and even although the respondent had voluntarily renounced the promise, her renunciation [964] would have been nugatory and unavailing. By that time she was the appellant's wife for better for worse.

The position, that the promise *copula subsequente* did not amount to marriage, because the parties had had intercourse before the letters were granted, is maintained on a mistaken notion of the true principle of the law (per Lord Stowell in *Dalrymple*, Dodson's Report, p. 60, 62). Marriage is held to be formed, not as a punishment on the seducer, or as a compensation to the injured female. The true principle is, that the copula is the actual fulfilment of the previous promise, as much as if a *de presenti* declaration had been given, or a formal marriage solemnized, and the marriage thus contracted may be declared and enforced, as well against the woman as against the man. The previous character or conduct of the parties has no bearing on the question. If they could have contracted the matrimonial relationship in any way, it is formed if a copula succeeds the promise (Stair, b. 1, tit. 4, s. 6; b. 3, tit. 3, s. 42; Bankton, b. 1, tit. 5, s. 2; Erskine, b. 1, tit. 6, s. 4). The principle on which marriage by promise *subsequente copula* depends is altogether independent of the consideration, whether the copula has or has not been the first to which the female has submitted. The previous promise is equivalent to the sponsalia of the Romans, the subsequent copula to the actual consummation of the matrimonial relationship. By the "natural commixtion," the promise "transit in matrimonium," from an inflexible legal pre-



sumption that the parties thereby interchange a consent *de praesenti*. And so strong is this presumption, that it obtains, even [965] although one of the parties should not consider himself or herself married (Pennycuick, 15th Dec. 1752; *Shillinglaw v. McIntosh*, 6th March 1829, 7 S. and D. 533; *M'Kinnon v. Sandys*; and *Myles v. Sim*, 20th Nov. 1829, 8 S. and D. 89). The case of *M'Dowall* (*ante*, p. 960), was entirely different in its circumstances from the present. The promise there given was not absolute, but qualified. It was made to induce the woman to submit to the man's embraces; and the promise was, that he would marry her if she fell with child. The Court held this not a promise *subsequente copula*, but a promise *post copulam*. The woman might not have conceived, and in that case no promise had been given. It was only when pregnancy took place that the promise came into existence, and there it remained unconsummated and unfulfilled.

The parties were habit and repute husband and wife, and cohabited together as married persons.

Lord Chancellor.—My Lords, in this case the Lord Ordinary, and all the judges of the Inner House, concurred in the opinion that there had been a valid marriage between the parties, although there was a difference of opinion as to whether it was to be considered as resting upon a contract *per verba de praesenti*, or a promise of marriage *copula subsequenti*. It appears to me impossible for the appellant to escape from one or the other of these grounds; as to the first, it is not necessary to prove the contract itself, it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place; upon this principle the acknowledgment of the [966] parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage, *contrahuntur nuptiae consensu quomodo-cunque declarato, verbis aut factis* (Voet, l. 23, t. 2, s. 2), according to the doctrine of the civil law, or according to Mr. Erskine, book 1, title 6, section 5, "Marriage may be entered into where the consent is not expressed, but is discovered *rebus ipsis et factis*." Everything, therefore, is pertinent and relevant in an inquiry like the present, which indicates the present or previous consent of the parties.

Upon examining the evidence of what took place between these parties in March and April 1834, so far as it is to be found in the written documents, (only with reference to this principle,) I think there is satisfactory proof of a previous contract binding upon the appellant; it seems, indeed, probable that he attempted so to manage his communications with the respondent as to satisfy her wishes, and put a stop to her importunities, and, at the same time, to keep open to himself the means of escaping from his contract. But this will not avail him if there be proof of a binding contract, and if the respondent understood it to be so.

In order fairly to try the import of the letters, and to ascertain whether they prove the case set up by the respondent, or are consistent with the case as represented by the appellant, it must be kept in mind that the respondent insists there had been a previous contract or promise of marriage, and that the appellant denies this, and says that the connexion had been altogether illicit.

The letters appear to me quite inconsistent with the [967] latter supposition. The letter dated the 25th of January but written on the 8th of March, (an ante-dating strongly corroborative of the respondent's case, but unexplained by that of the appellant,) states the writer's intention of providing for the respondent, by an annuity payable from the widows' fund of the Writers to the Signet, which he could not do unless she were his wife. He wished, indeed, that the declaration, acknowledging her as such, should not be made known until after his decease, but such declaration would have been wholly inoperative, unless there had been a marriage in his lifetime; a declaration of marriage made known at that time, he says, would be his ruin, which is quite consistent with a previous secret contract, but is absurd, as addressed to a woman pressing for marriage not previously contracted. If it is to be construed to mean "I will never marry you, but after my death you shall have a declaration which may enable you by fraud to obtain an annuity as my widow," would it not have been absurd in the circumstances to permit her to shew it to her parents? but if, as between themselves, it was a recognition of the respondent as the wife of the writer, it would naturally tend to relieve their anxiety, although the announcement of the marriage was refused.

Again, if the letter was felt by the writer to be a recognition of the marriage, his prohibition to make it known to any other person or persons is intelligible; but if it was only to announce an intended fraud against the widows' fund after his own death, by the publication of which the respondent alone would suffer, the concealment might safely have been left to her. The [968] only rational and consistent construction of that letter appears to me to be this, "As between ourselves I acknowledge you to be my wife, and you may, to satisfy your parents, shew them this letter; but it must not be made known during my life; I will, however, furnish you with the necessary evidence to enable you to obtain the annuity after my death as my widow." That the respondent so understood this letter, or professed so to understand it, is proved by her letter of the 8th of March, if legally proved, which I think it is, and is scarcely less evident from the appellant's admission, in his answer to the eighth article of the pursuer's condescendence, in which he says, that upon reading her letter it appeared to him to have been written for a sinister purpose, and that he threw it into the fire. With this knowledge of the appellant's construction, or assumed construction, of the letter dated the 25th of January 1834, he wrote the letter of the 29th of March, in which he at first expressed his intention of providing for her, "whilst unmarried," to which she objected, and he, yielding to the objection, instead of those words introduced the words "while we are separate from each other." The appellant's wish to use the words "whilst unmarried" may be consistent with his declared intention of keeping the marriage secret, but his yielding to the respondent's objection to these words proves at least that he knew that she considered herself as married to him, and that he acquiesced in such her representation of her status.

Knowing then that the respondent treated the letter of 25th January as an acknowledgment of their marriage, and that she had refused to permit any expression to be [969] used in the letter of 29th March calculated to throw any doubt upon it, the appellant wrote another letter, of the 1st of April, in which he says, "I hereby declare most solemnly, before Almighty God, that I never granted a letter to any one such as I have given to you, and cannot now grant any letter with such an obligation to any other person, as I consider myself bound by my letter." The appellant attempts to escape from the effect of this letter, by suggesting that it was only to satisfy the respondent about her annuity; there is not an expression in it consistent with such a construction; on the contrary, being written to a woman who he knew claimed to be his wife, and relied upon his former letter as a recognition of her marriage, that letter can receive but one construction, namely, that she might rely upon that letter for that purpose, and that he was himself bound by it.

Upon the evidence of those letters, therefore, without referring to any parts of the testimony upon which doubts have been raised, I think the case made out, of a written recognition of the respondent, by the appellant, as his wife, and admission of a previous contract of marriage having taken place between them. Whatever difficulty there may be as to the evidence of what took place when the respondent obtained the papers from Mr. White, or what took place at Queensferry on the 22d of April; the appellant's letter to the respondent's mother of that date, seems to me to make such evidence comparatively immaterial. The respondent had determined to institute a declarator of marriage against the appellant, with the concurrence of her parents. This proceeding she withdrew, and left [970] Edinburgh with the appellant on the 22d of April, and on the evening of that day he wrote to the respondent's mother in these words, "To prevent the unnecessary and very unpleasant exposure which must have taken place had the intended action gone on, Elizabeth and I have arranged and agreed to put a stop to it. From the arrangements which I have made there will be no cause for regret. We shall return to Edinburgh to-morrow or next day." On the night of that day the parties slept together, and it was not till the next day that the appellant got possession of the letters which, up to that time, had been in the respondent's possession. It is, therefore, quite immaterial by what means he so obtained possession of the letters, because cohabitation had clearly taken place whilst they were still in the respondent's possession.

If according to the opinion of the judges of the First Division the letters before referred to implied rather a promise of marriage than a contract *per verba de presenti*, there was a copula following such promise, and therefore all that is necessary to constitute a marriage according to the law of Scotland. In order to try the construction

of those letters, as containing a promise of marriage, it must be assumed that there had been no previous contract, or at least none such as the respondent could rely upon.

The letter of the 25th of January was in terms a promise to secure for the respondent a provision which she would only become entitled to by a marriage. That which was to be postponed until after his death was the publication of the evidence of the marriage. What was the intention which was to be concealed, and which if [971] made known would be the utter ruin of the appellant? What was the fact which it would be necessary to make known within three months to the collector of the widows' fund? What was to be made known to the respondent's parents, and in what way was the letter to be used as a document against him? Those expressions have all a natural meaning if a marriage was the subject to which they refer, but are wholly inconsistent with the appellant's construction that a plan of defrauding the widows' fund was the only subject to which they referred.

The letter of the 1st of April puts this beyond all doubt. What was the obligation referred to in that letter, which after the letter of the 25th of January the appellant would not grant to any other person, and by which he considered himself bound? What but marriage? I think that those letters do recognize a previous contract of marriage, but if not, they clearly contain a promise of giving to the respondent the character of wife, which, followed by the cohabitation of the 22d of April, constitutes a marriage.

It has, however, been contended upon this latter view of the case that the above rule of law does not apply in cases in which cohabitation has also preceded the promise; some authority has been referred to in support of that proposition, particularly *White v. Hepburn*, 18th November 1785, Mor. 12,666, and the case of *McDowall*, in February 1800, *Ferguson's Consistorial Law* (1829) pages 167 to 178; but in the [972] latter case the promise appears to have been conditional upon the woman proving with child; and a contrary doctrine has been recognized in *Shillinglaw v. McIntosh*, 6th March 1829, 7 Shaw and Dunlop, 533; *McKinnon v. Sandys*; and *Myles v. Sim*, 20th November 1829, 8 Shaw and Dunlop, 89. In the view I take of this case it is not necessary to express any conclusive opinion upon this point. It has been further contended that if there had been any promise it was released by giving up the letter which contained it before any *copula* took place; the evidence proves the contrary, the *copula* having taken place on the 22d of April, and the possession of the letter by the appellant not having then taken place; even had this been otherwise it would have been necessary for the appellant to have proved the voluntary delivery of the letter to him by the respondent for the purpose, and with the intent of releasing the contract, which he has wholly failed in doing.

Finding sufficient in this case to support the judgment of the Court of Session without relying upon that part of the evidence which has been objected to, there is no necessity for saying much upon that point. If the ground of the rule of law in Scotland as to rejecting the evidence of near relations be the same as that upon which the rejection of the evidence of a husband and wife in this country rests, namely, the avoiding that invasion of domestic confidence which the admissibility of such evidence would occasion,—there may [973] be reason in considering a penuria of other evidence as an exception to the rule; but if it be founded upon the supposed want of credit of such near relations, it seems most unreasonable to reject such testimony, when its credit may be fairly tested by other evidence to the same point, and to receive it only when, there being no other evidence, the conclusion must be drawn from such evidence only. There is, however, no doubt of the rule and of the exception, and there cannot be a case more clearly falling within the exception; for not only is this a case of domestic transaction likely to be known only to members of the family, but the evidence of the father and sister become material in a great measure from the secrecy maintained at the instance of the appellant himself, and from the spoliation by him of written documents; the admissibility of the evidence, under such circumstances, appears to be established by the authorities referred to by the respondent.

The evidence of *White*, as to what the respondent said to him upon applying for the paper, does not appear to me to be at all material in coming to a conclusion upon the merits of the case. For these reasons I think that the interlocutors appealed from are right, and therefore move your Lordships that they be affirmed with costs.

Lord Brougham.—My Lords, I entirely agree with my noble and learned friend. I had no doubt respecting this case from the beginning, as I intimated during the argument at the bar, though I pressed the counsel for the respondent on several points for the purpose of having it fully argued. My opinion has [974] been confirmed by having since read the cases. My Lords, I agree with my noble and learned friend that it is sufficient if there is a promise *cum subsequenti copula*; and in that view I am of opinion that there is evidence sufficient in this case to establish a marriage. Some law has been vented at the bar which I cannot agree to, but which it is wholly immaterial to decide, because the facts of the case do not raise it; it is not necessary for your Lordships to decide the question whether or not, if after a promise, and before the *copula*, a renunciation of that promise or a release of that promise took place, that would or not negative the marriage. If the *copula* took place no one has gone so far as to say that the subsequent release of the promise could have the slightest effect. Nay, it ought to be known, if there is the least doubt upon that point, that if not only one party, but both parties, were to agree after the *copula* had taken place, a promise having preceded it,—if the husband, who had given the promise, were to say “I will no longer abide by it,” and the wife, who had received it, were to say, “I no longer compel it,” they could not possibly divorce one another by that means. If a marriage has taken place it is a complete valid marriage, and the promise cannot be released. My Lords, it is wholly unnecessary, in the view I take of this case, to argue the point whether, if before the promise is followed by a *copula*, there is a release and renunciation by the promisee, that would prevent the subsequent *copula* from constituting a valid marriage; for in this case the *copula* took place previous to the alleged renunciation. I would not, however, be understood as at all giving my opinion in favour of the [975] doctrine that even if it had been proved that the promise had been renounced between the contract and the *copula*, there would not be sufficient to sustain the marriage, because I am inclined to think the sounder view is, that though the renunciation might bar an action for breach of promise of marriage,—if the *copula* took place after renunciation, the *copula* would revive the promise and repeal the renunciation. Where the *copula* takes place subsequently to the promise it is taken to be in execution of the previous promise.

It is unnecessary to enter into the other questions which have been discussed by my noble and learned friend, with whom I entirely agree. The letter of April, connected with the letter of the 25th of January, can bear no other construction than that which he has given them. One part of the case entirely fails, namely, that which relates to the supposition of an attempted fraud on the widows fund. I think a very slight attention to the case sufficient to shew that the facts do not bear out that allegation in the smallest degree, but that the facts are most consistent with the case made by the respondent. My Lords, without entering further into the reasons, or discussing the argument used at the bar or in the court below, I am of opinion, with my noble and learned friend, that the interlocutors must be affirmed, and of course with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the [976] clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

ARCHIBALD GRAHAME—JOHNSTON and FARQUHAR, Solicitors.

[977] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

ARCHIBALD HORNE, Judicial Factor, on Cromarty, and COLIN M'KENZIE of Newhall, *Appellants*.—Sir F. Pollock—Pemberton; The Honourable Mrs. MARIA HAY MACKENZIE of Cromarty and Captain HUGH MUNRO, her Tacksman, *Respondents*.—Attorney General (Campbell)—Buchanan [26th August 1839].

[*Moss*' Dig. vii. 111; S.C. 6 Cl. and F. 628. Distinguished in *Reece v. Miller*, 1882, 8 Q.B.D. 631.]

*Salmon Fishing—Statutes 1424, c. 11, etc.—Stake Nets—Evidence.*—At the trial of an issue as to whether certain stake nets and other engines were placed in situations prohibited by the statutes regulating the salmon fisheries, the judge in the course of his direction to the jury, after defining estuaries as spaces between the strictly proper river and the strictly proper sea, the waters of which were partly salt and partly fresh, proceeded thus:—"The mere name is of little importance. The thing to be looked to is the fact of the absence or of the prevalence of the fresh water, though strongly impregnated by salt. Now, where this fresh water prevails, though in the estuary, these structures are illegal." The Court of Session disallowed a bill of exceptions to the [978] direction. The House of Lords reversed this judgment, and remitted the cause with directions to allow the bill of exceptions, and grant a new trial.

Question raised,—Whether it was matter for exception that a witness had been allowed during his examination to use, for the purpose of reference, a printed copy of a report, with certain jottings and calculations recently made thereon, relative to the subject of his testimony, which report he had prepared on the employment of the party adducing him as a witness:—observed, per L. C.—It is clear that for some purpose at least the witness was at liberty to refer to the paper he produced, and that a bill of exceptions could not have been supported on that ground.

By a statute of Robert I., A.D. 1318, c. 12, it is enacted thus:—"Item ordinatum est et assensum, quod omnes illi qui habent croas, vel piscarias, vel stagna aut molen-dina in aquis ubi ascendit mare et se retrahit, et ubi salmunculi vel moliti seu fria alterius generis piscium maris vel aquae dulcis descendunt et ascendunt, tales croae et machinae infrapositae sint ad minus de mensura duorum pollicum in longitudine et trium pollicum in latitudine, ita quod nulla fria piscium impediatur ascendendo vel descendendo, secundum quod libere possint ascendere et descendere ubique."

Another statute, in the reign of James I., 1424, c. 12, enacts,—“Item, It is ordanyt that all cruifis and yairs, set in fresche waters quhair the sea fillis and ebbs, the quhilk destroys the fry of all fischea, be destroyt and put away for three yeirs to cum.”

Another statute, in the reign of James III., 1469, c. 87, enacts,—“Item, for the multiplication of fish, [979] salmond, grillsis, and trowtes, quhilk are destroyed by cowpes, narrow messes, nettes, prynes, set in rivers that hes course to the sea, within the flude mark of the sea, it is advised in this instant parliament, that all sic cowpes and prynes be destroyed and put away for three ziers.”

Another statute, in the reign of James IV., 1488, c. 13, enacts,—“It is statute and ordained, that all cruifis and fisch-dammys that ar within salt watyrs quhar the sey ebbs and flows, be utterly destroyed and put down, alsweil thai belongis to our soveregn lord, as utheris throw all the realme. And as anent the cruifis in fresche waters, that they be of sic largnes and sic days keepit as is containit in the actis and statutis maid thereupon of befor.”

Another statute, in the reign of Queen Mary, 1563, c. 3, ratifies the preceding statute, with the following addition:—"That is to say, that all cruives and yairs that ar set of late upon saunds and schauldes far within the water where they were not of before, that they be incontinent, tane down, and be put away, and the remanent

\* Rep. 16 D., B., and M., 1286.

cruives that ar set and put upon the water sandis to stand still quhil the first day of October next to cum, and incontinent after the said first day to be destroyed and put away for ever."

In 1828 the respondent, as proprietrix of salmon fishings in the river Conon, and her tacksman, Captain Hugh Munro of Teaninich, applied to the Court of Session, by bill of suspension and interdict, against several proprietors of fishings situated to the eastward of her fishings, on the ground, that they were fishing [980] illegally within the locality described by the statutes above recited. In support of this application it was averred, that the whole expanse of water between a point at or near the town of Dingwall and the two great headlands called the Sutors, which abut upon the ocean and form the entrance to what is known as the Frith of Cromarty, was subject to the prohibitions in the said statutes.

The application was opposed by Mr. Archibald Horne, accountant in Edinburgh, judicial factor on the estate of Cromarty, situated near the Sutors; and also by M'Leod of Cadboll, Mackenzie of Newhall, and others whose fishings are situated between the Cromarty fishings and those of the respondent. By these parties it was contended, that all the water below the line of lowest ebb tide beyond which the sea never recedes, whatever shape or form the contiguous coast might assume, was excluded from the operation of the prohibitions aforesaid.

The bill of suspension was passed; and a record having been made up, issues were adjusted for all the parties in a corresponding form, but it was agreed that the issue as to the Cromarty fishings should be held as the issue for all the others, *mutatis mutandis*, and that their interests respectively should be determined by the result of that issue. The following accordingly was the issue sent to trial, viz. "Whether the defender, Mr. Horne, or his predecessors in office, has or have wrongfully fished for salmon in the Frith of Cromarty, opposite to the lands and estate of Cromarty and others, during the years 1824, 1825, 1826, 1827, and 1828, or any part [981] thereof, by means of stake nets, bag nets, yairs, or other engines, placed in situations prohibited by statute?"

The affirmative of the issue was with the respondents, the pursuers of the action. In the course of the trial a witness for the respondents, who had been employed to make a survey of the subjects in dispute, proposed to refer to a printed paper purporting to be a report of his survey, and containing also certain manuscript jottings on the margin. This was objected to by the appellants, but the objection was overruled, and the examination proceeded.

After a variety of evidence adduced by both parties, the judge directed the jury in point of law, and a verdict was returned for the respondents.

The above ruling of the judge in respect to the evidence, and certain parts of his direction to the jury in point of law, were then made the subject of a bill of exceptions.

The first ground of exception was thus set forth in the bill:—"The counsel learned in the law for the said defenders did object to the witness having before him a printed paper, while giving his testimony. And the witness being examined as to the said printed paper, deponed, that it was a copy of a report which he had made to the pursuers on their employment, and on the margin of which he had, two days ago, made a few jottings. The witness stated that he had his original note-book with him, and these jottings are not in it, though their materials are. He could, with a little time, repeat the calculations of which these jottings consist, but he happened to make them, [982] with a view to his own explanations as a witness, on the margin of the printed copy. His report is dated 1st November 1836. It is made from his original notes, but is not a literal transcript of them; but in substance it is the same. Whereupon the said counsel for the defenders did object to the said witness being allowed, while giving his testimony, to have before him, and refer to the said printed paper, and notes written thereon, which were not made at the time of making the survey or observations with reference to the Frith of Cromarty. But the said Lord Cockburn, after looking at the said printed paper and notes, repelled the objection, whereupon the said counsel for the said defenders did then and there except to the foresaid judgment of the said Lord Cockburn, and insisted that the said George Buchanan ought not, in giving his testimony, to be allowed to have the

said paper and jottings thereon before him, or to refer thereto, and that such testimony so given could not be received as legal and competent evidence."

The direction of the judge in point of law was thus set forth in the bill of exceptions:—"Now, assuming the machines to have been used, the point is, whether they were so wrongfully? There are many circumstances which might have made the use of them wrongful; but the only ground on which they can be held to have been so under these issues is, that they were placed in illegal situations. Hence the full question put to you is, whether salmon were wrongfully fished by means of these engines, 'placed in situations prohibited by law.'"

[983] "It may naturally occur to you as odd, that a question so much involved in law should be put to you. But it was unavoidable. Because, though a Court may give the legal rule, which permits or condemns these machines, according to circumstances, the determination of the circumstances, that is, of the facts, to which the rule is to be applied, is the proper province of a jury. I shall therefore begin by giving you as much of the law as is necessary, and shall then leave you, with such observations as may appear to me to be proper, to apply this law to what you shall think the true import of the evidence.

"I say as much as is necessary: for it is not necessary, for the determination of this particular case, that I should give, or attempt to give you, a catalogue or a description of all the circumstances, even of situation, under which stake-nets may be lawful, or the reverse. Many of them have no application to this case; and it is needless to encumber ourselves with legal matter that is superfluous. Nor shall I trouble you by any observations either on the history or on the policy of the law. These may be useful to lawyers, by assisting them to put the right construction on disputed statutes; but they are of little or no use after the construction of these statutes is fixed, and least of all to juries, who, without any reasoning on the subject, must take the law as they receive it from the Court.

"Now I have to lay it down to you, in the first place, that the statutes, as explained by decisions, make these machines unlawful, if they be placed in what is usually known as a river in the ordinary sense of this word. You have heard enough in this case to [984] let you know that science and investigation may discover rivers where the uninformed eye cannot or does not trace them. Of this case I shall speak instantly. All I now say is, that this apparatus is prohibited by law if it be placed in a river.

"In the second place, there are many rivers which only join the ocean through a firth or through a long land-locked valley, where the fresh and salt waters meet. In this situation it will probably depend upon external appearances,—whether ordinary observers say that the space is occupied by the sea, or by the river, or by both. If it shall be so fully and distinctly occupied by the flowing fresh water as that it is really a river, though the common river features may be periodically effaced by the tide, it comes under the preceding rule; that is, being still a river, these machines are unlawful.

"Moreover, rivers have estuaries,—that is, spaces intermediate between the strictly proper river and the strictly proper sea. Through these partly fresh and partly salt estuaries, though its ordinary river features may be impaired, or at high tides even obliterated, the river still does in truth exist and operate; though its existence be only continued among sands and shaulds through which it has to work its way, struggling with the tide. Now these structures are also unlawful in these estuaries. Not that estuaries are specially mentioned by name in the statutes, neither are friths. But the estuary is a part of the river, and is included under this word. The mere name is of little importance. The thing to be looked to is the fact of the absence or of the prevalence of the fresh water, though strongly impregnated by salt. Now, [985] where this fresh water prevails, though in the estuary, these structures are illegal; and they are not only unlawful (meaning always within the ebbing and flowing of the tide) when placed in the channel of the estuary that is always covered with water, but they are so also if they be placed on the sands which are left dry by the ebbing of the sea.

"In these two situations, viz. in the river, or in its land-locked estuary, the contrivances are illegal. There are two situations of a different description in which they are lawful.

"For, in the third place, some rivers terminate without passing through any frith or estuary, and are lost in the open ocean almost so soon as they touch the salt water. In this case stake-nets are not prohibited, if they be placed away from the immediate mouth of the river, though situated where the sea ebbs and flows. The ebbing and flowing won't of itself render them unlawful, because they may be within the sphere of this phenomenon, and yet in the pure and undoubted sea.

"In the fourth place, there are examples in which the junction of the fresh water and the salt does not take place, as in the case last put, at the edge of the open ocean, but far up in the land, where the river loses itself in arms, or in bays of the sea. These portions of the ocean become what are called arms of the sea, merely because they happen to be enclosed within ridges, which guide their waters into the interior. But this circumstance does not make these arms identical with estuaries. They are the sea. And being so, these machines, if placed in or on arms of [986] the sea, as distinguished from estuaries of rivers, are not unlawful. What shall be held to be an arm, and what an estuary, is a question of fact for you. All I say as to the rule is, that if there be an arm distinct from an estuary, then, in that arm, or, in other words, in that portion of the sea, these fixed traps are not illegal.

"The substance of these rules is nearly this, that to make the particular engines, with which we are now dealing, unlawful, it must be proved that they are in a river or in its estuary, whether within the channel or on the sands made dry by the ebbing. It is the pursuer's business to prove that they are so placed. If he shall fail, the defenders may have nothing to do. But if, not content with relying on the pursuer's failure, the defenders choose, they may shew, and they have tried to do so, that their structures are truly in the sea; whether the open sea, or on one of its arms or bays; and if so, they are lawful.

"In short, a river does not lose its legal protection, in reference to salmon fishing, merely by being met by the advancing tide, provided this be within what are called (though usually by two Latin words) the jaws of the land, and provided the relative size of the river and the other circumstances shall satisfy a jury that, on the whole, the space is river, including in this term its estuary. And, on the other hand, the sea does not lose its privileges merely because a river flows into it, or flows through one of its arms or bays where the tide ebbs and flows, provided the relative smallness of the stream and other circumstances shall satisfy a jury that, on the whole, the space is sea and [987] not river, or the continuation of a river through its estuary."

This direction was excepted to, in the first place, as being in itself erroneous; and secondly, in respect the judge "did not direct the jury, that the prohibitions of the statutes could not extend lower down than to the point where the fresh water of the river joined the salt water of the sea at low ebb tide."

The Lords of the First Division, having heard parties upon the bill of exceptions, ordered cases, and thereafter pronounced the following interlocutor:—"21st Dec. 1837.—The Lords direct the cause to be laid before the judges of the other division of the Court and the Lords Ordinary, for their opinions upon both the grounds of exception contained in this bill of exceptions, and with that view appoint the parties to put into the boxes of the said judges printed copies of said bill of exceptions, record, and cases for the parties, together with the plan of Mr. Buchanan, and that *quam primum*."

The consulted judges thereafter returned in writing the opinions, which are subjoined.\*

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\* Opinions signed by Lords Justice Clerk (Boyle), Glenlee, Meadowbank, Medwyn, Fullerton, Jeffrey, and Cuninghame.

"We are of opinion, that the first ground of exception, touching the evidence of Mr. Buchanan the engineer, cannot be sustained; and that the bill, so far as rested on this ground, should therefore be disallowed.

"As to mere calculations, or statements of averages or general results, we are clearly of opinion that these might with perfect propriety have been read from or referred to by the witness, though made out immediately before his examination. If not so made out indeed they probably must have been framed and reduced to writing while the examination was going on, to the great delay and embarrassment of the proceedings.



[988] The cause having come on, on 30th June 1838, for [989] advising upon these opinions, the following judgment [990] was pronounced by the Lords of the First

"With regard again to matters of fact and observation, it is admitted that the original notes made at the time might have been competently referred to; and the witness swore distinctly, that the report, to which [988] he did refer, was made up entirely from these original notes; and, though not literally, was 'in substance the same.' The defender did not attempt to test or discredit this statement, by calling for the original notes, or by any farther examination; and the statement must therefore now be taken for true. The result is, that he spoke from a transcript of the original notes, made carefully by himself.

"As to the separate objection, that the witness referred only to a printed copy of the report, and not to the original, and that there might have been variances or errors, in printing or transcribing, we are of opinion that the defenders have not put themselves in a condition to insist on this objection, inasmuch as they have not sought to ascertain, from the witness himself, or otherwise, in what way the accuracy of the copy had been tested. The witness expressly swears, that the print before him was a copy of the report prepared by him from his original field notes; and we are of opinion this must now be taken to mean that it was a correct copy; and that, if he had been farther interrogated on the subject, he would have proved this, by specifying the collations or other means by which its correctness had been established. The defenders, we think, having proposed no such interrogatories, are not now entitled to hold that, in positively swearing that it was a copy, the witness was swearing to a fact which he had no sufficient means of knowing, or to assume the existence of variances or errors, without proof, either of their actual existence, or even of its being possible, from the way in which the copy was prepared, that they might have existed.

"The report, it should also be observed, was not laid before the jury as a piece of documentary evidence, in which case the law as to primary and secondary evidence might have applied, but was merely referred to by the witness to refresh his memory, the only proper evidence on the matters which it might contain being his own oral deposition, and nothing more.

"As to the argument in the case for the defenders, that they were at all events entitled to see the paper referred to, and to cross-examine the witness on its contents, it seems to us to be a conclusive answer, that it is nowhere stated in the bill of exceptions that they ever asked to see that paper, or proposed to go into such cross-examination; and the bill being necessarily held to set forth all the facts on which exceptions are to be raised, it is plainly incompetent for the court now to go into any other averments, even if their truth were admitted (as it is here positively denied) by the opposite party.

"We are therefore clearly of opinion, that none of the grounds of exception as to Buchanan's testimony have been established; and that the bill as to these should be dismissed.

"2. With regard to the second ground of exception, or that relating to the directions in point of law which the judge addressed to the jury on the merits of the cause, there may, at first sight, appear to be a little [989] more difficulty; but, on the fullest consideration, we have come to the opinion, that the defenders have failed on this point of the case also, and that the bill ought therefore to be disallowed *in toto*.

"If we were satisfied, indeed, as the defenders have contended, that the true import of the whole direction in point of law was, that wherever a river terminated in an estuary the only thing to be looked to, in determining whether stake-nets placed in such estuary were legal or illegal, was, whether there was a preponderance of salt or of fresh water at the place, we should certainly have had great difficulty in finding this to be a correct exposition of the law. But we think it manifest, that such is not the import of the direction; and that it never can be supposed that the jury took this to be its meaning.

"In the first place, there is nothing whatever in the passage referred to, as to the comparative prevalence or predominance of salt or of fresh water in a river estuary, affording the only true criterion of the legality or illegality of stake nets in such a situation. What the judge says is to be looked to is, the absence or

Division:—[991] “10th July 1838. The Lords disallow the bill of exceptions, but find no expenses due.”\*

prevalence of the fresh water only. We think it quite impossible to hold, that prevalence here means presence only; especially when such a substitution would make the direction more questionable than as it stands. The word prevalence, in fact, is too plain to admit of interpretation; and the judge told the court in consultation, that he meant it in its natural and plain sense, as equivalent to predominance.

“Now, even if we could hold (as we certainly do not) that this single passage contained the only direction in law which the judge gave to the jury, and that it could not be qualified or explained by what went before or came after, we are not prepared to say that it would have been absolutely unsound or erroneous. It was confessedly applied only to the case of a river terminating in an estuary, *intra fauces terrae*; and is supposed to have been given as a criterion for judging whether that estuary was sea or river, in the sense of the laws about salmon fishings. Now if, in such an estuary, there is absolutely no sensible admixture of fresh water whatever, when the tides are ebbing and flowing (and it is plain that this is the only thing that could be meant by the absence of fresh water), we can scarcely conceive a more decided proof that an estuary of such a description could not be considered as a river, in the sense of the laws referred to. On the other hand, if, during the ebbing and flowing of the tides, and in the average condition of the waters, the fresh water actually predominates, or forms more than a half of the whole, it seems almost as difficult to hold that such an estuary could ever be regarded as the sea, or an arm or branch of the sea.

“But the substantial ground on which we have come to think that this exception must be disallowed, is, that this part of the direction must clearly be taken along with all that relates to the same matter in the context; and that, when so taken, it is quite plain that the absence or prevalence of the fresh water is not meant to be held as the only thing [990] to be looked at, but only as a very material circumstance to be attended to, along with all the other circumstances from which the jury were to form their own conclusion as to the question of fact. Whether, on the whole matter, the estuary in question partook more of the character of a river or of the sea!

“That this is the way in which such a direction is to be dealt with can admit of no doubt. Detached words are not to be separated from the context, nor inaccurate or imperfect expressions caught at, to obscure or apparently contradict, what every one must have seen to be the clear meaning of the whole, when taken together. There are other instances, perhaps, of such expressions in the direction now in question; as, where the judge, after describing estuaries merely as spaces intermediate between the proper river and the proper sea, and where salt and fresh water are mingled, says generally, and apparently without limitation, that such engines as the defenders’ ‘are unlawful in these estuaries.’—But though this seems to be absolutely stated as law, it is plain from what follows, that nothing more is meant than that they may be unlawful in such situations; for very soon after comes the passage so much relied on, where it is said that they are only unlawful, though in an estuary, if the fresh water prevails or preponderates, but not unlawful if there are indications of any fresh water, though in an estuary. The correction or qualification of the inaccurate expression follows here a little more closely after that expression than in the case now in dispute; but we think it is, in the last case, if possible, still more complete and decisive.

“In the first place, the judge states distinctly, in the very beginning of his exposition, that the law ‘permits or condemns those machines according to circumstances; and that the determination of these circumstances is the proper province of the jury.’ He then informs them, that in a proper river they are clearly unlawful;

\* Further Opinions at advising (30th June 1838), by Judges of First Division:—

Lord President.—Two points were raised on this bill of exceptions: (1.) one in regard to Buchanan’s evidence; in regard to it we all agree; but there is another question, viz. (2.) as to the law contained in the charge. As to it, seven judges adhere, and Lord Moncreiff concurs, with an explanation, and Lord Cockburn adheres to his previous opinion.

[992] Mr. Horne and Mr. Mackenzie of Newhall appealed.

[993] *Appellants*.—(1st exception.) Although the appellants admit that Mr.

and proceeds to state the effect of their being in an estuary, in the way already referred to. He then speaks to the case of an arm of the sea, which has this much in common with an estuary, that it is *intra fauces terrae*; and distinctly tells them that what should be held to be an arm of the sea, and not an estuary, is a question of fact for them. But the most important and decisive passage is that which closes the whole direction, and in which, professedly resuming the whole substance of what had been previously said, and apparently for the very purpose of removing ambiguities or supplying defects, he again recurs, though in a different form of expression, to the absence or prevalence of the fresh water, but takes care, in this final summing up, to state, twice over, that it is not the only thing to be looked to, but is always to be taken along with the whole other circumstances of the case. The words are: 'In short, a river does not lose its legal protection merely by being met by the advancing tide, provided (1) that this be within what are called the jaws of the land, and provided (2) that the relative size of the river, [991] and (3) the other circumstances, shall satisfy a jury, that on the whole the space is river, including in this term its estuary; and on the other hand, the sea does not lose its privileges merely because a river flows into it, or flows through one of its arms or bays, where the tide ebbs and flows, provided (1) the relative smallness of the stream, and (2) the other circumstances, shall satisfy a jury, that on the whole the space is sea, and not river, or the continuation of a river through its estuary.'

"After this, it seems to us impossible to doubt that, when it was previously said that 'the thing to be looked to' was the absence or prevalence of fresh water, it was only meant, and must have been understood by all who heard the direction to the end, that it was 'the great or principal thing,' but to be taken into view along with all the other circumstances; not, in short, a legal or exclusive criterion, but merely a very important element in judging of the complex question of river, estuary, or sea. It is to be observed, that it is not said, even in the previous passage, to be the only thing to be looked to, but simply that it is the thing—a form of expression quite common for signifying the chief thing; as, when it is said that the thing to be looked to in a witness is veracity, or in a lawyer skill or learning; these expressions certainly could never be conceived to imply, that intelligence or exact memory was of no consequence in the former, or honour or honesty in the other. If the passage therefore stood unexplained by any other we should think that this was its fair meaning; but when the whole direction is resumed and summed up, in the anxious and accurate words which we have cited, we think there is not even a pretext for saying, that there could be any doubt or mistake about the matter.

"We are also very clearly of opinion, that the law as suggested in the bill of exceptions is not that which it was the duty of the judge to state to the jury as applicable to the case before them."

Lords Moncreiff and Cockburn added the following concurrence in the foregoing opinion.

Lord Moncreiff.—"I entirely concur in the first part of the above opinion.

"I also concur in the second part of it, but with the following explanation: Taking the charge as an entire whole, and looking to the substance and result of it, I think that it amounts to this, that in this question the estuary of a river is to be considered as a part of the river; that stake-nets placed in such an estuary are illegal; and that the question, whether the particular place or part of the water condescended on is in the estuary of the river or in the sea, is a question of fact for the consideration of the jury, depending on all the various circumstances which may

Lord Gillies.—As the judge who presided at the trial has explained his meaning to be, that in using the expression "prevalence" of fresh water he meant by it predominance, I agree in the main with him; but if he had meant, as I understood it from the charge, to be mere presence of fresh water, I certainly could never agree, because in that way any body of salt water must be held to be a river, if the presence of any portion of fresh water could be detected. We could not stop short after

Buchanan was entitled to refresh [994] his memory in regard to the observations made by him while employed in his survey, he could only do so from authentic

have been brought before them in evidence. Viewing it in this light, I have come to be of opinion that the observations made, or the mere form of expression employed, in pointing out any of the particular circumstances requiring attention, ought not to be regarded as laying down to the jury any unbending rule of law, in opposition to the whole scope and very precise conclusion of the charge, so as in any manner to control or fetter the judgment of the jury on the question of fact expressly left to their determination on the whole evidence; and therefore that supposing that there may be some inaccuracy of expression, according to the opinion of the court, in the particular passage of the charge excepted to, in so far as the learned judge may seem to have attached more weight than is justly due to one particular circumstance, as a test of the stake-nets being in the estuary of the river and not in the sea, that does not afford a good ground of exception to the charge generally, in so far as it is a charge on the law of the case.

"But I think it necessary to qualify my concurrence by observing, that in so far as it may be held to be laid down or strongly implied in the above opinion, that if that part of the charge wherein it is said, that, in the question whether it is the estuary of the river or not, 'the thing to be looked to is the fact of the absence or prevalence of the fresh water, though strongly impregnated by salt; now, where this fresh water prevails, though in the estuary, these structures are illegal,' had stood alone as the substance of the charge, it would not have been liable to exception. I cannot agree in that opinion, because I think that the fact thus rested on is both in its nature exceedingly loose, as affording any legal or decisive rule in the question, and even when definitely ascertained is not such a test as could invariably or in all circumstances lead a jury to a correct result.

"But being on the whole inclined to think that that particular part of the charge ought not to be so considered, I am, on full consideration, of opinion that the exception should be disallowed.

"I have no doubt that the law suggested in the bill of exceptions is not that which, consistently with the decisions, it could be the duty of the judge to lay down to the jury."

Lord Cockburn.—"I have only to state, that the construction put upon the charge in the preceding opinion gives it the meaning which it was intended to convey; and that, thus understood, I have not seen ground for thinking it wrong."

that, and refuse to call the Frith of Forth a river; and indeed in that way the Mediterranean would become a river, or estuary of the Nile.

Lord Mackenzie.—On the whole, I am inclined to adhere to the opinions delivered.

Lord President.—I have gone over the whole of the statutes referred to. Some of them talk of salt waters, and others of waters, and fresh water that ebbs and flows, and so much confusion prevails in the mode of expression, that it is exceedingly difficult to make sense of any one act.

Lord Corehouse.—I certainly agree with the opinions of the consulted judges, but under the explanation given by Lord Moncreiff. It did not appear to me that it would be just to set aside the verdict of the jury because the charge referred to the prevalence of fresh water, as I did not consider that the prevalence of salt or fresh water was the chief circumstance to be regarded, and I don't think that this was decided in the Tay or other cases. There were other matters in the charge, on which the jury may have proceeded. Therefore, with the caution contained in the charge, I am inclined to hold that we cannot allow the exception to the law; for I consider the law in the charge to have been properly ruled, and it appears to me that the charge is exceedingly well expressed, and I agree that it was a most fitting question for a jury.

Lord Mackenzie.—I concur with what has just been expressed by Lord Corehouse: and I ought to have said previously, that it is entirely under the explanation given by Lord Moncreiff that I coincide in the opinions of the other judges. I think the explanation of Lord Moncreiff is very necessary.

Dean of Faculty moved for expenses.

sources. It was not competent for him to refer, in regard to this matter, to an elaborate report prepared by him at the distance of months. He neither consulted, nor proposed to consult, his field-book, or even his original report. All that he looked at was a printed paper, of which the appellants neither knew nor were allowed to know any thing, but which they were told was a printed copy of the report. To sanction a reference to such a document by a witness when under examination is a latitude hitherto unknown in practice. There are many intermediate stages between the principal copy and the print, in all of which there is much likelihood of error; a manuscript copy must, in the first place, be made from the principal, and a printed copy from the manuscript. It is impossible to tell how many errors there may have been in the manuscript, and how many additional errors in the print. There was not a [995] vestige of evidence to show that either the manuscript or the print had been compared with the original or with each other. What apology was there for Mr. Buchanan reading from a document, which, as regards authenticity, was utterly worthless, more especially as it must be presumed that the best evidence, viz. the field-books and original notes, were within his reach? The very circumstance that the report contains a detail of many observations and many results in numbers, is one of the strongest reasons that can be urged for the strictest enforcement of all the rules as to authentication. It cannot be supposed that Mr. Buchanan could carry in his memory all those numerical results, and it was therefore impossible for him to check the accuracy of the copy. Blunders might pass unnoticed, and he might give in evidence with the utmost *bona fides*, on the strength of the printed report, results and observations totally at variance with the truth. It would be dangerous in the extreme to put testimony in jeopardy by such laxity of procedure. Even supposing the report had been duly authenticated, it cannot be regarded otherwise than a plan, a book, or a deed, and ought to have been produced eight days before the trial (Act of Sederunt, 29th Nov. 1825, s. 29). In this way it might be made evidence, but it would be both unwarrantable and inex-

Lord Gillies.—This has been a question of very great difficulty indeed. So I do not see why you should get your expenses. It is not the ordinary case where you would be entitled to expenses. Indeed, I consider that the result is contrary, not only to justice, but it is contrary to common sense, to make a river of the Cromarty Frith.

Lord Mackenzie.—I certainly am against allowing expenses, for it was a question attended with great difficulty.

Lord Corehouse.—I should rather be inclined to give expenses. There was a very ingenious argument by Mr. Solicitor General, but I think after the decision in the Tay case it was clearly made out to my mind that the law in the charge was well laid down by the presiding judge. So I think expenses should be given, and that too where the judges are so unanimous.

Lord Gillies.—I cannot think that the case was so clear, for we took the opinions of the other judges after ordering cases. I cannot think it is right to say that the case was clear.

Dean of Faculty.—They may be reserved till the issue of the motion for a new trial; but the practice has always been to give expenses to the gaining party where the exceptions in a bill are disallowed.

Lord Mackenzie.—I am not for laying it down as a rule abstractly, that in no circumstances should we allow expenses after advising a bill of exceptions; but certain circumstances may arise in consequence of which we may take the reason of the thing into view, and I don't think here that we ought to give expenses, from the difficulty attending the case.

Lord Corehouse.—I am far from laying down any inflexible rule; but it did appear to me that the law was clear, and that after an unanimous opinion of the whole judges sustaining the charge expenses should follow.

Lord President.—I rather concur with Lord Corehouse, that the expenses should be given, as I was inclined to think that the matter was decided in the Tay case.

Lord Mackenzie.—I must say I am against giving expenses.

Lord Gillies.—So am I; and as that is the case the point will require to be sent to the consulted judges.

pedient to allow a witness to give his testimony from what ought (if admissible at all) to have been treated as documentary evidence. It gives him an advantage which no witness whatever is entitled to claim. The ordinary rules of evidence afford the strongest analogy on this subject. There is no rule in practice better settled, than that secondary evidence will not be admitted, where the best may be obtained. And [996] it is a familiar illustration of this rule, that the copy of a document can never be given in evidence, when the principal document is within reach, or at all events, never without a due authentication of the copy. Thus, if a party tendered in evidence a printed copy of a charter, without any verification of it, while the principal could have been obtained without difficulty, is it not a matter of trite law, that it would be instantly rejected? A common case is that of a shorthand-writer's notes. To prove what occurred on a former occasion, one is not bound to produce his notes; but the usual course is, to call the shorthand-writer, and ask him if he had made a transcript from the original. If the opposite counsel object to the transcript, the shorthand-writer must read from the original. The same may be said in regard to entries made in a ledger from a waste-book. Whatever a person sees, and commits to writing, either in his own or the handwriting of another, at the time when the transaction is fresh in his mind, may be used. But a witness cannot refer to a paper made subsequently to the time when the matter was under his consideration. The question is not, as put by the consulted judges, whether the copy is accurate or not accurate, but between a copy and the original. A witness who is compelled to apply to documents in order to aid his memory is as apt to be misled by errors in an unauthenticated copy, which may give a false colour to his whole testimony, as where the documents themselves are tendered as matters of direct evidence to the jury.

(2d exception.)—The direction is objectionable in respect it lays down that stake nets are forbidden in estuaries, and at the same time defines or attempts to define the forbidden locality as consisting in the pre-[997]-valence of fresh water, although neither the term nor definition used are to be found in any of the enactments on the subject. The question is not within what locality is there the presence, the prevalence, or the absence of fresh water; but the question is, what is meant by the term *aquae*, as distinguished from the term *mare*, i.e. what is the *aqua* within which the sea *ascendit et se retrahit*. The meaning of the term has been established, by a totally different criterion from that given by the learned judge, by our standard institutional writers (*post*, p. 1017). But not only so; in the *Don* case (*post*, p. 1017), the Lord Chancellor, in reviewing the salmon fishing statutes, comes to the following conclusion:—"Taking the latter acts in connexion with the earlier acts, and the whole subject together, construing one with the other, I think I am justified in recommending to your Lordships to come to the conclusion that the whole body of the acts, taken together, refer not to the sea coast, but to rivers and to continuations of rivers. And therefore I should recommend to your Lordships to confirm the judgment of the Court, as far as relates to the construction of those acts of parliament."

That the term *aquae* denominates the river can therefore no longer be disputed. But it also includes the continuation of the river; and what is the continuation of the river, as distinguished from the river, but that part of the river which continues to flow after the sea has receded from it. This definition corresponds precisely with the term *ostium fluminis*, which, in the *Spey* case (as stated by Lord Kames) (*post*, p. 1017), this House judged to [998] comprehend the space betwixt the lowest ebb and the highest flood mark. Even if the learned judge, in using the term estuary, meant to indicate the *ostium fluminis*, his definition was clearly at variance with the legal one. A river ceases to be a river or the continuation of a river when it ceases to descend to the level of the sea. [Lord Chancellor.—At low or high water?] At low water.

But again, there is a further criterion by which to determine the forbidden territory. The statute says also, "*ubi salmunculi*," etc. (*ante*, p. 978). The avowed object of the prohibition was to protect the fry. This demonstrates how anxiously the attention of the legislature had been directed to this subject. They had observed, that the cruives and yairs set in rivers were very injurious to the salmon fry in their descent to the sea. This was the great evil complained of. But farther, the other facts connected with the natural history of salmon could not have escaped their

observation. At first the fry keep the shallow water about the sides of the river; but as their strength increases they are seen on the middle of the river descending with the stream. The first flood or fresh which occurs at this period hurries them to that part of the river affected by the tide which is protected by the statutes, where for a time they remain in the tideway, ascending and descending with the flux and reflux of the tide, till, having gained additional strength, they at once sink down into the bed or channel of the sea or firth, and go off to the ocean. They do not swim about the shallow parts of the firth, but proceed at once to the ocean from the place where the river joins the sea [999] at low ebb. Their natural instinct seems to lead them to select the deep water at that point, because they are more secure from interruption or disturbance, occasioned by the ripple arising from the constant flux and reflux of the tide. Experience and observation would shew to the early Scottish legislators that yairs or other stationary engines could not obstruct the descent of the fry below the line of low ebb tide.

Looking to the declared object as well as to the express provisions of the statute, —to the habits of the salmon as well as to the leading features connected with the flux and reflux of the tide,—that no line can be pointed out, the boundaries of which quadrate so nearly with the enactment, as that contended for by the appellants. Below the line of low ebb tide the sea never recedes. It never withdraws itself. It constantly occupies and holds possession of that space. Above that point the contending influence of the river becomes apparent. There is a periodical balance between the force of the ascending tide and that of the descending fresh water stream, which maintains the river in a state of comparative quietude, certainly favourable to the motion of the fry, "*ascendendo et descendendo ubique*." Within that locality it may be said that the fishings are in *aquis ubi ascendit mare et se retrahit*; and it may be said, with equal truth and accuracy, that they are situated *ubi salmunculi vel smolti ascendunt et descendunt*; and where such fry and smolts, when they approach the sides, would be interrupted in their course and destroyed.

Much reliance seemed to be placed by the respondent on the statute of James IV., 1448, c. 13 (*ante*, p. 979). The parti-[1000]-cular sorts of apparatus mentioned in that statute of themselves sufficiently indicate the local situations referred to. It is on all hands admitted as the very essence of a cruive-fishing, that there be a mound or dike stretched across the river from side to side, and it follows of course that such fisheries must be peculiar to rivers properly so called. The same thing is equally true of what are called fish dammys. A dam is a mole or bank to confine water. A fish dam is therefore a mound erected across the stream for the purpose of intercepting and catching the fish, by means of some apparatus of the nature of a cruive inserted into it. But such an erection, it is obvious, could be made only in rivers by cutting the stream across from bank to bank. When, therefore, by this statute it was ordained that all cruives and fish-dams should be destroyed, "that ar within salt watrys, quhar the sey ebbis and flowis," the epithet "salt" must have been introduced merely for the purpose of contradistinguishing those fisheries from the "cruiffis in fresch waterys;" that is, in the higher parts of rivers where the tide does not reach, to which a different class of regulations were to be applicable. In this view the lower portion of a river, *ubi ascendit mare et se retrahit*, may, without any violence or impropriety, be denominated the salt part of a river; for with every return of the tide, its own proper fresh water is not merely re-stagnated, but is also strongly impregnated with the salt water of the ocean, which then flows into it. That "the salt waters" of this statute do not mean the salt waters of the sea itself, is abundantly obvious from the structure of the remaining clause, "quhar the sey ebbis and flowis." It is impossible, indeed, to read the whole clause, without being [1001] satisfied that these words are used in contradistinction to each other. They cannot be read as implying the same thing, without involving an absurdity. To say that cruives and fish dams are prohibited in the sea where the sea ebbs and flows, is ludicrous; for it is the characteristic of all sea, that it is always in a state of ebb or flow. It is clear, therefore, that the term "salt waters" was employed to denote something different from the sea; and it is equally clear that this prohibition cannot extend below the line of low ebb-tide; because the engines here denounced cannot, from the very nature of their construction, be erected below it.

The Tay case (*post*, p. 1017) proceeds on specialties. One important specialty is,

that it went entirely upon the terms of the statute 1581, c. 15, which, in appointing conservators for the protection of the fishings, fixed the limits within which this protection was to extend. Another important specialty was the fact of the bar of the river being below the Drumly Sands; whereas, in the present case, there is no bar or alluvial deposit below the town of Dingwall. The non-existence of yairs in the Tay was also strongly relied on. The extent therefore to which fishing by yairs has been carried in the Frith of Cromarty, while it demonstrates the general understanding in favour of their legality in these localities, serves to distinguish it from the case of the Tay in one of its most important features. The last but not the least important of these specialties is rested on the title deeds of the several proprietors. If the Court had not been satisfied as to the position of "the natural bar of the river," and if there had not been before them any evidence of the existence [1002] of a special office of conservator for the protection of the salmon of the river, and if in other respects the case had been presented as a perfectly pure and abstract case of legal construction on the statutes themselves, who can take it upon him to say what would have been the decision of the Court in the Tay case? None of the other decisions referred to in the slightest degree interfere with the interpretation of the prohibited locality above contended for. But, apart from this, the respondents have examined the whole of the cases with the utmost minuteness, and they affirm, without fear of contradiction, that throughout these multifarious processes, beginning with the Tay and proceeding onwards to the South-Esk, the Don, the Beaully, the Dornoch, and the Nith (*post*, p. 1017), there is not a finding in any interlocutor, or even the opinion of a single judge, which sanctions the notion now promulgated as law for the first time, that the absence or prevalence of fresh water is the thing to be looked at in determining what waters fall under the statutory prohibitions. In not one of them was it laid down that this was the test to be adopted.

But again, the arguments of the respondents, as well as the proceedings on the bench in considering the bill of exceptions, show distinctly that it will admit of a doubt whether the expressions used by the learned judge import presence or prevalence of fresh water. If this be so, the direction given was not a fitting direction for a jury. From its obscurity it was calculated to mislead them. What was stated had been so misapprehended, that reference was actually made to the learned judge for an explanation of his meaning. But the jury [1003] had got no such explanation; and who can tell what construction they had put upon the expressions?

(2d branch.)—If the interpretation of the statutes above contended for be the true one, it follows of course that the learned judge should have directed the jury that the prohibitions of the statute could not extend lower than the confluence of the river with the sea at low ebb tide.

*Respondents.*—(1st exception.) The objection to Mr. Buchanan's examination clearly rests upon an attempt to confound the different objects and purposes for which a witness may refer to a manuscript. Reference to manuscript to enable a witness to speak correctly as to facts, is altogether different from the object and purpose Mr. Buchanan had in view, and hence the authorities referred to on the other side do not apply. Measurements, soundings, etc., are not occurrences or facts as to which a witness is to speak from recollection. Whether the witness saw strata or rocks of a particular character in the course of his survey, whether he found sea-weed or marine plants, etc., in different parts of the frith, these may be matters of fact as to which he is either to speak from recollection or from notes made at the time. But measurements, soundings, analyses of water, etc., are not matters of recollection at all. They are the witness's experiments, and if the witness has before him that which he deposes to be the record of such experiments, it is not for the purpose of refreshing his recollection that he refers to the paper, but of enabling him to report to the Court the experiment made by the witness, and which the court and jury could not see made.

[1004] Again, if from a variety of soundings an average is to be struck and stated, such calculation is not the recollection of an occurrence, and in using materials for giving that calculation, the witness is not refreshing his memory, but he is reporting to the court and the jury that which he himself had previously done, instead of making the calculation on the spot. In fact the calculation was not made at all at the time of making his survey and taking his field notes. The rule that a copy of a document cannot be



taken when the principal document exists, has no application to this case. There is no question as to the admissibility of documents; there is no document sent to the jury; there is a witness before the jury. He has before him a report or document entirely of his own creation, made for the sake of accuracy, and as the result of scientific inquiry. He has with him the original rough notes from which that report is prepared; and why should he not refer to that which is in substance the same, and which for the sake of convenience and ready reference has been printed? It is ridiculous to liken this to the tender of a printed copy of a charter instead of the charter itself. That would be a muniment wholly independent of the witness. The notes and report, on the other hand, were made by the witness for the sake of giving evidence. It is of the very nature of this kind of evidence that it must be so got up. The notes are not the evidence, like the charter; they are ancillary to the testimony of the witness given by parole, which parole testimony is the matter, and the only matter put in evidence. The witness speaks partly by recollection and knowledge, abstracted from his notes and report, and partly from the aid of that report. He knows [1005] the truth of his statement, and he knows the accuracy of his report. He may have erred in his calculations when he made them on the field,—he may have erred when he checked them in his closet. But this is nothing more than an observation on his accuracy, which is quite open to make to the jury, or in the motion for a new trial, but is wholly unavailing as matter of legal exception.

(2d exception.)—The Spey case (*post*, p. 1017) has no bearing whatever upon the present discussion; the question there was not as to the interpretation of the statutes, but as to the meaning of a term used to denote the boundary of certain fishings in a river by private grant. Assuming that the term "*ostium fluminis*" was rightly defined in that case, it merely denotes the termination of the river proper; there is an expanse of water between the proper river and the sea; *i.e.* between the *ostium fluminis* and the sea proper, which is also part of the forbidden territory. It may be true, as has been stated, that in the Don case (*post*, p. 1017) this expanse of water has been denominated the continuation of the river; but it does not on that account follow, that it is not distinguishable from the river proper. So far as that case went the question was just as open as before, what is and what is not the continuation of the river. The words used in the statute are, not "in rivers," but "*in aquis*." This is something different from the river proper, and the defenders are right in saying that it was fixed in the Don case (*post*, p. 1017) to be something different from the sea proper. It is in waters where the sea ascends and draws itself back. Surely this does not mean the point of low water ebb. It means in waters where the sea is filling and ebbing. There must be river, and [1006] there must be sea. But if there be both in the valley or channel, and if the sea is ebbing and flowing within that valley, this is all that is required to characterize the prohibited ground. The statute is intended to describe the space both upwards and downwards, and if it be water where the sea ascends and descends—ebbs and flows—this is all that the act requires. The sea proper is excluded, because although it ebbs and flows upon the open coast, "*ascendit et se retrahit*," it does not ebb and flow "*in aquis*."

But, say the appellants, it is not only where the sea fills and ebbs, it is also "*ubi salmunculi*" (*ante*, p. 979), etc. Now, how can this apply to the point of the lowest ebbing of the tide? It is where not only salmon fry, but the fry of all other fish, whether of the sea or of the fresh water, descend and ascend. The fry of salmon, in point of fact, never ascend. When the salmon come up to spawn, or when the fry come down, they regulate their motions in no degree by the point of the lowest ebb. On the other hand, do the fry of sea fish, which are equally protected by the statute, come up where they could not exist.

Again, in the statute 1488, c. 13 (*ante*, p. 979), the expression "salt" is used in contrast to the "*fresche watteris*." The salt water cannot mean the river, it clearly means something different from both the river and the sea proper. In which of the statutes is it set forth, that the confluence of the river and the salt water at the low ebb is the boundary of the prohibited territory towards the sea? Had an inflexible rule been fixed, such as that contended for on the other side, the matter ought not to have been settled by a jury trial at all. Besides, the point fixed on by the appellants is one to be disclosed by the ingenuity [1007] of modern science, not known or capable of being acted on in a comparatively rude age, when the statutes

on this subject were passed; and it would lead to results of a most startling description, as applicable to various rivers,—results for which no reason either in law or sound policy can be assigned.

The general position contended for by the appellants, was expressly and solemnly overruled in the Tay case (*post*, p. 1017). It was so completely overruled, that the Court, finding that there was no exclusive test, were obliged as a jury to enter into consideration of the whole circumstances of the case, and to fix the boundaries as to that frith, within which the stake-nets were illegal. That case has been regarded ever since in Scotland as a leading case on this subject. The same rule was followed in the case of the Clyde in 1813 (*post*, p. 1017)—of the South Esk (*post*, p. 1017)—of the Beaully (*post*, p. 1017) and the Dornoch (*post*, p. 1017) in 1817 and 1818,—and then followed the Don (*post*, p. 1017) case, in which it was held that stake-nets were not illegal in the sea proper, as contrasted with rivers, friths, or estuaries, or continuations of rivers. The whole train of decisions, therefore, has conclusively fixed that stake-nets, although legal in the sea, are unlawful in rivers or estuaries: and whether any particular place is to be held as forming part of a river or frith, estuary, or continuation of a river, on the one hand,—or part of the sea proper on the other,—is a question depending on a variety of circumstances connected with the locality, which question is fitted for the determination of a jury. It has been ruled over and over again, that there is no fixed and absolute criterion which in law determines whether the place be a prohibited place or not, and it [1008] has been specially determined that the meeting of the salt and fresh waters at low ebb is not a criterion which is adapted for determining the legality or illegality of the position of stake-nets.

The presiding judge properly and legally directed the jury to take into view the whole circumstances proved in evidence. His Lordship treated it throughout as a question of circumstances. He did not state that the absence or presence of fresh water, although a circumstance of material importance, was to form the rule, or to exclude from consideration other material circumstances. The direction throughout was abundantly clear and explicit, and in no respect whatever calculated to mislead. It was the duty of the judge to give the jury some direction to guide them in their finding, whether the places in question were within the estuary of the Canon or not. The consideration of the quality of the water, whether salt or fresh, its existence in certain quantities, more or less,—was but an ingredient in the investigation, and had only been so put to the jury. No difficulty had been raised by the jury. It did not appear that the judge was asked by the court to give any explanation of the sense in which he had used the expression, in order to solve any doubt which the consulted judges had as to the sense in which the words were used, or as to the jury rightly apprehending the import and meaning of the words, coupled with the whole charge, but rather with the view of satisfying their own minds by the authoritative declaration of the judge as to the actual *res gestae* on the trial.

(2d branch.)—Had the learned judge directed the jury in the terms suggested by the appellant, it is clear from what is above stated, that his direction would have [1009] been directly at variance with the established law of Scotland.

Lord Chancellor (16th April).—My Lords, this case seems to be one of very considerable importance, both as to the question upon the evidence, and upon the merits.

As to the point of evidence, this case lays down a rule which will have the effect of securing a uniform practice, in the course of proceeding in the courts of Scotland, similar to that which prevails in the courts in this country. The results of this case however do not depend upon this rule.

With respect to the principle which has been discussed in reference to the main question, it is one of very considerable importance, and the property in these salmon-fisheries is of very considerable magnitude. I cannot but think that a great deal of difficulty has arisen from the introduction of terms very difficult of definition, nowhere to be found in the statute. Arguments are used, and discussions take place, upon the meaning of the word “estuary,” and even upon what is the meaning of the word “river;” and neither of these words is to be found in the statutes. The matter of law involved is neither more nor less than the construction to be put upon

the statutes; and to that extent the party had a right to have the opinion of the learned judge. Whether the particular water in question in the particular suit does or not come within the definition, (if any definition can be found,) is matter very properly within the province of the jury.

The first question will be, whether your Lordships can, by any reasonable rule of construction, drawn from the statutes themselves, at once ascertain whether the [1010] learned judge has accurately explained to the jury the definition to be fairly inferred from the provisions of these statutes. If your Lordships find that has not been the case, however desirable it may be to lay down the rule, it is not the province of your Lordships to do so, and it may not be safe to attempt it. The point is, whether the rule laid down is the proper rule, within the meaning of the act.

If there had been no decisions of your Lordships' House, and it had been a new question, and merely turned upon the observations of the learned judge, compared with what appears to have been the objects of the statutes, your Lordships might not feel it necessary to postpone the further consideration of this matter. But, my Lords, that is far from being the fact: much litigation has taken place; and your Lordships' House has proceeded to adjudication upon cases similar to the present; and, in any course your Lordships may think fit to take, it is undoubtedly most important to ascertain the course adopted by this House when the former cases were brought before it.

In order to proceed accurately in the examination of what has been done upon this subject, I should propose to adjourn the further consideration of this case to a future day.

Further consideration adjourned.

Lord Chancellor (26th August).—My Lords, this appeal is from a judgment of the Court of Session disallowing a bill of exceptions. The whole case, therefore, must be found within the bill of exceptions; and the question is, whether the direction of the learned judge to the jury was right in law.

[1011] The issue was: "Whether the defender, or his predecessors in office, has or have wrongfully fished for salmon in the Firth of Cromarty, opposite to the lands and estate of Cromarty and others, during the years 1824, 1825, 1826, 1827, and 1828, or during any part thereof, by means of stake-nets, bag-nets, yairs, or other engines, placed in situations prohibited by statute."

These latter words comprehend the whole question; viz., what are the situations prohibited by statute? If it was the duty of the House to lay down a rule upon this subject, and to prescribe the principles upon which this question ought to be tried, it would be necessary to consider carefully, not only the words of the statute, but the various decisions which have taken place. That, however, is not, at this stage of the cause, the duty of this House, nor would it be proper to do so. All that this House has to consider is, whether the rule, as laid down to the jury by the learned judge, was correct.

That learned judge, after mentioning that estuaries were spaces intermediate between the strictly proper river and the strictly proper sea, and that they were partly fresh and partly salt, stated that the structures in question were unlawful in those estuaries, and then proceeded thus: "The thing to be looked to is the fact of the absence or of the prevalence of the fresh water, though strongly impregnated by salt. Now, where this fresh water prevails, though in the estuary, these structures are illegal."

The learned judge, when the case came before the court upon the bill of exceptions, stated, that by the word "prevails," he meant "predominates;" but the question is, not what he intended, but what the terms [1012] used were calculated to impress upon the jury. The word "prevalence" is put in opposition to "absence;" if it meant "predominates," why were the words added, "though strongly impregnated by salt?" In speaking of the predominance of one thing over another, the presence of the minor is assumed; but absence and predominance are not properly put in contradistinction. Predominance, therefore, if necessary to the proposition, should have been distinctly expressed in terms.

That the jury understood the term to mean presence I have no doubt, for such is the natural construction of the sentence; and the respondents, in their printed case

(see page 26 of printed Appeal Case for respondents), (signed by three most learned persons,) insist that such is the true construction of the sentence. After quoting the sentence, *inter alia*, they say, "In doing justice to the meaning of these sentences, it is plain from the context, that the word prevalence must mean presence, which is one of the most common and most appropriate significations of the word, as opposed to the expression absence; and the meaning of the whole is just this, that in estuaries, where these structures are unlawful, there is always some portion of fresh water."

The word prevalence then, as used by the learned judge, was by the respondents understood as presence; the consulted judges however say, that it is quite impossible to hold that prevalence means presence only; Lord Gillies says expressly, that if prevalence was to be understood as mere presence, he could not agree to the direction.

From this, I think, it may be assumed, that if the [1013] word presence had been used instead of the word prevalence, the court would have held the direction to be erroneous, as, beyond all doubt, it would have been. But the judges seem to have been influenced by the explanation of the term used by the learned judge who directed the jury, as if the question were, whether the judge was right in his view of the law, instead of being, what it really and solely is, whether the direction was in terms calculated to lead the jury to a right understanding of the law. I have no doubt but that the jury understood the word prevalence to mean presence, and that, so understood, the direction was erroneous. Let it, however, be assumed that it means predominance, I think it scarcely less erroneous.

The consulted judges say, that if they were satisfied that the true import of the whole direction, in point of law, was, that the only thing to be looked to was, whether there was a preponderance of salt or of fresh water at the place, they should certainly have had great difficulty in finding it to be a correct exposition of the law; and the Lords Moncreiff and Cockburn say, that if the sentence had stood alone as the substance of the charge, it would have been liable to exception; and Lords Corehouse and Mackenzie say, that they did not consider that the prevalence of salt or fresh water was the chief circumstance to be regarded.

I quite agree with the consulted judges and others, who thought, that if the direction was to be considered as implying, that the fact of the absence or predominance of fresh water was the only thing to be looked to, or, in other terms, was the thing upon which in their opinion the verdict was to be founded, it would be erroneous; but I totally differ from them in thinking [1014] that such is not the natural and obvious construction and meaning of the words used. The question is, not what was the meaning of the author of these words, to be collected from different passages, but what effect the words spoken were calculated to produce upon the jury. And when we find that they were told, that the thing to be looked to was the fact of the presence or of the prevalence of fresh water, it must be assumed that they understood that such was the test upon which they were to try the question between the parties.

But were it otherwise, if the words imported only that this was an important subject for consideration, I could not agree that the direction would be sound in point of law. I see nothing in the statutes, or in any authority, to justify the putting the legality or illegality of the act upon such a test; and on principle there is nothing to support it. If this were the test, the legality of the act at any particular place would depend upon the state of the tide, and the right of fishing would belong to one party at high tide, and to another at low tide. Suppose a small river flowing into a large estuary, at low water there might at any particular place be scarcely any salt water, whereas at high water the presence of fresh water might be scarcely perceptible. Whereas in a large river the fresh water might predominate long after the junction with the sea. The large rivers of America are perceptible at a great distance from the shore, and in the Mediterranean ships take in their water from the Rhone in the open sea. The test suggested is therefore, I think, erroneous, whether it be treated as exclusive, or as an important ingredient in the consideration of the question.

If your Lordships should agree with me in this view [1015] of the direction of the learned judge, it follows that the bill of exceptions ought to have been allowed, and that the judgment of the court below ought therefore to be reversed. It is therefore unnecessary, and would be improper, to pronounce any opinion or decision as

to what ought to have been the direction. But as there is much of uncertainty in the decisions which have taken place, and much doubt appears to exist as to the proper rule to be followed, I think it may be useful to throw out some suggestions, to which those who may have to decide upon the merits of this and other similar cases, in the first instance, will give such weight as they may think them entitled to.

The statute of Robert the First, in the year 1318, speaks of waters in which the sea rises and falls, and in which the fish descend and ascend. The waters mentioned must be distinct from the sea, and this the Don case (*Earl of Kintore v. Forbes and others*, post, p. 1017) has established. They must also be waters above the level of the sea, at least at low water, because otherwise the sea could not rise in them, nor would the fish, having the level of the sea, be said to ascend in such waters.

In the subsequent statutes the expressions vary, but it being decided that none of these include the sea proper, I do not apprehend that they in fact extend the limits beyond those prescribed by the statute of Robert the First.

In those waters which are above the point at which the river reaches the level of the sea at low tide, all the circumstances described in the statute of Robert the [1016] First concur, but in no others. Down to the point of low tide the waters of the river descend, but no further. Into these waters the sea rises, and the fish ascend, which cannot be said of any part beyond that point. This also is a point capable of being ascertained with much precision. The definitions in Lord Stair, Lord Bankton, and Mr. Erskine, coincide very much with this view of the case; and the decisions of the House of Lords, in the case of *The Earl of Moray v. The Duke of Gordon*, (Spey case,) deciding that the "ostium fluminis" comprehended that space betwixt the lowest ebb and the highest flood mark, and in *Lord Kintore v. Forbes*, (Don case,) seem strongly to confirm their authority. Finding, however, that the learned judges of the court below rejected this as the proper rule, I abstain from expressing any opinion upon the subject.

If your Lordships shall concur with me in thinking, that upon these grounds, there must be a new trial, it is unnecessary to come to any decision upon the point of evidence raised by the bill of exceptions. I am, however, clearly of opinion, that for some purpose at least the witness was at liberty to refer to the paper he produced, and that the bill of exceptions could not have been supported upon that ground.

I therefore move your Lordships that the interlocutor appealed from be reversed, and the bill of exceptions allowed.

The House of Lords ordered and adjudged, that the said interlocutor complained of in the said appeal be, and the same is hereby reversed; and it is further ordered, that the cause be remitted back to the Court of Session in Scotland, [1017] with directions to allow the bill of exceptions, and to grant a new trial, and to proceed further in the said cause as shall be just, and consistent with this judgment.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.

Appellants' Authorities.—(1st Exception.) Robertson, 2 Murr. Rep. 304. 368; Lindsay, 3 Murr. 99; Oswald, 5 Murr. 8; Graham's Trustees, 5 Murr. 99; Graham, 5 Murr. 75; Jones, 2 Carr. and Pay. 196; Starkie on Evid. 154; *Burton v. Plummer*, 2 Ad. and El. 341, and 4 Nev. and Man. 315; *Doe v. Perkins*, 3 T.R. 749; Adam on Trial by Jury, 171. 238. 306.

(2d Exception.) Balfour, voce Fishings; Stair, b. ii. tit. iii. sec. 70; Ersk. b. ii. tit. vi. sec. 15; Bank. b. ii. tit. iii. sec. 70; *Earl of Moray v. Duke of Gordon*, (Spey Case,) 16th April 1728, Mor. 12797; *Earl of Kintore v. Forbes*, (Don Case,) 31st May 1826, F. C., 4 Sh. and D. 641, or 648 new edit., S. C., 11th July 1828, as affirmed, 3 W. and S. 265; *Oswald v. M'Whir*, (Solway Case,) 11th March 1837, F. C., 15 D., B., and M., 873; Statutes (Scots Acts,) see Thomson's edit, Robert I., 1318, c. 12; James I., 1424, c. 12; 1427, c. 6 or 116; 1429, c. 22 or 131; James II., 1457, c. 34 or 66; James III., 1469, c. 13 or 87; 1477 or 1478, c. 6 or 73; James IV., 1488, c. 13 or 16; 1489, c. 16; 1503, c. 17 or 72; James V., 1535, c. 16; Mary, 1563, c. 3; James VI., 1579, c. 27; 1581, c. 15; 1685, May 30; William III., 1696, c. 35; 1698, c. 3; Anne, 1705, c. 12.

Respondents' Authorities.—(1st Exception.) 1 Phillipps on Evidence, 289 (7th edit.); Starkie on Evidence, 155 (2d edit.); Tait on Evidence, 372 (2d edit.); Bell's Princ. 653.

(2d Exception.) Bell's Princ. 296, 8; Bell's (Wm.) Digest, *voce* Salmon; *Earl of Kinnoul v. Hunter and others*, (Seaside Case,) 26th Jan. 1802, Mor. 14301; *Duke of Athol and others v. Maule*, (Tay Case,) 7th March 1812, F. C. and Buchanan's Rep. 254; S. C. 5 Dow, 282, 4th Feb. 1817, F. C.; *Magistrates of Dumbarton v. Colquhoun*, (Clyde,) 16th Jan. 1813, F. C.; *Carnegie's Trustees v. Erskine and Ross*, (South Esk,) 1812, not rep.; *Carnegie* (South Esk,) 7 S. and D. 284; *Fraser v. Grant and others*, 5th Dec. 1817, (Beauly,) not rep.; *Fraser*, 13th Nov. 1829, (Beauly,) 8 S. and D. 14; *M'Kenzie and others v. Magistrates of Tain*, 7th Mar. 1817 and 5th June 1818, (Dornoch,) not rep.; *M'Kenzie v. Houston*, 26th Feb. 1831, (Dornoch,) not rep.; *Sir James Colquhoun v. Duke of Montrose*, Mor. 14283; *Duke of Queensberry v. Marquess of Annandale*, Mor. 14279.

# [1018] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

JAMES PEDIE, *Appellant*.—John Stuart; ARCHIBALD SWINTON and others, *Respondents*.—Tinney [26th August 1839].

[*Arnott v. Brown and Common*, 1847, 9 Dunlop, 497.]

*Nuisance—Interdict*.—An application being made for suspension and interdict against the erection of slaughter-houses, the party complained against, after interim interdict, alleged that he had discovered a mode of conducting the proceedings in these houses which would prevent their being a nuisance. The Lord Ordinary (Corehouse) passed the bill, but in respect the party complained against “desired to go on with the erection of the buildings at his own risk, and agreed that his doing so shall not be considered as affording him any plea of favour when the question of nuisance shall be determined,” recalled the interdict in so far as it prohibited the erection of the buildings, but *quoad ultra* continued the interdict. Upon discussing the expedite letters, the Lord Ordinary (Fullerton) found that the erection of shambles or slaughter-houses in the situation proposed would be a public nuisance, and therefore sustained the reasons of suspension, and continued the interdict, and found the respondent liable in expenses. The court, upon a reclaiming note, after ordering a condescendence of the precautionary measures the respondent (appellant) meant to adopt, and having examined plans and models of the buildings, adhered to the interlocutor of Lord Fullerton. The House of Lords (the party complaining having intimated that he had no desire to foreclose the party complained against [1019] from having his case reconsidered upon a change of circumstances,) declared, that the appellant ought to be interdicted in the terms of the interlocutor of the Lord Corehouse; and that liberty be reserved to the appellant to apply for an opportunity to try the experiment, whether he can conduct the business of slaughtering cattle upon his premises, mentioned in the appeal, without creating a nuisance.

The appellant and respondents were proprietors of adjoining grounds near Stockbridge, in the neighbourhood of Edinburgh. A bill of suspension and interdict was presented to the Lord Ordinary on the bills, at the instance of the respondents, setting forth that the appellant was about to erect, upon his property, a range of shambles or slaughtering houses, which they alleged would prove a nuisance to their property, and would tend to pollute a mill-lead which passed in the neighbourhood. The bill prayed that the appellant should be interdicted “from proceeding with the erection of said houses and buildings at present in progress on his property aforesaid, as shambles or slaughterhouses for the slaughtering of cattle and other beasts, and from erecting any other buildings thereon for the said purposes; and from letting, using, and occupying all or any part of his said property, and the buildings erected and to be erected thereon, as slaughterhouses or shambles, for the purposes aforesaid; and from emptying or depositing the offals or other im-

\* 15 D., B., and M., 775.

pure matter therefrom into the mill-lead aforesaid, or in any other matter thereby prejudicing the interests and properties of the complainers.

When this bill was presented an interim interdict was granted, *ex parte*, by the Lord Ordinary, in general terms. A hearing then took place before the Lord Ordinary [1020]nary, in consequence of which a minute was presented for the appellant, stating that he did not object to the passing of the bill upon caution, for the purpose of trying the question of nuisance; and with regard to the interdict, that he did not object to its being continued, in so far as related to the pollution of the mill-lead. He farther represented, that in case the Lord Ordinary should be of opinion that the interdict ought in the meantime to be continued to any greater extent, it ought at least to be recalled in so far as related to the erection of the houses and other buildings at present in progress, or any other buildings, and ought to be confined to the letting, using, or occupying all or any part of his said property, and the buildings erected or to be erected thereon, as slaughter-houses or shambles for the purposes aforesaid. That he was perfectly aware that the erection of these buildings must now, in consequence of this judicial challenge, be at his own risk. But he was confident that he would be able to prove to the satisfaction of the court that his projected operations, in a new and improved form, would constitute no nuisance such as to entitle the respondents to interfere. The following interlocutor was thereafter pronounced by Lord Corehouse.

"The Lord Ordinary, having considered the bill and answers, with the minute for Mr. Pedie, and having heard counsel for the parties, and inspected the premises in question, passes the bill; but in respect that Mr. Pedie desires to go on with the erection of the buildings at his own risk, and agrees that his doing so shall not be considered as affording him any plea of favour when the question of nuisance shall be determined; recalls the interdict, in so far as it prohibits [1021] the erection of the buildings, but, *quoad ultra*, continues the interdict."

The record being closed upon reasons and answers, and pleas in law, the Lord Ordinary (3d March 1836) pronounced the following interlocutor:—"The Lord Ordinary (Fullerton) having heard parties procurators, and considered the closed record, and visited the ground, finds that the erection of shambles or slaughter-houses, in the situation proposed by the respondent (appellant), would be a public nuisance, and therefore sustains the reasons of suspension, and continues the interdict, and decerns; finds the respondent (appellant) liable in expenses; and remits the account thereof when lodged to the auditor to tax the same, and to report." Note. "It has been repeatedly decided that the slaughtering of cattle in the suburbs of a town, or in the immediate neighbourhood of inhabited houses, is a common nuisance. Whether or not it be possible to devise means by which the various offensive consequences of such operations may be mitigated, or entirely avoided, it is not for the Lord Ordinary to determine; *prima facie*, it does not seem likely; but at any rate, if there be such a possibility, it was incumbent on the respondent (appellant) to show how it was to be accomplished. But the respondent (appellant), though perfectly apprized by the proceedings in the Bill Chamber of what would be expected of him, gave no explanation, but merely avers in general 'that the shambles are to be erected on a new and improved plan, by which there will be nothing offensive to the sight or smell,' etc. In these circumstances [1022] the Lord Ordinary thinks the interdict must be continued."

Against this interlocutor the appellant presented a reclaiming note to the First Division of the Court, and their Lordships pronounced this interlocutor:—6th Dec. 1836, "The Lords, having advised this reclaiming note, and heard the counsel for the parties, appoint the reclaimer to lodge in process plans of the buildings he proposes to erect, and a special condescendence of the precautions he means to adopt, in order to satisfy the Court that his shambles will not be a public nuisance."\*

\* The following was the condescendence lodged for the appellant:—"The condescender herewith produces a ground plan and an elevation plan of his proposed buildings, part of which are already erected; and he has also prepared a model in wood, on a large scale, of such a portion of the building as will enable any one who examines it, to understand the details. The slaughter-houses are to consist of two ranges of buildings, parallel to each other, running from east to west, at the distance

[1023] Thereafter the Court pronounced the following interlocutor:—"The Lords, having resumed consideration of this reclaiming note, with the condescendence ordered, and answers thereto, and the plans and models of the buildings, and heard counsel, adhere to the interlocutor of Lord Fullerton of 3d March 1836, and refuse the desire of the note, but find no ex-[1024]penses due since the date of said interlocutor; of new, remit the account,' etc.

Against the interlocutors of the Lord Ordinary of 3d March 1836, and of the Court of 9th March 1837, the appellant entered his appeal, contending that the effect of these interlocutors was to exclude him from making a trial of his slaughter-houses, with a view to determine the question, whether they would create a nuisance:

of about twenty feet from each other. The interposed space, which is to form a court, being flanked with high walls on the east and west, will be entirely excluded from view. The only access to it is to be by an opening in the northmost range of buildings, where there is to be a gateway. This opening establishes a communication between the court and a stable-lane, which is to run parallel with the court, and the two extremities of which, on the east and west, open out to public roads or lanes. This stable-lane is interposed between a range of stables and coach-houses on the south, and a range of byres on the north. Still farther to the north, the ground between the byres and the public road is to be occupied by a range of self-contained dwelling-houses, with back greens attached to them. The eastern end of the stable lane opens upon a parish road running north and south, by means of which cattle coming from the eastward may be introduced. The western end of the stable lane opens upon a lane which is shewn upon the plan, etc. The slaughter-houses consist of several separate killing places, which all open into the court, and have windows in the roof. The buildings consist of stone and lime, and the roofs are slated. The court is causewayed with whinstone causeway. Each killing place occupies an area of about nineteen feet square within walls; the floors consisting of the best and strongest Craigleith ashlar pavement, eight inches thick, squared and jointed, and broached or drowed on the surface. The walls immediately above the pavement, all round, are coursed, and the stones laid square, so as to be perfectly tight. The pavement is not laid horizontal, but forms an inclined plane; so as that any liquid spilt upon the floors, will immediately find its way into the cess-pool. By this means the floors can be made perfectly clean by merely pouring water upon them. Between each pair of killing places a cess-pool or dung-pit is constructed, which is somewhat like a closet of six feet square, the floor of which is sunk considerably below the level of the adjoining pavement, and consists of a hewn stone trough, well jointed, and neatly broached, so as to be perfectly tight. Into this trough, whatever liquid is spilt, or water is poured upon the pavement of the killing places, will find its way, by means of a small aperture. No liquid can ever escape from the killing places to the outer court; but from the inclination of the floors, and the construction of the doors of access, the whole is immediately discharged into the cess-pool. The upper part of this square closet is completely shut in, and excluded from the outward air, there being merely an opening to each of the killing places, for the purpose of discharging into it any refuse, which opening can be shut by a close lid. These cess-pools are to be cleansed every second day by the farmer to whom the manure is let, before five o'clock in the morning. For this purpose there is an access from the outer court into the cess pool by a locked door, of which he has a key. The cattle are to be brought into the killing places at a very early hour in the morning, so that there will be no such thing as danger from the driving of the cattle, either in the street or in the lanes. By means of these contrivances there will be neither danger nor offence either to the sight or smell. It will be perfectly impossible for any one on the outside of the establishment to see any thing that goes on either in the slaughter-houses or in the court. Even in the court itself there will be no appearance of filth or of blood, and from it there will be no immission into the mill-lead, of any filthy or offensive substance whatever. There will be no smell of an offensive kind even in the court, and far less on the outside of the buildings, or in the neighbourhood. This will be effectually prevented by keeping all the refuse from being exposed to the action of the outer air, and by its being regularly and frequently taken away."



that this was unjust, because it was impossible to determine, without a trial, whether such nuisance would be occasioned; and that it was also illegal, because, by special act of parliament, the determination of questions of nuisance are, in Scotland, appropriated exclusively to the cognizance of a jury.

Lord Chancellor (25th June 1838).— My Lords, according to the facts, as they appear before the House, and according to the natural construction I should put upon the interlocutor complained of, I have no difficulty in suggesting to your Lordships that the course ought to be pursued which has been suggested at the bar. I therefore do not propose, at this moment, to move your Lordships judgment, but to give the appellant an opportunity, if he can, of satisfying your Lordships that the course of proceeding would not be open to him, which, from the papers before the House, I apprehend would.

The suit in discussion is to prevent the appellant from proceeding to erect slaughter-houses upon a very large scale. Now, the erection of slaughter-houses, generally speaking, would be a nuisance according to the law of Scotland, which is not disputed. Several decisions have established that it is so; and it is accord-[1025]-ing to the practice of the law in Scotland, when erections are made which, if completed, would amount to a nuisance, to interdict the proceedings of the party, for the purpose of protecting persons interested, and the neighbourhood, from any injury that might be sustained from such a nuisance. The course of proceeding in Scotland is similar to the course of proceeding in this country. In England the Court interferes by injunction, or finally by a discontinuance of that injunction, if there is any doubt of the fact of a nuisance, for the purpose of enabling the parties to try it.

The appellant in this case, not pretending to dispute the rule of law, that generally speaking a slaughter-house would be a nuisance, suggests various modes by which the nuisance might be avoided.

Now, it so happens that these plans which are suggested would not depend upon any mode of proceeding which would prevent the nuisance independently of the act of the party; he says he means to clean out the cess-pools every second day, and that the cattle are to be driven by a certain hour in the morning: all that entirely depends upon his volition, and is not a fact which can be tried, if the question were sent to a jury. An inquiry, before a jury, to ascertain whether if this thing were done there would be a nuisance or not, could lead to no conclusion at all affecting the rights of the parties. On the other hand, if the suggestions were of the same nature as in Trotter's case (see *post*, p. 1027), then indeed the Court could see grounds upon which it might safely proceed.

The orders, as they stand printed, undoubtedly would shew that the appellant is not prohibited from continuing the erection of these buildings; but if the appellant [1026] can satisfy your Lordships to the contrary, it will be material before you finally dispose of this case. It appears that, in the first instance, he was prohibited from erecting the buildings at all. That was altered by an order, which, as printed, is thus: "But in respect that Mr. Pedie desires to go on with the erection of the buildings at his own risk, and agrees that his doing so shall not be considered as affording him any plea of favour when the question of nuisance shall be determined, recalls the interdict, in so far as it prohibits the erection of the buildings." The moment that interdict was pronounced it stood good as an interdict against what was alleged to be nuisance, but it was no interdict against continuing the buildings. In March 1836, the Lord Ordinary sustained the reasons of suspension, and continued the interdict. The only interdict was the one I have just stated. The question came before the Inner House; and the Court adhered to the interlocutor of Lord Fullerton, namely, of the 3d March 1836, which was the interlocutor I last stated; and the result of that would show, that at this moment there is no interdict against continuing the building. If however the appellant is able to show your Lordships that some mistake has been made in the mode in which the interdict is printed, and that there is an interdict against continuing the building, he might possibly induce your Lordships to alter the interlocutor in that respect.

What he says is in substance, "I am so satisfied that I can prevent any nuisance, —and I will satisfy the Court of Session, or this House, that no nuisance will arise in

carrying on the business of a slaughter-house in these premises,— I am willing to be at the [1027] expense of erecting slaughter-houses, taking the chance of being able to carry on the business.” Certainly, so far, there is room for confidence that he will be able ultimately to succeed in carrying on the business without creating a nuisance. The court however were not satisfied that that which he suggested was sufficient to enable him to call upon them to rescind the interdict altogether; and I am clearly of the same opinion. The business itself is declared and recognized by the law of Scotland as a nuisance; and certainly, that he means to carry it on in a particular form, is not a reason why the Court of Session ought to entrust him with a power to expose the interests of the inhabitants to that which the law considers a nuisance.

Then comes the other question to which I would also wish to draw your Lordships attention. It has been argued at the bar, that he is precluded from saying to the Court at a future time that he has devised means by which he will be able effectually to prevent the nuisance. In the case of *Trotter (Trotter v. Farnie and others, 7th Dec. 1830, 9 S., D., and B., 144; affirmed, 1st Oct. 1831)* I find that this House adopted the course which, subject to what may hereafter be shown by the appellant, I should advise your Lordships to adopt; but, practically, notwithstanding the judgment of the Court, in the first instance, and of this House affirming it, the party was permitted to show that by pursuing the mode he intended to adopt, that that which, *prima facie*, would be a nuisance, would not be a nuisance. I cannot doubt therefore, but that in the present case the same course of proceeding might be open to the appellant, as was practically proved to be [1028] open to the appellants in the case to which I have referred. There the party was about to erect a building for the purpose of boiling whale blubber, which by prior cases had been held to be a nuisance. It was suggested to the Court, that although, *prima facie*, that was a nuisance, and, if conducted in an ordinary manner, would be a nuisance, yet he had the means, from a particular form or system of carrying it on, to prevent it being a nuisance. The Court of Session were not satisfied that the course suggested would be sufficient to protect the property of persons in the neighbourhood, and they interdicted him “in so far as regards the boiling whale blubber in the premises in question;” and this House (1st October 1831) affirmed the interlocutor, and prevented further proceeding. So far the cases are similar. He afterwards procured the assistance of a gentleman of great eminence (Professor Leslie), who suggested means by which they were enabled to apply to the Court of Session for that purpose; and I have no doubt that a similar course is open to the appellant in the present case. It is quite impossible to suggest a mode at the present time for trial, according to the suggestion of the appellant.

I am anxious, undoubtedly, to give the party an opportunity of satisfying your Lordships that the interlocutor would prevent him from applying to the Court of Session for a discharge of the interdict, upon the ground that he has discovered the means of avoiding the nuisance, and can satisfy the Court that he might safely be permitted to proceed with his work and his business, securing those whose interests are likely to be affected. If he can satisfy your Lordships that he cannot [1029] do that as the matter now stands, there may be a reason for a variation of the interlocutor.

For the purpose of giving the appellant an opportunity to communicate further information to your Lordships upon the points to which I have alluded, I will now suggest that your Lordships should abstain at this moment from finally disposing of the case. But, undoubtedly, unless the appellant can satisfy your Lordships upon those points, considering the circumstances of the case, I will advise your Lordships to dismiss the appeal, with costs. If it become necessary for counsel to attend here, of course you will give them the opportunity. If the appellant hand in a written statement, the House will then say whether the other side shall have an opportunity of answering it.

Statements were thereafter given in on both sides, the only part of which material to notice will be found in the following speech:—

Lord Chancellor (26th Aug.).—My Lords, at the hearing of this appeal I expressed my opinion that the Court was right in continuing the interdict under the

then existing circumstances. But, as the Lord Ordinary's interim interdict, whilst it prohibited the nuisance, permitted the appellant to go on with the buildings at his own risk, (he agreeing that his doing so should not be considered as affording him any plea of favour when the question of nuisance should be determined,) was founded upon a representation on the part of the appellant, that he should be able to show that from the manner in which he proposed to conduct the business of slaughtering cattle, all nuisance to the neighbourhood would be avoided, I thought it unjust, after [1030] the appellant had proceeded upon the faith of such an arrangement, that any interdict should be subsequently pronounced, preventing the further building of the projected premises, or which should not be capable of being relaxed, (for the purpose of enabling the appellant to try the experiment by which he hoped to be able to prevent the nuisance usually arising from his business,) and, if necessary, ultimately recalled.

How far the existing interlocutors were consistent with this view of the case was the subject of a difference of opinion. The case therefore stood over for the purpose of ascertaining that point. The result has been a statement on each side, contending for directly opposite positions: but on the part of the respondents an offer has been made which precludes the necessity of coming to any conclusion upon that subject; for after contending that the interdict, as it exists, does not prevent the appellant from proceeding with the building, they say that they have no desire to foreclose the appellant from having his case reconsidered upon a change of circumstances, and the interdict recalled upon cause shown, or a remit to the Court, with power, if they shall see cause, to entertain and dispose of such an application.

The appellant has not shown that the existing interdict prevents his continuing the erection of the building, nor has he succeeded in proving that he should be able effectually to prevent the nuisance, if permitted to commence the business of slaughtering cattle; and yet he has appealed against the whole of the interlocutor granting the interdict. In this he was, I think, wrong; but I am by no means satisfied that the interlocutors are altogether right, because I think they ought, after what had before [1031] taken place, to have been so framed as to give to the appellant an opportunity of applying in the cause to the Court for liberty to try the experiment he has suggested, and that there should have been reserved to the Court the power of dealing with the interdict as might be just after such experiment had been tried.

I therefore think that the right order for the House to make will be to declare that the appellant ought to be interdicted in the terms of Lord Corehouse's interlocutor, which will enable him to proceed with his intended buildings, if he shall think proper to incur the risk of so doing; and that liberty ought to be reserved to the appellant to apply to the Court for an opportunity to try the experiment, whether he can conduct the business of slaughtering cattle upon those premises without creating a nuisance; and that power ought to be reserved to the Court to recal, alter, or vary the interdict, and to make such order therein as shall be just, after the result of such experiment shall have been ascertained. And with this declaration the cause ought to be remitted to the Court of Session to be reviewed, and to have such alterations, if any, made as may be necessary for these purposes. There can be no costs of the appeal.

The House of Lords declared, That the said appellant ought to be interdicted in the terms of the interlocutor of the Lord Corehouse, Ordinary, pronounced on advising the minute of the appellant; and that liberty be reserved to the appellant to apply to the said First Division of the Court of Session for an opportunity to try the experiment, whether he can conduct the business of slaughtering cattle upon his, the appellant's, premises, mentioned in the appeal, without creating a nuisance; and that power be reserved to the said First Division of the Court of Session to recal, alter, or vary [1032] the said interdict, and to make such order therein as shall be just, after the result of such experiment shall have been ascertained: And it is ordered, That with this declaration the cause be remitted back to the First Division of the said Court of Session, to review the said interlocutors, and to have such alterations, if any, made therein as may be necessary for the said purposes, and as shall be consistent with this declaration.

A. DOBIE—RICHARDSON and CONNELL, Solicitors.

## [1033] APPEAL FROM THE COURT OF SESSION, SCOTLAND.

Sir WILLIAM FRANCIS ELIOTT of Stobs and Wells, Bart., Sir JAMES BOSWELL of Auchinleck, Bart., and Others, his Trustees, *Appellants*.\*—John Stuart; JAMES CLEGHORN Esq., of Halkburn, and GEORGE CLEGHORN Esq., of Weens, and the Trustees of the late JOHN WILSON Esq., of Hallrule, *Respondents*.—Attorney General (Campbell)—Sir William Follett [27th August 1839].

Et è contra.

*Entail—Statute 42 Geo. 3. c. 116—Restitution.*—An heir of entail having sold certain portions of an entailed estate, under a warrant from the Court of Session, applied the purchase money, 1st, in redemption of the land tax; 2d, in payment of entailer's debts; and, 3d, in payment of provisions to younger children. The sales were set aside as irregular at the instance of a succeeding heir. In an action of declarator, repetition, and damages, by the purchasers, —Held (affirming the judgment of the Court of Session), 1st, that the estate should be liable to an annual payment corresponding to the land tax, redeemable on payment of a sum specified as the value thereof; 2d, that in so far as the prices of said lands were applied in payment of debts of the entailer, the same should form real burdens upon the estate; and 3d, that such should also be the case with the sums applied in payment of provisions, although the same might not have been kept up by assignation. Farther, that the heirs of entail should not be liable to personal diligence for payment of the principal sums of any of said provisions, but that they should be personally liable successively for payment of the interest [1034] of such sums during their possession of the estate respectively. Further, that the same forms of diligence should be competent for the debts of the entailer as if the same had been still subsisting in the persons of the original creditors; and also, that the same form of diligence should be competent for any of the sums of provisions for younger children which would have been competent if the same had not been discharged; "declaring always, that this decree shall be subject to all the provisions and declarations of the deed of tailzie of the lands in question, etc.; and declaring all the said findings to be without prejudice to any questions which may arise as to the effect of any particular form of action or diligence which may be raised in any particular case in virtue thereof."

The late Sir William Eliott, professing to take advantage of the statute 42 Geo. 3. c. 116, which authorizes entailed proprietors to sell a portion of the entailed estate for redemption of the land tax, made an application accordingly to the Court of Session in May 1803, and having obtained their warrant to sell certain parts of the entailed estate specified in the application, Sir William himself became the purchaser, at the price of £15,420. Sir William afterwards sold the same lands in different lots to the respondents, and thereby obtained an advance of price amounting in the whole to £23,912 10s. Besides redeeming the land tax (which amounted only to £56 8s. 7½d.) for the sum of £1183 9s. 5d., various burdens upon the estate were paid off, viz, two debts of the entailer, amounting respectively to £1111 2s. 2d. and £111 2s. 2d.; provisions to three children of a former proprietor, Sir Francis Eliott, of £1170 each; another provision to a son of a previous proprietor, amounting to £2500; and likewise provisions by Sir William himself, amounting to £5483 0s. 4½d. Of these four classes of debts, the first three were paid during Sir William's [1035] life-time of simple discharges. The debts forming the fourth class were paid after Sir William's death, and assignations were taken.

In 1812 Sir William died, and was succeeded by the present appellant, who brought an action of reduction of the sales, founded on various violations of the statute. The Court of Session (7th June 1825) reduced the whole of the sales, and their judgment was affirmed on appeal, 2d May 1828 (3 Wilson and Shaw's Appellants).

\* Fac. Coll., 2d June 1837.

Cases, p. 68). In the meantime the purchasers brought an action of relief and damages against Mr. Riddell, the statutory trustee, alleging that he, as agent and trustee, was bound to have seen the proceedings regularly carried through under the statute; but Mr. Riddell was assoilized from that action, reserving liberty to cause Mr. Riddell to repeat and pay back any parts of the sums received by him, and not applied for the purposes above specified, on a proper process to that effect. The purchasers then raised the summons, (dated and signeted 3d January 1827,) which has given rise to the present appeal, directed against the appellants and Mr. Riddell's trustee (he having died), which, after stating in detail the leading facts above mentioned, subsumes, 1st, that the defender Sir William Francis Elliott, as representing the late Sir William, is liable for the whole sum of £23,912 10s. paid by the pursuers; 2d, that the heirs of entail are liable for the original price of £15,420 paid by the late Sir William, or for such part thereof as was applied beneficially in terms of the act of parliament; 3d, that in so far as the £15,420 was not applied beneficially in terms of the act of parliament, the representatives of Mr. Riddell, the trustee, are liable, and then [1036] concludes, 1st, against Sir William Francis Elliott, as representing the late Sir William, for the said sum of £23,912 10s., and for £10,000 of damages; 2d, in the event of the first conclusion not being successful, against Mr. Riddell, for the original price of £15,420, in so far as the same may not have been applied strictly in terms of the statute; 3d, against Sir William Francis Elliott and the other heirs of entail to repeat and pay back the original price of £15,420, or at least such part thereof as had been applied in terms of the statute. There is also a conclusion that the entailed estate is liable and may be adjudged in payment of the said price of £15,420, or at least such part thereof as can be shown to have been applied beneficially in terms of the statute.

In defence it was pleaded for the appellant, 1, that he, as representing his father in no other character than that of heir of entail, is only liable in payment of entailer's debts, and debts which may have been subsequently created upon the entailed estate in virtue and in terms of the deed of entail; 2, that the pursuers are not vested in the right of any of the entailer's debts or other debts legally affecting the entailed estate, and consequently are not entitled to sue for payment of the same, either directly or indirectly; 3, that at the time of the defender's succession to the estate of Stobs, none of the debts specified in the condescendence, excepting the provisions to his younger brothers and sisters, affected that estate, or the portion thereof which had been sold to the pursuers, and it is not competent to claim payment of any debts from the defender as heir of entail, under any of the conclusions of the present summons; 4, that the defender Sir William Elliott, as heir of entail, is not liable for any debts or burdens paid, or any outlay or expendi-[1037]-ture made by the pursuers or their authors upon the estate, the same having been paid and expended in reliance on the security of the late Sir William Elliott, with whom the authors of the pursuers dealt in the character of fee simple proprietor.

For Mr. Riddell's trustee it was pleaded, that it is *res judicata* that Mr. Riddell was not liable in damages to the pursuers for alleged misconduct as Sir William Elliott's agent, or as trustee in regard to the matters set forth in the summons, and consequently his trustee cannot be bound to make good any part of the loss sustained in consequence of the sales being found ineffectual.

Upon the report of Lord Moncreiff, the following judgment (dated 18th January and signed 7th February 1833) was thereafter pronounced by the First Division of the Court of Session:—"The Lords having advised this cause, with the cases for the parties, and heard counsel, Find the pursuers entitled to repetition of the several sums of money applied in payment of burdens and of debts affecting the entailed estate of Stobs, or for which the said estate was liable to be affected: Find that the following sums were so applied; viz. the sum of £1183 9s. 5d. for redemption of the land tax of the said entailed estate; the sum of £1111 2s. 2d. paid in extinction of the debt of the entailer Sir Gilbert Elliott to the Countess of Hyndford; the sum of £111 2s. 2d. paid in extinction of a debt of the said entailer to William Calderwood, advocate; the sum of £1170 in extinction of a provision made by Sir Francis Elliott in favour of Miss Mary Elliott, his eldest daughter, paid to the Countess of Hyndford; the sum of £1170 in extinction of a provision made by the said Sir Francis Elliott in favour of Miss Anne Elliott his youngest daughter, [1038] paid to the Countess of Hyndford;

the sum of £2500 in extinction of a provision made by Sir John Elliott to Anne Elliott, his only child, paid to the Edinburgh Friendly Insurance Society; the sum of £1170 in extinction of a provision made by the said Sir Francis Elliott in favour of John Elliott his second son, paid to Charles Elliott's trustees; the sum of £5483 Os. 4 4-12d., being the amount of provisions granted by the late Sir William Elliott in favour of John Elliott his second son, Gilbert Elliott his third son, Bethia Mary Elliott his eldest daughter, and George Augustus Elliott his fourth son, in terms of the entail, and for which the said entailed estate was liable to be affected: Finds, that for the above-mentioned sums the said pursuers are just and lawful creditors of the heir of entail of the estate of Stobs, now in possession thereof, and of each succeeding heir of entail of the said estate who shall obtain possession thereof, while the said debts shall remain unpaid: Find and declare that the pursuers, as creditors foresaid, are entitled, *omni habili modo quo de jure*, to adjudge the said entailed estate of Stobs in payment and satisfaction of the said sums applied as aforesaid, and decern: And farther, decern and ordain the said Sir William Francis Elliott, as heir of entail in possession of the said estate, and the heirs of entail who shall succeed to him in the right and possession thereof as they shall respectively attain possession, to make payment to the pursuers of the foresaid several sums of money: And in respect of the preceding findings assoilzie Claud Russell, the trustee for the creditors of the late William Riddell, and all others the representatives of the said William Riddell and of Edgar Hunter, his cautioner, from the con-[1039]clusions of the libel to the extent of the said several sums of money, and decern: *Quoad ultra*, remit to the Lord Ordinary to hear parties farther as to the sum of £622 8s. 1d. alleged to have been expended by Sir Francis Elliott on improvements on the entailed estate; likewise as to the several dates from which interest on the said several sums shall run; also as to the balance still due by the late Mr. Riddell and his cautioner, and their representatives; and as to what farther sums fall to be charged against the entailed estate and heirs of entail; and generally, as to all other remaining points of the cause, and to do therein as shall be just: Find the defenders, Sir William Francis Elliott, and Sir James Boswell, George Sinclair, and James Brown, his trustees, who have sisted themselves as parties to this action, and that only *qua* trustees, liable to the pursuers in the whole expenses hitherto incurred by them in this action, and ordain the account thereof to be given in; and when so given in, remit to the auditor of Court to tax the same, and to report."

This judgment formed the subject of an appeal by the appellants, and a cross appeal by the purchasers against the present appellant and also against Mr. Riddell's trustee, in so far as it fell short of the conclusions of their summons, upon which the House of Lords pronounced the following judgment (8th Sept. 1835):—"After hearing counsel, as well on Monday the 14th, Tuesday the 15th, and Tuesday the 22d days of April 1834, as on Monday the 31st day of August last, and Tuesday the 1st day of this instant September, upon the original petition any appeal of Sir William Francis Elliott of Stobs and Wells, baronet, and of [1040] Sir James Boswell of Auchinleck, baronet, George Sinclair esq. (now Sir George Sinclair baronet) younger of Ulbster, and James Brown esq., accountant in Edinburgh, trustees of the said Sir William Francis Elliott, complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, dated the 18th January and signed upon the 7th day of February 1833, and praying that the same might be reversed, varied, or altered, or that the appellants might have such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the cross appeal of James Cleghorn esq., of Halkburn, and George Cleghorn esq., of Weens, and David Watson, esq., writer in Edinburgh, their commissioner; and Edward Filder, esq., of Mellington Hall, Montgomeryshire; the Reverend James Glen of Argyle Place, London; Henry George Watson, accountant in Edinburgh; and William Wilson, clerk to the signet, trustees of the deceased John Wilson esq., of Hallrule (which said cross appeal was, by an order of this House of the 17th of May 1833, amended, by omitting the names of Bethia Mary Elliott, Captain John Elliott, Gilbert Elliott, Daniel Elliott, George Augustus Elliott, Russell Elliott, Alexander Elliott, Euphemia Elliott, William Elliott, Georgina Elliott, Elliott, Elliott, Anne Elliott, and Gay, and Gay, her husband, as parties respondents), complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, of the 18th of January (signed 17 th [7th] February) last, in so far as Claud Russell, the trustee for

the creditors of the late William Riddell, and all others the representatives [1041] of the said William Riddell, and of Edgar Hunter his cautioner, are assoilzied, and praying that the same might be reversed, varied, or altered, so far as complained of, or that the appellants might have such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also, upon the answer of James Cleghorn esq., of Halkburn, and George Cleghorn esq., of Weena, and David Watson, writer in Edinburgh, their commissioner; and Edward Filder esq., of Mellington Hall, Montgomeryshire; the Reverend James Glen of Argyll Place, London; Henry George Watson, accountant in Edinburgh; and William Wilson, clerk to the signet, trustees of the deceased John Watson esq., of Hallrule, put in to the said original appeal; and also upon the answer of Sir William Francis Elliott of Stobs and Wells, baronet; and of Sir James Boswell of Auchinleck, baronet; George Sinclair esq., of Ulbster; and James Brown esq., accountant in Edinburgh, trustees of the said Sir William Francis Elliott; and also upon the answer of Claud Russell esq., accountant in Edinburgh, trustee for the creditors of the late William Riddell esq., of Camieston, severally put in to the said cross appeal; and due consideration had this day of what was offered on both sides in these causes: It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, that the said cause be remitted back to the said First Division of the Court of Session, to review their interlocutor complained of in the original appeal; and farther, to state to this House whether, in pronouncing the same, they have had regard to the eighth finding of the interlocutor [1042] pronounced by the Court of Session of the 7th day of June 1825, in the action of reduction brought by the defender Sir William Francis Elliott, which finds it proved, by the terms of the dispositions to the defenders in that action, that they were made aware that the act of parliament had not been followed out (see 3 W. and S. 68): and also to state to what extent, and under what form of diligence, the present defender Sir William Francis Elliott, as heir of entail in possession of the said estate, and the heirs of entail who shall succeed him in the right and possession thereof, as they shall respectively attain possession, may be compelled, according to the law of Scotland, to make payment to the pursuers of the several sums of money in the said interlocutor mentioned: And it is further ordered that the said First Division of the said Court, in reviewing their said interlocutor, do order the matter thereof to be heard before the whole Judges of the Court of Session, including the Lords Ordinary: And this House does not think fit to pronounce any judgment upon the said appeals until after the said Court of Session shall have reviewed their said interlocutor according to the directions of this order."

In consequence of the preceding judgment the cause was heard before the whole judges of the Court of Session in February 1836. Thereafter the following interlocutor was pronounced (1st July 1836):—"The Lords of the First Division having considered the letters of the Lord Chancellor to the Lord President, with the letter by the Earl of Devon to the Lord Chancellor, explanatory of the remit by the House of Lords in the case of *Cleghorn and Wilson v. Sir [1043] William Elliott*, direct the said letters to be printed and laid before the Lords of the Second Division and Lords Ordinary, in order that they may furnish the First Division with their opinions in writing on the points contained in the said remit, as explained by the letter of the Earl of Devon, transmitted by the Lord Chancellor."\*

\* The letters referred to were as follow:—

"House of Lords, 27th June 1836.

"My Lord,—Having instituted an inquiry into the circumstances of the case of *Sir William Elliott of Stobs v. Cleghorn and Wilson*, and having for that purpose thought it right to apply to the Learned Lords who gave their particular attention to that appeal, when argued before this House, I have obtained from the Earl of Devon a letter in explanation of the terms of remit, as made to your Lordship and the other judges of the Court of Session, of which I have the honour to inclose a copy. I should also state, that I have communicated upon the subject with Lord Denman, who concurs with the Earl of Devon in the explanation offered in that letter, and which I trust will be satisfactory to your Lordship and the other judges.—I have the honour to be, my Lord, your Lordship's most obedient humble servant, (Signed) COTTENHAM."

"To the Right Honourable the Lord President of the Court of Session, etc. etc."

In obedience to this interlocutor the consulted judges (Lords Justice Clerk (Boyle), Glenlee, Meadowbank, [1044] Medwyn, Corehouse, Fullerton, Moncreiff, Jeffrey, and Cockburn) returned the following opinion:—"We understand that this cause having been remitted by the House of Lords, in order that the interlocutor of the First Division of the Court, under appeal, might be reviewed generally, subject to the particular instructions given, as explained by the letters of the Lord Chancellor and Lord Devon now laid before us, our opinion is [1045] required on the general merits of the case, with particular reference to the question, 'To what extent, and under what form of diligence, the present defender, Sir William Francis Elliott, as heir of entail in possession of the said estate, and the heirs of entail who shall succeed him in the possession thereof, as they shall respectively attain possession, may be compelled, according to the law of Scotland, to make payment to the pursuers of the several sums of money in the said interlocutor mentioned.'

"With reference to the state of the case as thus presented to us, we have considered

June 11, 1836.

"My Dear Lord Chancellor,—I am sorry that accidental circumstances have prevented my sooner writing to you upon the subject of the case of *Elliott v. Cleghorn*, with reference to the letter of the Lord President. I have now carefully gone over the papers, and think that I can explain with confidence what was the view with which Lord Brougham and the Lords who assisted him framed the judgment in question. The case was first argued during the time that I sat at the table as clerk; but the last argument took place after I had taken my seat as a peer, and I attended to it, and had much conversation with Lord Brougham upon the case.

"The printed copy of the petition to apply the judgment gives the general history of the case. The short substance appears to be this:—

"An action was raised by Cleghorns and others to recover from Sir William Elliott certain sums of money alleged to have been paid by the pursuers as the price of certain lands and estates purchased under a judicial sale thereof, made at the instance of a preceding heir of entail, but which sale had been in the year 1825 reduced and set down as irregular.

"The Court of Session sustains this claim to a considerable extent by the finding set forth in page second of the printed petition.

"This judgment being brought under review by appeal, the House of Lords thought that it might assist them in coming to a right conclusion upon the case, if they should be informed, first, whether the judgment in question was pronounced with or without reference to the fact that the parties claiming repetition were aware of the irregularity of the sale in respect of which their claim is now made; and secondly, to what extent, and by what form of diligence, the claims which are declared valid by the judgment, can, by the law of Scotland, be made available against Sir William Elliott, and succeeding heirs of entail. There was some discussion at the bar upon this latter point. It is not necessary, nor am I competent to say in what manner the information thus sought for would affect the ultimate judgment of the House.

"It is sufficient to say that it was conceived that such information might throw light upon the case, and I cannot think that there will be any difficulty on the part of the Lords of Session in giving their answers, when the object of the inquiry is explained.

"The consulted judges can of course give no assistance to their brethren of the First Division, in answering the first of the special inquiries; but, upon the second point, the opinion of the whole may be given, and the whole judgment (which may, I should think, include within it the answer to the special inquiries) will be in point of form the judgment of the First Division, as in the case of an ordinary remit for consultation of the whole judges.

"This particular form of remit being, as the Lord President observes, unusual, there is not any particular form in which the judgment given upon it should be framed; but any form of words which, after reviewing the former judgment in the ordinary way, conveys an answer to the first inquiry, and gives the opinion of the court upon the second, will, I think, be satisfactory to the House, and enable it to come to a final decision upon the case.—Yours faithfully, (Signed) Devon."

"To the Lord Chancellor, etc."



the written pleadings of the parties, and the arguments of counsel in presence of the whole court, and now beg leave to deliver our opinion as follows:—

“1. We are of opinion, that the claim made by the respondents, in their action directed against the appellants and the heirs of entail in the estate of Stobbs, in so far as it is a claim for relief, or *restitutio in integrum*, is, in its general substance, a well-founded claim in equity, to which this court, as a court of equity, ought to give effect, to such extent, and in such manner, as the circumstances will admit of consistently with the general principles of law and justice. The case, divested of all specialities, is, that the lands in question, having been offered for sale under warrants of this court, proceeding on the statute for redemption of the land-tax, were purchased by the respondents or their predecessors; and that, on the faith of having obtained a good title to these lands, they paid the prices in the manner set forth in the record. And the sales having been reduced and set aside in respect of irregularity in the proceedings, [1046] and the lands restored to the heirs of entail, while, in the meantime, the money of the respondents had been applied to relieve and disburden the entailed estate of debts and charges, which previously stood as real and effectual burdens affecting the estate and the heirs of entail, the respondents claim, by their action, relief or restitution to the extent of the money so paid and beneficially applied. The conclusions of the summons go farther than this, in regard to the form and mode of redress which is sought. But, on the general merits of the claim, we are of opinion, that the defender and the other heirs of entail are not entitled to take benefit by the transaction which has been reduced, to the manifest loss of the respondents in the specific sums of money ascertained, and that there is a good right in the respondents to be restored against it.

“Without entering into any argument on the subject, it may be proper to mention, that in forming this opinion, we have not overlooked the eighth finding of the interlocutor of the First Division of the Court in the process of reduction, or the fact therein referred to, that from the dispositions received by the respondents one irregularity in the execution of the statute, though not that on which the sale was reduced by the House of Lords, might have been discovered. But that circumstance does not affect our opinion as to the equity of the present claim, so far as it appears to us to be in other respects just and competent.

“2. Being of opinion, that the principle of liability, on which alone the action can be maintained, is that of *restitutio in integrum*, in as far as the powers of the court, and the circumstances of the case, will admit [1047] of it, we farther think, that that principle necessarily requires, that the appellant and the heirs of entail shall in no case be placed in a worse situation, than that in which they would have stood if no such transaction had taken place; and that, in so far as there may be, in any of the particular objects or purposes to which the money may have been applied, a legal impracticability of recalling or replacing it as paid by the respondents, the loss or inconvenience of a less perfect remedy must be borne by the respondents.

“3. We are therefore of opinion, that the respondents are not entitled to obtain any decree against the defender Sir William Francis Elliott, personally or individually, for payment of the several sums of money concluded for, by which any greater or more direct liability to diligence for payment thereof might be incurred, than that to which he might have been subject, if the sales had never taken place, and the burdens on the entailed estate, as they previously stood, had remained unaltered. We think, that, merely as the party at whose instance the sales were reduced, he did not incur any such personal liability; and that it is only in respect of the direct and defined benefits to the estate, to which he has succeeded in the first instance, and the other heirs of entail may eventually succeed, that the claim of the respondents is just and well founded against him or them. Being of this opinion, we so far differ from the judgment under appeal, in respect of the findings and personal decerniture therein expressed, that we do not think that the respondents are entitled, according to the principles of equity on which they found, to any decree for payment in such terms.

[1048] “4. The sums of money, for payment of which the summons concludes, are of three descriptions: 1. The sum paid for the redemption of the land-tax, being £1183 9s. 5d.: 2. Various sums, stated to be the amounts of entailer's debts, or debts which were effectual burdens on the entailed estate, as created within the powers of the entail, and which have not by any deeds of assignation been kept up against the

estate: And 3. A sum of £5483 0s. 4½d. of provisions stated to have been made effectual burdens on the estate, but which have been duly kept up by assignments. It is unnecessary to say anything of the last sum, as it is not now in dispute. The other two classes require particular notice.

"One of the most difficult points in the case, as it now stands, appears to us to be that which relates to the money applied for redemption of the land-tax. We think that neither Sir William Elliott nor the heirs of entail can be required to repay the capital sum so applied; because that would be to place them in a much worse situation than that in which they would have been if the sales had never taken place, contrary to the principles above laid down. For no one of them could ever have been compelled to pay any such sum in redemption of the land-tax; and to require them now to pay it would not be *restitutio in integrum*, but something much more to their prejudice. And, as the land-tax, once actually redeemed, cannot be precisely replaced with the legal remedies applicable to it, this raises a serious difficulty in the means of extricating this part of the case.

"But if the principle of equity be once settled, there seems to be no want of power in the law of Scotland [1049] to provide a mode of giving effect to it. The justice of the case is, that there should be again laid on the entailed estate, and the heirs of entail successively, an annual burden equal to the amount of the land-tax as it formerly stood, viz. £56 8s. 7½d.; and that it should be found, by decree of this court, that this burden shall subsist in favour of the respondents against the defender and the other heirs of entail,—subject, however, to one contingency. That contingency is, the possible, however improbable, event, that the land-tax in Scotland should be repealed or diminished. Subject to that possibility, the existence of which ought justly to exempt the heirs of entail from all liability, because they would have got the exemption if no sale had taken place, we are of opinion, that the said sum of £56 8s. 7½d. may still, by decree of this court, be declared an annual burden on the estate, and on the defender, and every succeeding heir of entail. The court cannot give the precise remedies which were competent for the recovery of the land-tax: but they can declare the annual sums as they fall due to be recoverable by all the ordinary diligence of the law of Scotland, without prejudice to the provisions of the entail as to the obligations of each heir successively in respect of the substitute heirs. It farther appears to us, however, that, in any such decree to be pronounced, power ought to be reserved to any heir to redeem the burden by payment of the sum of £1183 9s. 5d.

"The six sums of £1111 2s. 2d., £111 2s. 2d., £1170, £1170, £2500, and £1170, concluded for successively, and particularly described in the summons and interlocutor appealed from, consist of pay-[1050]-ments either of debts which were the entailor's proper debts, or of provisions stated to have been effectually appointed under the powers reserved by the entail; all of which would have been burdens on the estate, and the heirs to some effect, if no sale had been made. It appears to us, that the deeds executed for establishing the provisions were sufficient to have enabled the children, in whose favour they were granted, to make them effectual as burdens on the estate, according to the power reserved by the entail. It is therefore clear as matter of fact, that, in so far as the money of the respondents was applied in the payment and extinction of such debts and provisions, the estate was, by means of that money, to that extent relieved of burdens, which must otherwise have now affected it; and, if the principle laid down in the first part of this opinion be correct, we are necessarily brought to the conclusion that the respondents, upon reduction of the sale and eviction of the lands, are entitled to restitution in regard to all these sums, in so far as the court, as a court of equity, can give it, consistently with the just rights of the appellant and the other heirs of entail.

"In the precise remedy to be given, there may be a difference between the two sums of £1111 2s. 2d. and £111 2s. 2d., which were entailor's debts, and the four sums of £1170, £1170, £2500, and £1170, which consisted of bonds of provision. The former were proper debts equally against the estate and against every heir succeeding to it; and it will do no injustice to find that in restoring the respondents against the counterpart of the transaction of the sale reduced, the same sums shall still form burdens pre-[1051]-cisely to the same effect, and to give decree for payment of them against the defender, without prejudice to his right to keep them up as burdens on the estate, as the entail does indeed in express words permit. But with regard to the sums of provisions, as the entail only authorizes the heirs 'to burden and affect the lands with

such provisions,' we are of opinion that the remedy to be afforded to the respondents can go no farther than to find and declare the sums paid in extinction of them to be still burdens on the entailed estate.

"Subject however to this distinction, we are of opinion that the Court has power, and that it is just and necessary as a matter of equity, to declare that these several sums shall subsist and be of equal effect as burdens on the estate and the heirs of entail, as the debts to the payment of which they were applied would have been if they had not been paid.

"With regard to the forms of diligence which may be competent for the sums thus to be declared to come in place of the bonds of provision, we are of opinion that those sums, when established by decree as burdens on the entailed estate, must be considered as standing in all respects in the same condition with the other sums amounting to £5483, etc., which, though paid to the original creditors, have been kept up as burdens on the estate by direct assignments of the bonds; and that the same forms of diligence for making the burden effectual will be competent in the one case which would be competent in the other. As we do not think that the equity of the case will admit of any personal [1062] responsibility being laid on the defender or any other heir, to which they would not have been liable for the debts as they originally stood if no sale had taken place, we are of opinion that the nature and extent of the diligence which will be competent must depend on the special terms of the entail, and the legal effect of its provisions. The clauses of the entail of Stobs are very peculiar in their application to this point, and it is not perfectly easy, and might be attended with serious inconvenience, to attempt to define beforehand what shall be taken to be the precise operation of them. In general, but reserving our judgment if any case of the kind shall come before us for trial, we think that personal diligence will not be competent for compelling the defender or any individual heir to pay the principal sums of such provisions; that he may be liable to such diligence for the annual interest becoming due on them during his own possession of the estate; that adjudication, and probably inhibition also, against the estate, may be used for the principal sums as debts, subject to the effect of the very peculiar clause of the entail, providing that if any adjudications shall be led 'for debts to be contracted,' the heir 'shall be obliged to redeem the same within the space of eight years' after deducing and leading such 'diligence,' in as far as that clause may be held to be applicable. But the precise operation of such a provision, as well as the legal effect of deeds held to be duly executed under the power of appointing provisions for younger children by this entail, may involve questions of so much difficulty not necessary to be resolved in the decision of this cause, that we do not [1063] think that any judgment to be pronounced in it should be made to embrace any of these points."

The Lords of the First Division having concurred in the foregoing opinion, the following judgment was pronounced:—

"The Lords, having considered the judgment of the House of Lords, find and declare, that in the interlocutor appealed from they had fully in their view, and had given due attention to the fact, that it might have been discovered from the terms of the dispositions accepted of by the pursuers, that one particular irregularity in the execution of the statute had occurred, though of a nature not held to be sufficient to affect the validity of the sale; and having consulted with the other judges, and heard counsel in presence of the whole Court, and reviewed the opinions of the Lords of the Second Division of the Court and of the Lords Ordinary, recal their former interlocutor appealed from, find that the pursuers are entitled in respect of the sales of the lands made to them and the payment of the prices thereof, and of the subsequent reductions of the said sales on account of the irregularities in the proceedings alleged against them, to be restored *in integrum* against the effects of the sales being reduced, in so far as the circumstances of the case and their powers as a court of equity enable them to give such restoration: find, that under any statement now before the Court in the record, it must be assumed that the land tax redeemed cannot be brought back, or of new made a burden on the lands with the remedies for execution therewith connected; but find that in equity the heirs of entail are bound to bear a corresponding [1064] burden, and that the sum of £1183 9s. 5d., for which the said land tax so affecting the lands was redeemed, must still form a burden on the estate and on the heirs succeeding thereto, and find, decern, and declare accordingly, and grant warrant for

recording this decree in the register of sasines and reversions; but find and declare that this decree shall be subject always to these conditions and provisions, that in case the land tax at present exigible from all the lands of Scotland shall be abolished or diminished, the said burden shall also entirely or proportionally cease; and further, that it shall always be in the power of any heir of entail in possession of the estate to redeem and extinguish the said burden by payment of the foresaid sum of £1183 9s. 5d., but that until the same be paid, the burden shall subsist to the effect of each succeeding heir being bound to pay the sum of £56 8s. 7d. annually to the pursuers, being the amount of the sum exigible previous to the said redemption; and that all the ordinary diligence of the law shall be competent for the payment thereof, but that neither the individual heirs nor the estate shall be liable to any diligence for payment of such principal sum: find, that in so far as the prices received from the pursuers for the lands in question were applied in payment of debts of the entailor, and specially of the debts of £1111 2s. 2d., and £111 2s. 2d., specified in the record, it ought to be found and declared, and find and declare accordingly, that these sums shall form real burdens on the lands and estate in question; and the Lords decern for payment thereof against all the heirs succeeding to and possessing the said lands, [1055] without prejudice always to any heir of tailzie, on his paying such debts, keeping them up by assignation or otherwise against the said estate, as permitted by the entail: find, that in so far as the said prices of the lands have been applied in payment of the provisions for children of the family successively made by the heirs in possession, as set forth in the record, although the same have not been kept up by deeds of assignation, the sums thereof being £1170, also £1170, also £2500, and £1170, these sums, together with the sum of £5483 0s. 4<sup>8</sup>/<sub>11</sub>d., being the amount of provisions granted by the late Sir William Elliott in favour of John Elliott his second son, Gilbert Elliott his third son, Bethia Mary Elliott his eldest daughter, and George Augustus Elliott his fourth son, which has been kept up by assignation in favour of Messrs. Douglas and Bell, must still all form real burdens on the entailed estate to the same effect, but no farther, as if they had not been so paid, but had still stood as outstanding debts of the estate according to the terms of the deeds constituting them, and decern accordingly, and grant warrant for recording this decree in the register of sasines and reversions, that all may take notice thereof; but find, decern, and declare that neither the defender, nor any other of the heirs of entail, can be made liable by personal diligence for payment of the principal sums of any of the said provisions for younger children; and find that they are and shall be personally liable successively for the payment of the interest of all such sums accruing during their own possession of the estate respectively: find, decern, and declare that the same forms of diligence [1056] shall be competent to the pursuers for all the debts of the entailor hereby declared to be still subsisting, notwithstanding any discharges granted which could have been by law competent if the said debts had been still subsisting in the persons of the original creditors; and find that the same form of diligence shall be competent to the pursuers for any of the sums of provisions for younger children, paid as aforesaid from the prices of the said lands, which would have been competent to the children in whose favour such bonds or deeds of provisions may have been granted, if the same had not been discharged; declaring always, as it is hereby found and declared, that this decree shall be subject to all the provisions and declarations of the deed of tailzie of the lands in question, not inconsistent with the equity declared by the findings and decernitures in this interlocutor, and declaring all the said findings to be without prejudice to any questions which may arise as to the effect of any particular form of action or diligence which may be raised in any particular case in virtue thereof. And in respect of the preceding findings, assoilzie Claud Russell, the trustee for the creditors of the late William Riddell, and all others the representatives of the said William Riddell, and of Edgar Hunter his cautioner, from the conclusions of the libel, to the extent of the said several sums of money, and decern. *Quoad ultra*, remit to the Lord Ordinary to hear parties further as to the sum of £622 8s. 1d. alleged to have been expended by Sir Francis Elliott on improvements on the entailed estate: likewise as to the several dates from which interest on the said several sums shall run: also as to [1057] the balance still due by the said William Riddell and his cautioner and their representatives; and as to what farther sums fall to be charged against the entailed estate and heirs of entail, and generally as to all other remaining points of

the cause, and to do therein as shall be just: find the defenders Sir William Francis Elliott, and Sir James Boswell, George Sinclair, and James Brown, his trustees, who have sisted themselves as parties to this action, and that only *qua* trustees, liable to the pursuers in the whole expenses hitherto incurred by them in this Court, and remit the account thereof, when lodged, to the auditor to tax the same, and to report."

*Appellants.*—The judgment appealed from is at variance with the summons; it gives that which was never demanded or concluded for. The summons is at variance with itself; it concludes for repetition of sums applied in terms of the statute, and yet the groundwork of the action is, that the terms of the statute were not complied with at all. New and unprecedented burdens are attempted to be imposed upon this estate, which are utterly inconsistent with the subsistence of a valid entail. In the first place it reimposes the burden of the land tax, or rather it imposes an annual burden, not the land tax, but to be subject to some of the conditions and laws which would have applied to the land tax,—a new species of burden upon property, and a new species of right reared up against property not concluded for in the summons, and it is believed never before known in the history or practice of the law of Scotland. The burden thus imposed is even worse than the land tax, because the heirs of entail might have sold part of the entailed [1058] estate to redeem the land tax, but they have no power to sell any part of the entailed estate to redeem this new burden, and nothing less than an enactment as authoritative as the statute for redemption of the land tax can give them such power. In the second place the interlocutor makes and imposes other real burdens upon the entailed estate in a manner alike unsparing and unprecedented; for instance, certain debts of the entailer had been paid off and discharged, and the present heir of entail entered into possession of the entailed estate free of these burdens. They were not kept up by assignation or otherwise. The Court of Session however has, of its own authority, and against the will of the heirs of entail, done that which the heirs of entail themselves could not have done if they had been willing, and which the respondents never thought of asking in the summons; it has imposed a new real burden upon the entailed estate in favour of the respondents to the amount of the debts which had been paid off and discharged. In like manner the interlocutor has done the same thing in regard to other sums, being the amount of the provisions in favour of younger children, which had been paid off. It is apprehended that the Court had no power to do this, and, at all events, that it was not competent for the Court to do it, under the present action. The foundation of the claims of the respondents, as stated by themselves, and as dealt with by the Court, is, that the debts paid off were so paid in pursuance and professed implement of the provisions of the statute. But if so, they must have been permanently and finally paid off and extinguished out and out, and could not be revived, it being an acknowledged principle of the law of Scotland that debts once extinguished cannot by any device be revived. Indeed, [1059] the Court has not revived them; but, finding the entailed estate clear, it has of its own accord done that which is not only at variance with the former precedents, but which nothing short of an act of parliament could effect, viz., created and put upon it a new real burden in favour of the respondents, with all the qualities of the debts that were paid off. The heirs of entail are made personally liable for sums of money which are the personal debts of a preceding heir of entail whom the appellant (the heir of entail) does not represent, which are not legal burdens upon the estate entailed, and for which neither the present heir of entail, nor those who may succeed, incurred any liability either personally or by representation. The judgment appealed from purports to do what has not hitherto been attempted to be done by the Court of Session, either as a court of law or of equity, is contrary to the principles and practice of the law of Scotland, and wholly unsupported by any authority or precedent. To give the respondents a right to recover the sums concluded for, either from the appellant or any of the heirs of entail, or out of the entailed estate, is directly inconsistent with the right of the heirs of entail, sustained and given effect to in the former action to reduce the sales as a fraud upon the entail, and contrary to the act of parliament, and practically denies benefit to the heirs of entail from the judgment they have already obtained reducing such sales.

While the Court of Session has recalled and altered its former judgment, while it has not given to the respondents that which they asked under their summons, but has devised a remedy for them in something which they did not conclude for, it has

found them entitled to the whole expenses of the litigation, [1060] contrary, as the appellants humbly conceive, to the principles which ought to regulate the awarding of costs. Nay, it has even found the respondents entitled to recover from the present appellants the separate expenses which the respondents have incurred in this cause in the discussion between them and Riddell's representatives, in which discussion too the respondents have not been successful.

*Respondents.*—Nothing can be more clear and distinct than the tenor and object of the summons. It is distinctly averred in the summons that Mr. Riddell was named and approved of as statutory trustee in terms of the act of parliament, under the application for sale at the instance of Sir William Elliott. It is then averred that Mr. Riddell, as statutory trustee, received, directly from the respondents, or out of the monies paid by them, the sum of £15,420, which, with the exception of a small balance, he avers that he duly applied, in the execution of his duty, in terms of the statute, and under warrant of Court, to the redemption, in the first place, of the land tax, and next to the payment of debts which affected the entailed estate, as being either entailer's debts or debts contracted under faculties reserved in the entail. The action proceeds upon this ground, that either the statutory trustee on the one hand, or the heirs of entail and entailed estate on the other, are responsible to the pursuers for this sum of £15,420, the latter being responsible in so far as it has been applied by the statutory trustee for the benefit of the entailed estate, in the manner prescribed by the act, that is to say, in redemption of the land tax, or in payment of debts and burdens affecting the estate, and the former [1061] in so far as it has not been applied by him as statutory trustee, or, in other words, in so far as it remains in his hands, or has been applied otherwise than under warrant of court, and to the purposes prescribed by the statute, namely, the redemption of the land tax and the payment of debts and burdens on the estate. When the respondents speak of sums applied in terms of the statute, they use the words designative, and as elsewhere used in the summons, to mean the sums appropriated by the trustee in payment of entailer's debts, redemption of land tax, and other burdens for which the estate was liable. The respondents do not seek to constitute against the entailed estate, or against Sir William Elliott, as heir in possession, or against the heirs substitute, any new or extraordinary or enlarged responsibility, or any liability of any kind, or to any effect higher than attached to the entailed estate, and the heirs of entail under the various burdens and debts, in payment of which the price received by the statutory trustee has been applied. The heirs substitute of entail were not called as defenders, in order to obtain any direct or personal decree against them, but only in respect of their interest as heirs substitute in the entailed estate, and to the effect merely of constituting and declaring such responsibility against the entailed estate, and against the heirs succeeding to and holding it, as the estate and those heirs were previously under, in respect of the burdens and provisions which may have been paid by the statutory trustee. In like manner, as against Sir William Francis Elliott, the heir in possession, the conclusions proceeding on the supposition which forms the basis of the present argument, that he does not generally represent his father, are directed against him only as heir in possession, and to the extent [1062] to which he was liable for the debts and burdens in question. For some of them he was clearly liable personally, out and out, as, for example, for the bonds of provision in favour of his brothers and sisters, granted by his father, under the power of providing for younger children, conferred by the entail; and for which provisions he had given his own personal bond of corroboration, which stands at this moment assigned to trustees. *Quoad ultra*, the respondents did not demand decree against Sir William Elliott, beyond that liability which, as heir of entail in possession, he had already contracted for the debts and burdens affecting the estate and heirs in possession, and to which the trustee applied the price. For such burdens as entailer's debts, or debts contracted in execution of powers reserved or created by the entail, and as to which there exists no entail, or at least no entail which can exclude the creditor, the estate itself is very clearly liable. Some discussion there may be about the extent of the personal liability of the heir in possession, so far at least as regards the principal, but in no view can there be any discussion about interest, which it is the peculiar duty of the heir in possession to keep down during the term of his possession (*Campbell v. Campbell*, 29th Nov. 1815, Fac. Coll.; *Erskine and Others v. Lord Mar*, 7th

July 1829, 7 S. and D., 844). Generally, with respect to the principal also, the respondents apprehend it to be plain that an heir of entail, by taking possession of the entailed estate, though he may not be liable *ultra vires* of his succession, does incur direct and immediate responsibility to the extent of his succession, and so far as he is *lucratus* by it, for all debts, which, being contracted by an entailer or by former heirs of [1063] entail under powers and faculties created and reserved by the entail, form a necessary burden on the succession. The mere circumstance of the party interested not having taken an assignation, as he confessedly might have done, is not of itself sufficient to extinguish the debt, or justify the plea that it does not subsist, and cannot be made effectual to any intent or purpose whatsoever (*Temple and Halliday v. Gairns*, 22d Feb. 1706, Mor. 15355; *Gordon v. Sutherland*, 29th January 1731, Mor. 11534; *Scott of Harden*, 20th Dec. 1751, Mor. 15394; *Kerr v. Turnbull*, 15th Feb. 1758, Mor. 15551).

There can be no doubt that the late Sir William Eliott could have taken assignations, and kept up all these debts. The respondents are in all respects in right of Sir William Eliott, and, through him, in right of the price, and consequently of all those debts or securities affecting the entailed estate, which have been paid by that price. Under the circumstances, the fact that no assignation was taken cannot deprive the respondents of the security which, through an assignation, they might unquestionably have obtained. The case of *Sloane Lawrie v. Donald* is a clear authority for the respondents on this point. That case is noticed by Mr. Shaw, under dates 1st June 1825 and 7th December 1830, but is only partially reported by him. It is understood, however, that the facts of the case, so far as necessary to be now considered, are very shortly these:—Mr. Walter Lawrie entailed two estates, Redcastle and Bargattan, by two separate entails, which, with respect to the concluding part of the destinations, were not identical, so that the estates came ultimately to descend to different parties. Sloane Lawrie was the heir in possession of both estates in 1799, and in that year, under the authority of the existing statutes for redemption of the land [1064] tax, he sold Edgarton, a farm of Redcastle, but for the purpose of redeeming the land tax payable not out of that estate only, but also out of Bargattan. Sloane Lawrie became himself the purchaser, through a trustee. The price was applied in redemption of the land tax of both estates, and in payment of debts due by Walter Lawrie, the common entailer, and with respect to several of those debts there was not an assignation taken, but simply a discharge and renunciation. Sloane Lawrie possessed for some time after this sale, and was succeeded by Kennedy Lawrie, upon whose death the two entails divided, Bargattan going to Kennedy Lawrie's dispoonees, he having been the last substitute in that entail, and Redcastle, part of which had been sold, going to another party, the substitute in that entail. In the meantime Kennedy Lawrie, who immediately succeeded Sloane, had brought an action of reduction of the sale, which was afterwards insisted in by the heir succeeding to Redcastle, and decree was obtained, first, in the Court of Session and afterwards in this House, reducing the sale. An accounting then commenced between the parties in right of Bargattan, which had now become a fee simple estate, and the heirs succeeding to Redcastle. The Court found, or at least proceeded on the assumption, that although the entailer's debts had been paid out of the price, and some of them not upon assignation, but upon discharge and renunciation, they were yet not extinguished, and accordingly they gave Mr. Sloane Lawrie's representatives, who had come also to possess the estate of Redcastle, relief of those entailer's debts against the heir of Bargattan, according to the relative value of that estate, the heir of Redcastle being liable for the remainder; and in like manner they found [1065] the heir of Bargattan liable in the money which had been expended in redeeming the land tax of that estate.

To show the injustice which would result from an opposite rule, suppose that the purchaser at the sale had himself been a previous creditor, and that in part payment of the price he had granted precisely such a deed of discharge in extinction of his debt over the general estate, as those upon which the appellant here founds, could it ever have been maintained that an heir of entail could set aside the sale, thereby depriving the purchaser of his lands, and at the same time withhold from the purchaser, in his quality of previous creditor, the right to have his original debt revived, and this forsooth upon the notable argument that because the heir who made

the sale had taken a discharge and not an assignation, the debt was extinguished *confusione*? The price of the lands sold, or what is purchased with the price, whether land tax or previous debts or other lands or money securities, is to be regarded as constituting in some sort a *surrogatum* for the lands. The heir of entail who challenges the sale cannot have both the lands and their *surrogatum*. The party who is entitled to the *surrogatum*, the lands being re-vindicated, is not the party who gets back the lands, but the party with whom the lands were at the date of revindication, and from whom by force of that revindication they have since been taken. As between him and the heirs of entail revindicating the entailed estate, there can be no sort of question. The rule of law is universal: "Nemo debet ex aliena jactura lucrari" (Stair, b. 1, t. 8, s. 607. See to same effect, Ersk., b. 3, t. 1, s. 10 and 11; Bankton, b. 1, t. 9, s. 4; Pothier, tom. iv. p. 474-5 (*Du Droit de Propriété*, pp. 343-345)).

[1066] Upon the dependence of the present action, the respondents raised an inhibition against the appellants, dated 6th June and executed 7th June and 3d July, and registered 15th July 1828. When the judgment of the Court of Session, of 18th January 1833, was pronounced, the appellants presented an application for recall, on the ground, *inter alia*, that the judgment had sufficiently secured the right of the respondents to any debt which was due to them, and that the appellant had since succeeded to the estate of Wells, rented at £3000 per annum, which would also be affected by the inhibition; upon which the Court pronounced the following interlocutor (4th July 1833):—"The Lords, having heard counsel for the parties, refuse the desire of the petitioner; find expenses due to the respondents, and remit."

This interlocutor was also made the subject of a separate appeal.

The Lord Chancellor, after stating the import of the judgment of the House of Lords remitting the cause to the Court of Session, and the judgment of that Court thereupon, observed that the equity was clear in favour of the respondents, and nothing had been urged against the judgment appealed from which in any degree impeached its accuracy. His Lordship therefore moved an affirmance.

The House of Lords ordered and adjudged, That the said original appeal be and the same is hereby dismissed this House; and that the said interlocutor of the 31st of January (signed 2d June) 1837, by which the said interlocutor of the 18th of January (signed 7th February) 1833 was, upon [1067] the said remit from this House, recalled, be and the same is hereby affirmed: And it is further ordered and adjudged, that the said cross appeal be and the same is hereby dismissed this House.

JOHN BROWNLEY—SPOTTISWOODE and ROBERTSON—G. and T. WEBSTER, Solicitors.



REPORTS OF CASES determined in the House of Lords, on Appeals and Writs of Error from the Courts of England and Ireland, and Questions of Peerage, decided during the Sessions 1839, 1840, and 1841. By MARTIN JOHN WEST, Barrister-at-Law.

BARONY OF BRAYE.\*

Sir HARRIS NICOLAS and Mr. LEWIS for Mrs. SARAH OTWAY CAVE, *Claimant*; Dr. LUSHINGTON and Mr. DENNES for Sir PERCIVAL HART DYKE, *Claimant*; The ATTORNEY GENERAL for the CROWN [15th August 1839].

[*Mews' Dig.* x. 311, 314, 316; S.C. 6 Cl. and F. 757, *q.v.* See also Parl. Pap. 1895, 272, p. 5.]

*Evidence of Title to Peerage—Writ of Summons—Sitting in Parliament.*—Held to be a settled rule in questions of peerage, that where it is proved, after a careful search of all the depositories in which a patent of peerage would have been likely to have been found, that there is no trace of any patent, the writ of summons, and sitting in Parliament by the ancestor under it, shall [2] be evidence of the title to the peerage descending to the heirs of the body, including females.

*Attainder of Co-heir during Abeyance of Peerage—Forfeiture of Dignity by Descendants.*—During the abeyance of a barony descendible to the heirs of the body, one of the co-heirs is attainted for treason; an Act of Parliament is afterwards passed for the restoration in blood of the children of such co-heir: Held (after consulting the judges) that the previous attainder of the co-heir did not effect a forfeiture of the abeyant barony, and that the Crown may determine the abeyance in favour of the descendant of such attainted co-heir.

The petition of Mrs. Sarah Otway Cave of Stanford Hall in the county of Leicester, widow, to His late Majesty, praying that His Majesty would be graciously pleased to determine the abeyance of the barony of Bray in her favour, by His Majesty's letters patent, or in such other manner as to His Majesty might seem proper, together with His Majesty's reference thereof to this House, and a report by the Attorney General thereon annexed; and also the petition of Sir Percival Hart Dyke of Lullingston Castle in the county of Kent, Baronet, praying that His Majesty would be pleased to determine the abeyance of the said barony in his favour, by directing a writ of summons to him to attend His Majesty in parliament by the style and title of Baron Bray; were severally referred to the Committee for Privileges.

The result of the evidence adduced was, that it appeared to the committee that Mrs. Otway Cave had proved her descent from Elizabeth, the second daughter of Edmund

\* The Reporter was favoured with this and the following Peerage Case by Mr. Robinson.

Lord Braye, who appears to have sat in parliament in the reign of Henry the Eighth; and that the other claimant, Sir P. H. Dyke, appears also to [3] have made out his pedigree as descended from Frideswide, the third daughter and fourth child of that Edmund Lord Braye.

In the course of the investigation two questions of law occurred; one of these was held to have been settled by former cases,—as stated by their Lordships in their opinions postea; that is, that evidence of a sitting in this House under summons by writ, where it has been proved, on careful examination of all the depositories where a patent would have been likely to be found, that there is no trace of any patent, the summons, and a sitting under it, shall be evidence of the title to the peerage descending to the heirs of the body, including females.

The other question raised by the Attorney General, and which was argued in the presence of the judges, was this:—During the abeyance of this barony, descendible to the heirs of the body, one of the co-heirs was attainted for treason; an act of parliament was afterwards passed for the restoration in blood of the sons and daughters of the party attainted. Suppose A. claims the dignity through the co-heir who was so attainted, and B. claims through another co-heir, whether it is competent to the Crown to determine the abeyance in favour of A.; and, whether it is competent to the Crown to determine the abeyance in favour of B.

The arguments adduced, as well as the grounds on which the judges answered the questions in the affirmative, will be found in the following opinion delivered by the Lord Chief Justice Tindal:—

“During the abeyance of a barony descendible to heirs of the body one of the co-heirs was attainted for [4] treason; an act of parliament afterwards passed in the following terms:

“An act to restore in blood the sons and daughters of Edward Lewknor, Esquire.  
Anno Primo Elizabeth, N° 32.

“In most humble and lamentable wise shewen unto yo<sup>r</sup> Heighness yo<sup>r</sup> faithfull and most obedient subiects Edward Lewkno<sup>r</sup>, Thomas Lewkno<sup>r</sup>, Steven Lewknor<sup>r</sup>, and William Lewkno<sup>r</sup>, Jane Lewkno<sup>r</sup>, Maria Lewkno<sup>r</sup>, Elizabethe Lewkno<sup>r</sup>, Anne Lewkno<sup>r</sup>, Dorathie Lewkno<sup>r</sup>, and Lucrecie Lewkno<sup>r</sup>, sonnes and daughters to Edward Lewkno<sup>r</sup>, late of Kyngeston Bowsey in the countie of Sussex, Esquier, that where the said Edward Lewkno<sup>r</sup> their father, in the time of yo<sup>r</sup> Heighness syster the Quene's Ma<sup>tie</sup> that deade is, was attaynted of heighe treason, and by reason thereof yo<sup>r</sup> saide subiects and every of them standen and be parsons in their linage and blood corrupted, whereby they and every of them be not only deprived of all manor degrees, states, names, fames, and of all inheritance that shoulde or might have come vnto them or any of them from or by their saide father, if the same their late father had not been attaynted, but also of all and singular other inheritance that shoulde or mighte by possibilitie have come vnto yo<sup>r</sup> saide subiectes by any other their collateral auncestor or auncestors of the parte of their saide father, to whome they or any of them shoulde or mighte have coveyed or may coveye themselves as nexte cousen and heyer of blood by meane degrees by their saide father, whereby yo<sup>r</sup> saide subiectes as now reaste out of all name and reputation to their greate discomforte and daylie [5] sorrowes: And forasmuche as yo<sup>r</sup> saide subiectes be and alwayes have been to yo<sup>r</sup> Heighnes trewe and faithfull subiectes, it may therefore please yo<sup>r</sup> Heighnes of yo<sup>r</sup> most noble and habundance grace, and for the trewe and faithfull service w<sup>ch</sup> yo<sup>r</sup> said subiectes intend to dve to yo<sup>r</sup> Ma<sup>tie</sup>, and yo<sup>r</sup> heyres and successores, during their lives, that it may be at the humble sute and petiçon of yo<sup>r</sup> saide subiectes ordeyned, established, and enacted by yo<sup>r</sup> Heighnes, w<sup>th</sup> the assent of the lords spirituall and temporall, and of the comens, in this presente parlyament assembled, and by authoritie of the same, that yo<sup>r</sup> saide subiectes Edward Lewkno<sup>r</sup>, Thomas Lewkno<sup>r</sup>, Steven Lewkno<sup>r</sup>, Wylliam Lewkno<sup>r</sup>, Jane Lewkno<sup>r</sup>, Mary Lewkno<sup>r</sup>, Elizabethe Lewkno<sup>r</sup>, Anne Lewkno<sup>r</sup>, Dorathie Lewkno<sup>r</sup>, and Lucrecie Lewkno<sup>r</sup>, and every of them, and their heyres, and the heyres of every of them, from henceforth may and shall be by the authoritie of this acte restored and enhabled only in blood and lynage as heyre and heyres to the said Edward Lewkno<sup>r</sup> their father, in suche the same and like maner, fourme, degree, and condiçon, to all intents, cōstrucōns, and purposes, as they or any of them, theire heyres or the heyres of any of them, mighte or shoulde have been if the said Edward Lewkno<sup>r</sup> their father had not been attaynted; and also that yo<sup>r</sup> saide subiectes Edward, Thomas, Steven,

Wittm, Jane, Mary, Elizabethe, Anne, Dorathie, and Lucrecie, and every of them, and their heyres, and the heyres of every of them, from henceforthe may and shall be enhabled to demaunde as to have, hold, and enjoy all suche lands, ten<sup>ts</sup>, and hereditaments, w<sup>h</sup> their apptenances, which at [6] anye tyme hereafter shall descende, come, remayne, or reverte from any of theire collaterall or lyneall auncestors of the parte of the saide Edward Lewkno<sup>r</sup> their late father, other than suche castells, mannors, lands, ten<sup>ts</sup>, rents, revercōns, remaynders, serviçs, possessions, and other hereditaments w<sup>ch</sup> were the saide late Edward Lewkno<sup>r</sup> their saide father, in vse, possession, revercōn, or otherwise, the day of the attaynder of the saide Edward Lewkno<sup>r</sup>, or the day of the saide treason by him cōmitted, and other than such castells, honors, mannors, lands, teñ, and other hereditaments as yo<sup>r</sup> Heighness sister Queene Mary or yo<sup>r</sup> Heighness was or is entitled to have or mighte or oughte to have by force of the saide attayndor, or by reason of any office founde or to be founde after the saide attayndor, in such and like manner, fourme, and condiçon, to all intents, cōstrucçons, and purposes, as if the saide Edward Lewkno<sup>r</sup>, late father to your saide subiectes, had never been attaynted, and as though no such attayndo<sup>r</sup> of the saide Edward Lewknor had been had or made; and that yo<sup>r</sup> said subiectes Edward Lewkno<sup>r</sup>, Thomas Lewkno<sup>r</sup>, Steven Lewkno<sup>r</sup>, and Wittm Lewkno<sup>r</sup>, Jane Lewknor, Mary Lewkno<sup>r</sup>, Elizabethe Lewkno<sup>r</sup>, Anne Lewkno<sup>r</sup>, Dorathie Lewkno<sup>r</sup>, and Lucrecie Lewkno<sup>r</sup>, and every of them, and their heyres and the heyres of every of them, may hereafter vse and have any acçon or sute, and make his or their pedegrees and conveyance in blood, lynage, and degree as heyres, or heyres only as well to and from the saide Edward Lewkno<sup>r</sup> their father as als to and from any other parson and parsons, in like manner, fourme, condiçon, and degree, to all intents, con-[7]-strucçons, and purposes as if the said Edward Lewkno<sup>r</sup> their saide late father had never been attaynted, and as if no such attayndor were or had been hadd; the corrupçon of blood betwene the saide Edward Lewkno<sup>r</sup> and yo<sup>r</sup> saide subiectes and their heyres, or any acte of parliamente or judgment at the comon lawe concernynge the attayndo<sup>r</sup> of the said Edward Lewkno<sup>r</sup>, or any other thinge wherebye the blood of the saide Edward Lewkno<sup>r</sup> is or shoulde bee corrupted, to the contrary in any wise not w<sup>st</sup>andinge: Provided alwayes, and be it enacted by th<sup>e</sup>authorite aforesaide, that this presente acte, or any thinge therein conteyned, shall not extende to enhable, restore, or entitle yo<sup>r</sup> saide subiectes, or any of them, or any of their heyres, to any honours, castells, mannors, lordeshippes, lands, teñts, and other hereditaments w<sup>ch</sup> yo<sup>r</sup> Heighness now hathe or had, or is, mighte, or oughte to be entitled to have by reason of any attayndor or attayndors of the same Edward Lewkno<sup>r</sup>, or otherwise, nor to any castells, honnors, mannors, lordeshippes, lands, teñts, rents, revercōns, serviçs, and other hereditaments, late of the saide Edward Lewkno<sup>r</sup>, w<sup>ch</sup> yo<sup>r</sup> Ma<sup>ty</sup> sister the late Quene Mary was entitled to have by reason or force of the saide attaindo<sup>r</sup> or otherwise, savinge to yo<sup>r</sup> Heighnes, yo<sup>r</sup> heyres and successores, and to all and euery other parson and parsons, bodyes politique, corporate, their heyres and successors, and to the heieres and successors of euery of them, all such estate, possession, righte, title, interest, revercōn, remainder, entrie, lease and leases, clayme, cōdiçon, tearme of years, rents, and all other profits and commodities whatsoever [8] as yo<sup>r</sup> Heighness or any of them haue in or to any honnors, castells, mannors, lands, teñts, rents, profits, and hereditaments, in such manner, fourme, and condiçon, to all intents and purposes, as though this acte had neuer been had or made: Provided alwise, that this acte, ne any thinge therein conteyned, extende ne be preiudiciall to yo<sup>r</sup> saide moste humble subiectes or any of them, their heyers or assignes, or the heyers or assignes of any of them, for or concerning any mannors, lands, teñts, or other hereditaments w<sup>ch</sup> yo<sup>r</sup> saide subiectes or any of them haue or hathe by any good, lawfull, and perfecte feoffment, gifts, and assurance or other conveyance to them or any of them had or made by any of their lyneall or collaterall ancestors, or by any other parson or parsons."

"A. claims through the co-heir who was so attainted. B. claims through another co-heir.

"First. Is it competent for the Crown to determine the abeyance in favour of A.?

"Secondly. Is it competent for the Crown to determine the abeyance in favour of B.?"

The judges requested time to consider these questions.

The Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinions of the judges, in the words following; *videlicet*,

"My Lords, in the questions proposed by your Lordships' House to Her Majesty's judges, it is first supposed that during the abeyance of a barony descendible to the heirs of the body one of the co-heirs is attainted for treason; and after reference made to a certain act of parliament passed in the first year of [9] Queen Elizabeth, intituled 'An Act to restore in blood the sons and daughters of Edward Lewknor, Esquire,' it is further supposed that A. claims through the co-heir who was so attainted, and B. through another co-heir; and your Lordships then require the opinion of the judges on these two points; viz., first, is it competent for the Crown to determine the abeyance in favour of A.; and, secondly, is it competent for the Crown to determine the abeyance in favour of B. And although the consideration of the questions submitted to us involves some matters of curious learning, upon which no direct authority is to be found in the books, yet, looking at the principle by which we conceive the subject matter of those questions is to be governed, and reasoning by the analogy to be derived from the decisions of our courts of law, so far as they can be held to apply to inheritances of so peculiar a nature as those under consideration, and still further bearing in mind the decisions of this House on cases which have been brought before it, the judges,\* who have heard the argument at your Lordships' bar, have arrived at the unanimous opinion that both the questions proposed to us are to be answered in the affirmative.

"My Lords, the general rule by which the abeyance of a dignity or title of honour is governed was not disputed at your Lordships' bar. It has been indeed the established and undoubted law upon this subject from a very early period of our history, that in the case of a barony descendible either to the heirs [10] general or to the heirs of the body, if the baron die, leaving only daughters or sisters or other co-heirs, the dignity is in abeyance so long as more than one of such co-heirs is in existence, but so nevertheless that the Crown, the sovereign of honour and dignity, may at any time during such abeyance determine it by conferring the dignity on whichever of the co-heirs it pleases; but if the Crown do not exercise such prerogative, and the lines of all the co-heirs but one become extinct, then the abeyance is at an end, and such only surviving co-heir is entitled as a matter of right to the enjoyment of the dignity. Lord Coke, indeed, in his First Institute, 165 a., seems to think that such has been the law from the time of the Conquest; but it has, at all events, been acted upon at the least as early as the reign of Henry the Sixth, who in the case of the Lord Cromwell dying without issue male, and leaving several daughters, preferred the youngest; and in more modern times this exercise of the royal prerogative has been repeatedly put in force, as, amongst many others, in the case of the earldom of Oxford in 1625, and that of the barony of Grey of Ruthin. (See Collins's Claims, etc., pp. 175, 248.) But the great contention at your Lordships' bar has turned, not upon the fact, but upon the nature and qualities of this abeyancy, and upon the legal consequences of the attainder of one of the co-heirs pending such abeyance; it being contended on the one part that the attainder of one co-heir operates as a forfeiture and extinguishment of the dignity as to all, and consequently as a restraint of the exercise of the royal prerogative in giving a preference to any of the unattainted co-heirs; whereas [11] it is argued on the part of the claimants, that it can have no effect whatever upon the unattainted line, but at the utmost restrains the Crown from conferring the dignity on any descendant in the attainted line so long as the corruption of blood by means of the attainer continues.

"Now, the argument upon which the forfeiture or total extinguishment of the dignity rests for its support is this, that the abeyance of a dignity means no more than that the person who shall enjoy it is at the time in uncertainty and expectation, not that the inheritance itself is in suspense, but that such inheritance in the meantime descends to and vests in all the co-heirs equally, and that the dignity being so vested jointly and equally in all the co-heirs, and being at the same time in its own nature indivisible and impartible, the attainder of one co-heir works the forfeiture

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\* Tindal, L. C. J.; Vaughan, J.; Parke, B.; Bosanquet, J.; Patteson, J.; Gurney, B.; Williams, J.; Coleridge, J.; Erskine, J.; Maule, B.

of his share, and all the parts or shares in the barony being essential to the constitution of the dignity of baron, and one of them being forfeited, the whole becomes necessarily extinguished; and the authority which has been principally relied upon in support of these positions is the very learned speech of Lord Chief Justice Eyre when called upon to deliver the opinions of the judges in answer to the question proposed to them by this House in the year 1795 on occasion of a claim to the barony of Beaumont, in one part of which speech that learned person has expressed himself that 'the title of the co-heirs of a barony is that of *unus hæres* and *unum corpus*—it is *unitas juris*—they must take it, and it must vest in them as the heir of the ancestors.'

"Now, before entering upon any discussion of the [12] points submitted to us, it is to be observed that this *dictum* of Lord Chief Justice Eyre, upon which so great reliance has been placed, was not in any way necessary for the determination of the question put upon that occasion by your Lordships' House to the judges. The question submitted to them was, whether, supposing the claimant to have proved himself one of the co-heirs of the barony of Beaumont, he was then entitled of right to the barony, or, in other words, whether one of two co-heirs was a complete heir to the ancestor; a question which the judges necessarily answered in the negative. But this answer must equally have been given by them whether the dignity had vested in the co-heirs, or whether it had, by means of its being in abeyance, become vested in the Crown; in either case the answer to the question must have been that the one co-heir was not the complete heir so as to claim the barony as a matter of right. The observation, therefore, to whatever weight it may be entitled as coming from so able a judge, is not to be considered as bearing the same stamp of authority as the opinion of the judges expressed on the very point on which they were called to advise.

"Now, it is obvious that the whole strength of the position advanced by the Attorney General must depend on these two data: First, that when a barony is in abeyance the share of each co-heir in such barony descends to and vests in such co-heir; and, secondly, that the attainder of any one co-heir operates as a forfeiture of the part so vested in him; for if either of these data fail,—if, on the one hand, such be the nature of the abeyance of a dignity that it causes the dignity to revert to or be in the Crown, or, in the [13] language of the old books, to exist in contemplation of law only, instead of vesting in the co-heirs, as is the case with lands and other descendible hereditaments, it is manifest there can be no forfeiture by the co-heir of that which was not in him at the time of the attainder; and again, even admitting that the share of this impartible dignity did upon the abeyance taking place descend to and vest in the co-heir, still, if his interest is not a right of such nature or description as can be the subject of forfeiture, in either case the consequence which has been deduced from the premises, that the whole dignity is extinguished or gone, becomes altogether untenable.

"In order, therefore, to arrive at a just conclusion on the questions put to us, it may be advisable to consider, in the first place, the properties of the abeyance of a dignity, and the legal consequences which flow from such abeyance; and, in the next place, how far any right or interest which can by possibility vest in the co-heir pending the abeyance is capable by law of being the subject matter of forfeiture.

"My Lords, all the instances found in the books of the inheritance in land or other tenements being in abeyance have this common property, that there is no person in existence who is capable of taking. Tenant for term of another life dies; the freehold is said to be in abeyance until the occupant enters. Lease for life, remainder to the right heirs of J. S.; the fee simple is in abeyance till J. S. dies. (Co. Litt. 342 b.) If the parson of a church dies, the freehold of the glebe is in none during the time the parsonage is void, but in abeyance, viz., in consideration and in the under-[14]standing of the law, until another be made parson of the same church; and immediately when another is made parson the freehold indeed is in him as successor. (Littleton, s. 647.) And it is an admitted consequence, that where the right to the fee simple is in such abeyance that by possibility it may every hour come *in esse*, there the fee simple cannot be charged, granted, or forfeited until it come *in esse*. Lease for life, remainder to the right heirs of J. S., the fee simple cannot be charged till J. S. be dead (Co. Litt. 343); or, as is stated in *Termes de la Ley*, title Abeyance, after one comes in existence to take it is no longer in abeyance, but in such sort 'that the right heir may grant, forfeit, or otherwise dispose of the same.'

"Further, the peculiar nature of the inheritance in a dignity or title of honour has an important bearing on the question, whether it is capable of vesting in co-heirs. That lands and tenements of inheritance vest in co-heirs is undeniable; the law of parcenary is too well known to make it necessary to advert to it; but in all the instances in which inheritances are stated in our books to vest in co-heirs, that is, in several persons making together one heir, it will be found the hereditament is always capable of being actually enjoyed by the co-heirs. Land may be either held and enjoyed by all the co-heirs jointly, or, after partition made, by each co-heir in severalty. Where the tenements are in their nature entire and indivisible, as in the case of advowsons, the co-heirs may enjoy by appointing to the living in turn, according to their seniority. If under the ancient law a villein had descended to the co-heirs, either the [15] profits were divided, or one co-heir had the services of the villein for one week, the other for the next. In the case of common without number, or piscary, estovers, and the like, the eldest co-heir shall take, and the rest shall have contribution; or if the eldest cannot make contribution, there shall be an allotment made to the one for so long time, and afterwards to the others; and so as to a mill or a toll. But in all these cases the subject matter is capable of actual permanency and enjoyment, and it is absolutely necessary for the purpose of having such enjoyment that it should descend to and vest in the co-heirs; the inheritance therefore descends upon them, and they settle and arrange the mode of enjoyment amongst themselves. But far different is the case of a dignity; it is an inheritance which is peculiarly *sui generis*; it is not only in its nature impartible amongst the co-heirs, but in its undivided state utterly incapable of being enjoyed by any one co-heir. They cannot all take the barony; no one can take it by law in preference to another; nor is there any mode, by mutual arrangement, concession, or otherwise, by which all can enable any individual co-heir to wear the dignity. The reason, therefore, fails for holding that they take the inheritance of the barony, when they cannot take it for any available purpose. And this consideration at the same time fortifies and confirms the doctrine of abeyance as understood in ancient times, which places the inheritance anywhere rather than in the co-heirs.

"And this mode of reasoning agrees with the law laid down by Lord Coke (1st Institute, 165 a), viz., 'that the King, who is the sovereign of honour and [16] dignity, may, for the uncertainty, confer the dignity upon which of the daughters he pleases;' and again with that of Whitlocke, who says, 'the King may revive the honour in the issue of either, or suffer it to lie in abeyance or unrevived;' language which of itself seems to import that the dignity has not vested in any of the co-heirs: for he that has the power to confer must already have the dignity in himself before and at the time of his so conferring it; whereas if the dignity was already vested in others it must first be divested out of those co-heirs, before, in strictness of language, the sovereign would be in a condition to confer it. The writ of summons, or the patent, according as the co-heir is a male or female, must, on that supposition, have a double operation, one of which is very foreign to their nature, namely, that of divesting the inheritance in the dignity out of the several co-heirs, except as to the one who is favoured and preferred, and uniting the different shares in him.

"Looking, therefore, at the peculiar description and properties of a dignity or name of nobility, there appears nothing in the nature of the inheritance, or in reason, that should, *a priori*, cause it to descend to and vest in co-heirs who are altogether incapable of taking in the only way in which the subject matter can be enjoyed, that is, by wearing the dignity; and, on the contrary, it would seem much more suitable to its nature, and more consonant to reason, that when it has arrived in the stream of descent at a point beyond which it can no longer proceed in its regular course, when it is confessedly by all in a state of abeyance, that it should revert to and so long [17] as such abeyance continues remain in the Crown, that fountain of honour from which it originally proceeded.

"But there is an authority on this subject entitled to the greatest weight, and proving that this doctrine does not rest upon speculation and argument alone; I allude to the judgment in the case of the claims of the Lord Willoughby of Eresby and the Earl of Oxford to the great office of lord chamberlain, and the baronies of Bulbeck, Sandford, and Badlesmere. In that case the judges certify to your lordships' house, 'that John, the fifth Earl of Oxford, dying without issue, those baronies descended

upon his sisters and heirs, but these dignities being entire, and not dividable, they became incapable of the same, otherwise than by gift from the Crown, and they, in strictness of law, reverted unto and were in the disposition of King Henry the Eighth.' Coll. Claims, 175, Sir W. Im. 96. And again, in a further opinion, the language employed by the same eminent judges is this, 'That by the death of Earl John in 18 Henry the Eighth (Coll. p. 180) without issue, leaving three sisters, those honours returned to the Crown in strict construction of law;' and thereupon this House agreed, 'That the three baronies are in His Majesty's disposition;' and in the formal certificate delivered to the King of the opinion of this House they say, 'That for the baronies they are wholly in Your Majesty's hands, to dispose at Your own pleasure.' Jour. vol. cxi. p. 552. Now, although it must be admitted that the generality of this certificate, which perhaps exceeded in its application what was intended by the learned judges [18] themselves, has been in subsequent cases qualified and limited by restraining the power of the Crown to that of selecting one amongst the co-heirs, and again, in another particular, viz., that the co-heirs being reduced to one, such surviving co-heir has the right; still the main ground of the decision, viz., that the dignity had reverted to the Crown, remains altogether unshaken; and the inference to be drawn from that judgment is, that where all have equal pretence, and no one can claim *ex debito*, that the dignity is to be considered as in the Crown.

"And as to the objection urged by Mr. Attorney General, that there must of necessity be an actual descent and vesting in the co-heirs, for on no other supposition could the only surviving co-heir claim a writ of summons as a matter of right, the answer may well be, that when the number is reduced to one the only reason and cause of any suspension or abeyance is at an end, and that the reason ceasing, the consequence also ceases, and the whole entire and impartible dignity may then be well supposed to fall upon the complete heir, as in the usual course of descent.

"Now if it be the law that the barony does not descend to the co-heirs, and vest in each in separate parts and shares, there is at once an answer to the question, whether whilst the dignity is in abeyance the attainder of one of the co-heirs shall operate as a forfeiture or extinguishment of such dignity; for upon that supposition there was nothing in the person attainted which could become the subject of forfeiture; the whole had reverted to the Crown for the preservation of the title until the co-heirs were reduced to one, or until the Crown in the meantime declared [19] a preference *privatio prae-supponit habitum*, and on the supposition above made the party who was attainted had nothing in the dignity to forfeit.

"But, my Lords, conceding, for the sake of argument, and for that purpose only, that pending the abeyance the inheritance in the dignity had descended to and amongst the several co-heirs in the same manner as any other inheritance, still no authority has been cited in support of the position that the attainder of one co-heir would operate as a forfeiture of the whole dignity. It is evident from the old authorities that in the case of land a co-heir attainted of felony or treason forfeits the share descended to him, and that share only. If the other co-heirs sue, and there is a plea in abatement that one of the co-heirs is not joined as a co-demandant, those who are demandants may reply, 'that he need not be joined, for that he has committed felony, so that he is not a parcener.' (Fleta, cap. 48, *De exceptione ex omissione participis*.) If, therefore, the inheritance had descended, and had been considered as partible, the attainder of one co-heir could not have operated as a forfeiture of the title to the shares vested in the other co-heirs. And if such be the law in case of partible inheritances, it would surely be a strange conclusion, that because, from the peculiar nature of a dignity, it is impartible, therefore the whole should be forfeited by the attainder of one. Forfeiture is always odious in the eye of the law, and the inference, at once more just and more consistent with the genius of our law, would be, that where the inheritance is impartible, on that very account there should be no forfeiture at all, inasmuch as the opposite determina-[20]-tion would confound in one common punishment the innocent with the guilty.

"But, my Lords, it should be further considered whether the interest which devolves upon each co-heir pending the abeyancy, supposing the dignity not to revert to the Crown, is of such nature and description as to be the subject of forfeiture either by common law or statute. That all dignities or titles of honour, whatever be the estate in them, are forfeited and lost by the attainder of the possessor for

high treason, is undoubted law. 'Is it not'—as has been justly asked by Mr. Charles Yorke in his *Considerations on the Law of Forfeiture* (p. 30)—'both natural and politic that a distinction bestowed only for the praise of them who do well should be forfeitable on the commission of crimes, for a terror to evildoers?' But neither by common law or statute did the law of forfeiture comprehend within its limit any such right as that which is supposed to exist in the attainted co-heir, or any right bearing any analogy to it. At common law the only real estate which was forfeited by attainder for treason were all the lands of inheritance whereof the offender was seised in his own right, and all rights of entry to lands in the hands of a wrongdoer; and under the statutes 26th Henry the Eighth, cap. 13, and 33d Henry the Eighth, cap. 20, such forfeiture was made to extend to estates tail vested in possession; but it has always been held, that neither by common law or statute was a mere right of action to lands in the hands of a stranger, as for instance in the hands of a discontinuee, or of the heir of the disseisor, forfeitable by attainder for treason. (Coke Littleton, 8, 3, Co. 2, 3, Hob. [21] Rep. 240.) But how far does the interest which is in the attainted co-heir at the time of the attainder fall short of a right of action? It is a part or portion only of the title of co-heir to the dignity, giving the possessor of it at the utmost a *jus precarium*, a mere power of asking from the grace and favour of the sovereign that the abeyant dignity may be conferred upon him, with the distant chance that in case all the other lines should fail the attainted co-heir may, in case the corruption of blood be removed, wear the dignity himself.

"Other considerations, of a nature perfectly distinct, range themselves on the same side of the question, and strengthen the inference that no forfeiture of the dignity can under the circumstances assumed take place. To hold that the dignity is extinguished or forfeited, whilst it remains with the Crown by an exercise of its prerogative to revive it, and confer that dignity on one of the innocent co-heirs, what is it in effect but to abridge and limit such prerogative of the Crown, and to operate more as a penalty upon the innocent co-heirs, than on the guilty offender! And I must confess I feel strongly the weight of the observation which has been made at your Lordships' bar, that if the attainder of one of the co-heirs of a barony whilst it is in abeyance causes the extinguishment or forfeiture of the abeyant barony, it must be matter of very considerable doubt whether such an attainder, after the abeyance has been determined, and the barony revived by the Crown, must not be attended with a similar consequence, for it is one and the same dignity, whether it is in abeyance or in possession; and, upon all just principles of reasoning, the continued existence of such dignity must be held to depend equally in both cases upon the same title, and the same connexion with the deceased ancestor.

"But I forbear to pursue the consideration of these additional arguments, because, as it appears to me, the very principle now under discussion, viz., that the attainder of one of the co-heirs shall not operate as a bar to one claiming through another of the co-heirs to the dignity, has been virtually adopted and acted upon by your Lordships' House in several cases. I refer to the case of the Powys barony, where John Gray, the descendant of one of the co-heirs of Edward Charleton Lord Powys, was summoned to parliament in the 22d Edward the Fourth, after the attainder and before the restoration in blood of John Lord Tiptoft, the other co-heir, enjoying upon that writ of summons the seat and precedence of his ancestor.

"I refer again to that of the barony of Beaumont, in the first petition of the claimant, to which barony he made title as sole heir, upon the ground that the attainder of the other co-heir had extinguished that line, and which petition gave occasion to the learned discussion of Lord Chief Justice Eyre, before referred to. Upon the occasion of his second petition he stated his title as one of the co-heirs of Henry the first Baron Beaumont, by his descent through Joan Lady Stapleton, Sir Henry Norreys, the son of Frideswide, the other co-heir of the barony, having been attainted and executed in the 28th year of Henry the Eighth. Upon this second petition the report of the very learned Attorney General of the day, Sir John Scott, raises no difficulty as to the extinguishment or forfeiture of the barony, but simply [23] states it to be in abeyance; and the committee of this House, after argument before Lord Loughborough, the then Lord Chancellor, came to the resolution, which was afterwards reported to the House, 'That it appears to this committee that the



said barony remains in abeyance between the co-heirs of the said William descended from his sister Joan ;' which resolution was received and adopted by this House.

"My Lords, such being the grounds upon which the rights of the co-heir in the unattainted line depend, it remains only to make an observation upon the legal operation and effect of the act 1 Eliz., No. 22, to which your Lordships' question makes reference, with regard to the rights that may be claimed by the co-heir in the attainted line.

"And, my Lords, it appears by this statute that nothing that had been lost by the attainer has been restored to the descendants of the attainted person, but that the corruption of blood is so completely removed thereby that the heir may claim through his attainted ancestor as if no attainder had taken place. That the previous attainder of the co-heir effected no forfeiture of the abeyant barony has been already so fully discussed as to make it unnecessary to state more than that the descendant of such attainted co-heir may claim the right of petitioning Her Majesty that she would terminate the abeyance of the barony by giving the preference to the line of such petitioner, in the same manner as if his ancestor had never been attainted.

"Upon the whole, although I should not be justified in making my learned brethren responsible for the [24] precise grounds upon which I have endeavoured to support their opinion and my own, yet I have their full authority to declare our unanimous answer to the questions proposed to us, as follows:

"1st. That it is competent to the Crown to determine the abeyance in favour of A.

"2d. That it is competent for the Crown to determine the abeyance in favour of B."

The Committee having resumed consideration of the claims, the following opinions were (15th August 1839) expressed by their Lordships:—

Lord Chancellor.—My Lords, this case, since it was heard before your Lordships, has been the subject of anxious consideration by several noble Lords who took a part in the discussion. I have thought it my duty to look carefully into the pedigree, and the result is, that I am satisfied, as far as I can be satisfied after an investigation of transactions as far back as this investigation necessarily leads one, that the claimant, Mrs. Otway Cave, has proved her descent from Elizabeth, the second daughter of Edmund Lord Braye, who appears to have sat in parliament in the reign of Henry the Eighth.

My Lords, another party is also a claimant, and whose claim has been referred by the Crown to the consideration of this House; and that other party, Sir Percival Hart Dyke, appears also to have made out his pedigree as descended from Frideswide, the third daughter and fourth child of that Edmund Lord Braye.

My Lords, in the investigation of this claim two questions of law have been raised: with respect to the [25] one, it is not now raised for the first time, but, on the contrary, it has been raised in several other cases, and has received that decision from this House which I apprehend for the present purpose is to be considered as putting that question at rest. I refer to the effect of the evidence of a sitting in this House under summons by writ, where it has been proved, on careful examination of all the depositories where the patent would have been likely to have been found, that there is no trace of any patent. The last case that came before your Lordships under these circumstances was the Vaux case, in which the preceding cases were very carefully reviewed; and the result was, that your Lordships adopted in that case the resolution which had been adopted in some of the preceding cases,—that where the summons, and a sitting under it, are satisfactorily made out, it is evidence of the title to the peerage descending to heirs of the body including females. That is the nature of the title made out by the present claimants as descending from Edmund Lord Braye.

My Lords, another question also which had been discussed in former cases arose in this case; namely, the effect of an attainder on one of the line of co-heirs. In a case which occurred some years ago an opinion of very high legal authority was expressed, that the effect of that attainder might be fatal to the claim of the co-heirs. My Lords, I confess that I never could enter into the grounds on which that opinion was supposed to have been entertained; and your Lordships, probably feeling a

doubt as to the accuracy of that opinion, had the benefit of having that point discussed before the learned judges in the course of the present session, and whose [26] opinion has been delivered by the Lord Chief Justice of the Common Pleas. My Lords, the unanimous opinion of the judges, delivered by the Lord Chief Justice of the Common Pleas, appears to me to put the question entirely at rest. The grounds on which the learned judges came to the conclusion which has been communicated to your Lordships appear to me satisfactorily to remove those doubts which existed, I believe, only in the expression of the opinion of a great legal authority. Undoubtedly, if your Lordships shall concur in the view taken in the opinion as delivered by the learned judges, that second difficulty is removed out of the way.

Those difficulties being removed, we then come to the result; and, if your Lordships shall be of opinion with me, that Mrs. Otway Cave has made out her title of descent from Elizabeth the second daughter of Edmund Lord Braye, and that the other claimant, Sir Percival Hart Dyke, has made out his claim from Frideswide the daughter next younger in succession, then the only question which will remain will be what report your Lordships shall make to the Crown with respect to the descendants of the other daughters of that Edmund Lord Braye. My Lords, there are several parties who appear to be descended from the other daughters. The eldest daughter appears to have been Anne, and there are several parties who are now represented as being co-heirs of Anne. The present Duke of Bedford also appears to be descended from a younger daughter, and Sir Francis Vincent is represented to be a descendant of, I think, the youngest.

My Lords, various courses have been adopted in former investigations of this case, as to the report which [27] the committee of this House should make to the Crown upon the subject of the collateral branches, where there are, as in the present case, parties who have not claimed, but whose pedigrees have been investigated by the parties who do claim, in order that the Crown may be informed, as far as such an inquiry can lead to a satisfactory conclusion, as to the fact, what descendants there are who stand in the situation of co-heirs, as well as the claimants whose claims are referred to this House. My Lords, the history of those various lines has been to a very great degree satisfactorily made out; but it is not to be expected that parties making out the pedigree of another family should be enabled so accurately to trace the history of that family as of course they must be called upon to do when making out the pedigree of the line under which they claim; and the parties are not here themselves to make any claim. The sole object, therefore, of that investigation is to obtain knowledge, with a view to communicate to the Crown what persons there are standing in the same relative situation as those who make the claim, that the Crown, before it exercises a discretion whether it shall determine the abeyance at all, or, if it shall determine the abeyance at all, in favour of whom it shall be determined, may be informed of the state of the different parties who are descended from the common ancestor from whom the title is derived. I think that, though the evidence of the various lines is not so conclusive as to justify a report stating that they are descendants, there is sufficient evidence before your Lordships to enable you to report to the Crown so much as may be necessary to enable the Crown to exercise its discretion on the subject of those several lines: there is danger of saying too [28] much, because the sort of investigation which has been gone into is necessarily imperfect, in consequence of the absence of those parties.

My Lords, I observe there are four different modes in which a report has been framed; in some cases it has been reported that there appear to be descendants of the several persons from whom their descent is claimed; there are others in which the report has identified the individuals who appeared to make out their descent in those several lines; but with respect to those who have not claimed, and who are not therefore candidates, it can hardly be supposed that the Crown will exercise its discretion in favour of either of those parties. It seems, therefore, necessary to say no more than that there appear to be descendants proved of the several lines whose pedigree has been brought before your Lordships by those who are candidates, and have applied to the Crown to terminate the abeyance in their favour. Upon the whole, it appears to me the safer course, instead of pronouncing any opinion on those collateral pedigrees, to report merely that there appear to be descendants living of several females through whom their lines are traced. That report will be quite

sufficient if it shall become material to prosecute that inquiry further, and will relieve your Lordships from the giving any opinion as to facts which have not been sufficiently examined in the investigation before your Lordships to enable you to come to a satisfactory result. What I should propose, therefore, to your Lordships is, to resolve that it appears that the barony was a barony by writ descendible to females as well as males; that it is in abeyance between the co-heirs of John the eldest son of Edmund Lord Braye, which John Lord Braye sat in parliament [29] in the 31st of Henry the 8th; that Mrs. Otway Cave has made out her claim of descent from Elizabeth the second daughter of Edmund Lord Braye; that Sir Percival Hart Dyke has made out his descent from Frideswide the third daughter of Edmund Lord Braye; and that it appears that there are descendants living of Anne the eldest daughter of that Edmund Lord Braye, and also of his two youngest daughters. It appears to be quite sufficient to state the fact of there being descendants living of those several lines, without specifying the individuals who appear upon the evidence to stand most likely in the situation of descendants of those lines.

Lord Wynford:—My Lords, I entirely agree in the opinion expressed by the noble and learned Lord on the woolsack. The two claimants, Sir Percival Hart Dyke and Mrs. Otway Cave, have satisfactorily, in my opinion, made out their claims. With respect to the others, I have not sufficiently attended to their cases to say whether their pedigrees are proved or not. In one of the cases I am quite convinced the pedigree is not proved. Those will very properly be left by the report in such a state that if those who are interested should think proper to bring them forward they may have their claims considered.

As to the points of law, it certainly is an anomaly that a person who has a grant from the Crown without any words of limitation should have any estate beyond his own life, yet in peerage cases it has been established that a person who is summoned to parliament, though only for one parliament, and who takes his seat, thereby [30] becomes a baron in fee, and it is now too late to dispute that law.

As to the point which was raised by the Attorney General, that the attainder of the descendants of one of the co-heirs forfeits the whole peerage, I am of opinion that that person had nothing in him which he could forfeit at the time of the attainder; if he had there probably might be some ground for saying, that as a part of the peerage was gone by that attainder all that remained was not sufficient to constitute a peer. Perhaps, as the learned Chief Justice, whose excellent opinion your Lordships have received, has said, there was nothing at that time in any of the claimants, and there will be nothing till the Crown thinks proper by its prerogative to confer it. I think it appears clearly from the passage cited by the Lord Chief Justice from Lord Coke, that where there is nothing to forfeit, and that there is nothing to forfeit in such cases as these, there an attainder cannot work an annihilation of the peerage.

As far as regards corruption of blood, or the placing a party in such a situation that nothing can be transmitted through him, that has been completely taken away by the statute to which we have been referred by the Lord Chief Justice. I also think that the statute of Anne would have been sufficient in this case to have prevented the corruption of blood, stopping a portion of the peerage from descending through the corrupted ancestor. There may be some doubt whether the words of that statute apply to attainders that took place before the passing of the act, but in such cases as these the words are to receive the mildest construction; and [31] though I do not think that that statute could restore a forfeiture which was complete before the passing of the act, yet I think the words may be so construed as to prevent the attainder from operating to stop the descent of any peerage through the attainted person. For these reasons, my Lords, I concur with the Lord Chancellor in recommending to your Lordships the resolution which he has proposed to you.

Earl of Devon:—My Lords, having attended throughout the discussion of this claim, and had an opportunity of talking with my noble and learned friend upon it, if I had felt any difference of opinion in the result to which he has come I should have felt it my duty to state it; but I am of opinion that Mrs. Otway Cave and Sir Percival Hart Dyke have made out their claims as representing the two co-heirs from whom they respectively derive. Upon the point of law it is not necessary to say any thing; the point to which my noble and learned friend who spoke last has

referred has been now so many years settled law that we cannot entertain any question upon it at present. There arose in a previous case the question, not merely whether a sitting under a writ created a peerage in fee, but whether in a case where the writ was not produced this House could look to other evidence and decide that there was that which would give a barony in fee; that question also has been decided, and it is not now, I think, open to us to entertain or express any doubt on the propriety of that decision. The points of law, I conceive, are decidedly in favour of the existence of this peerage in those persons who represent the co-heirs of [32] Edmund Lord Braye as descending from the sisters of John Lord Braye.

My Lords, with respect to the form in which the resolutions are to be entered on claims of this nature, it has always struck me that there is a very great difficulty in the general way of putting them, and I suppose that difficulty has struck other persons, because unquestionably the resolutions vary; there is no strict rule as to the form of the resolutions. If you do not make some investigation into the titles of all the co-heirs you do not give the Crown that information which the sovereign is entitled to when it has made a reference to you with respect to an honour; but, on the other hand, if you call upon the claimant appearing at your bar to make out all the pedigrees of the other co-heirs, you impose a great difficulty upon that co-heir, to bring proof of three or four or five lines without having those opportunities and those facilities which the parties themselves would have of making out their pedigree. In the choice of those difficulties, I approve of the course which my noble and learned friend has proposed to your Lordships to take, as the most judicious; namely, to state an opinion upon those two lines, in respect of which claimants appear before the House, and then just to state enough to give to the sovereign notice that there are in existence other persons who claim to be co-heirs with those who have established their pedigrees. It is then for the sovereign to exercise a discretion, either to determine the abeyance in favour of A. or B., or to consider the existence of other co-heirs as a reason for not determining it. Having such information on the whole case as we have [33] given, I am of opinion that the two who have claimed have made out their claim as co-heirs, and that there are others who probably would be able to make it out, if they were to give their evidence. In both the substance, therefore, and the form of the resolutions I entirely concur.

The resolution, as moved by the Lord Chancellor, passed in the affirmative, and the chairman was directed to report the same to the House.

15th August 1839:—It was moved to resolve, "That the barony is now in abeyance between the co-heirs of John the last Lord Braye, and that the petitioner Sarah Otway Cave, and the petitioner Sir Percival Hart Dyke baronet, with certain others, are the co-heirs of the said John Lord Braye."

On the question being put, it was resolved in the affirmative, and the chairman was directed to report the same to the House.

## [34]

## BARONY OF CAMOYS.

Mr. FLEMING for THOMAS STONOR, Claimant. SOLICITOR GENERAL for Sir JACOB ASTLEY Baronet, and HENRY L'ESTRANGE STYLEMAN Esquire, Claimants. The ATTORNEY GENERAL for the CROWN [27th August 1839].

[Mews' Dig. vi. 698; x. 313. S.C. 6 Cl. and F. 789, *q.v.*]

The result of the evidence of the pedigrees of these several claimants will be found in the resolutions moved by the Lord Chancellor, and approved by the committee, *postea*, pages 39, 40.

Two points of law and practice in questions of peerage, similar to those determined in the preceding case of the barony of Braye, (see Report, *ante*, page 24,) were determined in like manner by the committee in the present case.

It was likewise held that the term "banneret" being added to a name in a writ, will not prevent a barony by writ being established upon the usual evidence.

The following opinion was expressed by the Lord Chancellor:—

Lord Chancellor:—My Lords, in this case your Lordships have had to inquire into

various claims which [35] are made to a peerage, the origin of which peerage cannot be traced, excepting that the individual from whom the claimants derive their descent is proved to have sat as a peer in this House; this House having held, under those circumstances where no writ can be found, but where there is proof of the ancestor having sat in this House, that the presumption is that he was summoned by writ; and if summoned by writ, and sitting under the writ, then that the peerage is descendible to heirs general of the body.

My Lords, in this case there is no doubt that Thomas Lord Camoys sat in this House. Some question has been raised, owing to an expression having been used in a writ to the sheriff in the seventh of Richard the Second, in which Sir Thomas Camoys is described as a banneret, and much investigation has been had for the purpose, on the one side, of showing to your Lordships that a banneret might have sat in this House at that period of our history who was not a baron, and, on the other side, for the purpose of showing that the words baron and banneret are synonymous, and have the same meaning: that banneret was not an order of knighthood, but descriptive of a baron, according to the language of those times.

My Lords, certainly the history of the term banneret is not very satisfactory. There is a great uncertainty as to its original meaning; but when your Lordships find the fact of this Thomas Lord Camoys having sat in several parliaments, and that other individuals, who are ancestors of families now sitting in this House,—who are peers, were bannerets, I think the circumstance of the [36] appellation of banneret having been added to his name in that writ is not such as ought to prevent your Lordships coming to the conclusion to which you have come in other cases,—of the barony having been a barony by writ, descendible to the heirs general of that Thomas Lord Camoys.

My Lords, another question arose in this case, which also arose in a case in which your Lordships have made a report, namely, the case of the Braye Peerage, in consequence of one in the line of the co-heirs having been attainted. My Lords, I do not again advert to that point; it was the subject for consideration and of argument before the learned judges, and your Lordships have had the unanimous opinion of all the learned judges who were present at that discussion, entirely agreeing with the opinion which I myself formed from the arguments at your Lordships bar, that that is no impediment to the claim either of the collateral branches, or even of those who claim through the attainted line, the corruption of blood having been removed by act of parliament.

My Lords, this case really, therefore, resolves itself into a question of pedigree; and in all cases of this sort there always must be, from the nature of the case, a considerable degree of doubt as to whether what appears to be evidence of pedigree be or be not satisfactorily made out. If it appears to be satisfactorily made out according to the evidence as it stands, it may satisfy your Lordships minds that the pedigree is proved; but in all cases of pedigree so much depends not only upon the evidence which is produced, but upon that which is [37] lost by the lapse of time, that it is always attended with a great degree of uncertainty; and all which your Lordships can do is to come to the best conclusion which you can, always feeling that there may be something behind which, if produced, would alter the proof.

My Lords, having looked into the proof of this pedigree with the attention which the importance of the subject requires, and which, from the difficulty of tracing the descent from so early a period, necessarily becomes incumbent upon those whose duty it is to investigate the title of a claimant, it does appear to me that the pedigree has been proved; that is to say, that, on the evidence as it now stands, your Lordships cannot come to any other conclusion than that the claimant Mr. Stonor has made out his claim, which he places under your Lordships consideration, and has established his descent from that Thomas Lord Camoys.

My Lords, another co-heir is Anthony George Wright Biddulph, who is not a claimant, but whose title and pedigree it becomes your Lordships duty to investigate, for the purpose of ascertaining and reporting to the Crown between whom the abeyance now exists. That pedigree, which is also a branch from the same family as Mr. Stonor, is, I think, also satisfactorily made out. These two parties derive their title from Margaret, who was the eldest grand-daughter of Thomas Lord Camoys.

There is another branch of the family who derive their title from the younger

sister of that Margaret, namely, Henry L'Estrange Styleman and Sir Jacob [38] Astley, and I think that those lines of pedigree are also proved. Mr. Styleman, however, appears to derive his descent from an elder sister; therefore, as between themselves, Mr. Styleman claims through a senior branch.

My Lords, so far it appears to me to be not open to any objection according to the evidence as it stands. There are other parties, one of whom is a claimant, namely, Sophia De la Cainea. That descent is derived from another branch, namely, from another sister of Margaret the grand-daughter of Thomas Lord Camoys, Alianora; and as far as that pedigree is necessary to be investigated for the purpose of tracing the descent to the claimant, Sophia De la Cainea, it appears to me that that also is satisfactorily made out. There is evidence, and I think satisfactory evidence, that there are other descendants of that Alianora. Those parties are not claimants, and that is the most difficult part of the pedigree, and that upon which the evidence has been the least satisfactory. My Lords, it is not important to inquire further into that line, because they are not claimants; and all that your Lordships have to do is, to be enabled to report to the Crown whether the title is in abeyance between the parties who have made out their pedigree, and whether there is reason to suppose that there are other persons who may stand in an equal degree with themselves. Upon that subject I should recommend your Lordships to adopt the course which you adopted a few days since in the Braye Peerage,—of not passing any judgment or expressing any opinion as to the title of the other lines, respecting which there is no claim made; that your Lordships [39] should report the pedigree proved as far as the claimants are concerned, and state also that there are other persons who appear to be co-heirs. And, my Lords, that is indisputably necessary, for the purpose of enabling the Crown to exercise the discretion which belongs to it after your Lordships shall have reported, at the same time not to express any opinion upon evidence which does not appear so satisfactory as your Lordships would require, if it were necessary to come to any certain conclusion as to the title of those branches.

My Lords, the result of the consideration I have given to this case would be, to submit to your Lordships certain resolutions which would constitute your Lordships' report upon the reference made by the Crown:

"First, that Thomas Lord Camoys sat in parliament in the seventh of Richard the second: that his barony was created by writ, and was descendible to heirs general: that he had an only son, Richard, who died in his father's lifetime; who had an only son, who died a minor: that Margaret and Alianora, the two daughters, and Richard the son of the said Thomas Lord Camoys were his co-heirs: that Thomas Stonor has proved his descent from Margaret, the eldest of those co-heirs; and it also appears that Anthony George Wright Biddulph is also descended from the same Margaret, Thomas Stonor being descended from Mary the eldest daughter of John Biddulph, who died in 1720, and the said Anthony George Wright Biddulph being descended from Anne, the youngest daughter of the same John Biddulph: that it has [40] also been proved that Henry L'Estrange Styleman and Sir Jacob Astley are also descended from the same Margaret, the grand-daughter of the said Thomas Lord Camoys, through Sibella, a younger grand-daughter and co-heir of the said Margaret: that the said Thomas Stonor and Anthony George Wright Biddulph derive their descent through Margaret, the eldest grand-daughter of the said Margaret; and that the said Henry L'Estrange Styleman derives his descent through Armine, eldest daughter of Sir Nicholas L'Estrange, the common ancestor of the said Henry L'Estrange Styleman and Sir Jacob Astley; and the said Sir Jacob Astley derives his descent through Lucy, the youngest daughter of the said Sir Nicholas L'Estrange: that it appears that Sophia De la Cainea is descended from Alianora, the youngest grand-daughter of the said Thomas Lord Camoys; and that there are other co-heirs of the said Alianora now living."

That, I believe, exhausts the subject which has been referred to your Lordships, and puts the Crown in possession of all the information necessary to be given.

Resolutions agreed to.

27th August 1839:—It was moved to resolve, "That the barony is now in abeyance between the co-heirs of Thomas Lord Camoys; and that the petitioner Thomas Stonor esquire, the petitioner Henry L'Estrange Styleman esquire, the petitioner Sir Jacob Astley baronet, and the petitioner Sophia the widow and [41] relict of the most

illustrious Chevalier Ferdinand Joseph Francis Raibaud Della Cainea, with certain others, are the co-heirs of the said Thomas Lord Camoys."

On the question being put, it was resolved in the affirmative, and the chairman was directed to report the same to the House.

[42]

FROM THE COURT OF EXCHEQUER.

EDMUND LOWDEN, THOMAS MATTINGLEY, WILLIAM BUDD, GEORGE BLISS, and CHARLES COWPER, *Appellants*.—The Reverend HENRY THORPE, Clerk, *Respondent* [27th January, 3d and 6th February, 1840].

[Mews' Dig. ix. 30; xi. 892. S.C. 7, Cl. and F. 137.]

By an agreement of 1711 between Mr. Plowden the patron and Mr. Wilson the rector of the church of Aston, the patron agreed to convey lands of the annual value of £130 and to grant a rent-charge of £40 a year for the benefit of the church, and the rector agreed to convey glebe lands of the value of £40 a year to Mr. Plowden, and to exempt other lands belonging to Mr. Plowden from the payment of tithes of the value of £56 a year. This agreement, being under a commission found beneficial to the church, was afterwards sanctioned by the ordinary, and established by a decree of the Court of Chancery, in a suit to which the patron, ordinary, proprietor, and rector were parties. From the time of the agreement all parties acted upon the faith of the agreement, except that the present rector since Michaelmas 1832 refused to receive the rent-charge, and in July 1833 filed his bill against the occupiers of those lands which had been exempted from tithes, for a common account of tithes. Mr. Plowden, the tenant for life of the lands exempted from tithes, was afterwards made a party defendant to the bill by amendment. Upon the hearing in the Court of Exchequer the bill as against Mr. Plowden was dismissed, [43] and as against the occupiers a decree was made for payment of tithes. Held, upon appeal, that the bill against the occupiers be dismissed with costs, and that the rector could not come into a court of equity and ask for the payment of tithes, without giving up the lands he received from Mr. Plowden as a compensation for his tithes.

*Semble*.—That a person made a party to a suit by amendment after the time limited by the third section of the second and third of William the Fourth may claim the benefit of the limitation given by the statute, though the bill was filed within the time prescribed by the statute.

William Plowden (the ancestor of the appellant Edmund Plowden) was in the year 1711 lord of the manor of Aston, and also patron of the church of Aston in the county of Northampton; and John Wilson was at that time rector of the church of Aston.

"By articles of agreement dated the first of March 1711, between William Plowden, lord of the manor and also patron of the church of Aston, and John Wilson, rector and incumbent of the church of Aston, after reciting that the said William Plowden was seised or owner of divers parcels of land lying and being in the late common fields of Aston, and that the said John Wilson, as rector of the said church, and in right thereof, was seised of several other parcels of land lying also dispersed in the said late common fields, and also of a parcel of ground lying and being in a close (known or called by the name of Aston Close) in Appletree in the said parish of Aston, being the glebe lands belonging to said rectory of Aston, and also of the tithes of all sorts arising as well out of the said common fields as out of the demesne lands of the said William Plowden in Aston; and that for [44] the better improvement of the said common fields the said William Plowden had lately inclosed the same, and being desirous that the rights and profits appertaining to the said church might be preserved, and that the present rector thereof and his successors might enjoy, in right of the said church, an advantage by and a just proportion

of the improvement expected from such inclosure; it was agreed that he the said William Plowden and his heirs, and all and every person or persons having or claiming any estate or interest in or unto the lands, tenements, and hereditaments herein-after particularly mentioned, should, on or before the twentieth day of February next ensuing the date thereof, well and sufficiently grant, convey, and assure unto the said John Wilson and his successors, rectors of the church of Aston, for ever, all that part or parcel of the late common fields of Aston therein particularly mentioned and described, and all parcels and pieces of ground or meadow, or any of them, belonging or appertaining, or set out or appointed to be held, used, or enjoyed with them or any of them (except one acre and a half of the furlong therein mentioned); all which said premises so to be granted to the said John Wilson and his successors as aforesaid, together with the churchyard, parsonage house, and close, and the gardens, orchards, and walls dividing the said gardens and orchards from the estate of the said William Plowden, and all yards, outhouses, and buildings, and all ground belonging thereto, should at all times thereafter be deemed and taken, and were thereby and by the parties thereunto declared and agreed to be and to be enjoyed as the glebe of and belonging to the church of Aston afore-[45]-said, and the rector thereof and his successors for ever; and also that he the said William Plowden, and his heirs and assigns, and all such other person and persons whatsoever as were or should be seised of the manor, lands, tenements, and hereditaments reputed to be the said William Plowden's in Aston aforesaid, should and would, on or before the said 20th day of February next ensuing the date thereof, well and sufficiently grant, settle, and assure unto the said John Wilson and his successors, rectors of the said church of Aston, for ever, one annuity or yearly rent-charge or sum of forty pounds, to be yearly issuing and going out of, and to be effectually charged and chargeable upon the said manor, lands, and hereditaments as counsel should advise, and to be paid at two equal payments, on the 25th day of March and 29th day of September every year, without any manner of deduction for taxes, levies, or payments of any kind whatsoever, except such as should be charged upon the annuity itself, with a power, in case the annuity should be unpaid, for the said John Wilson and his successors to enter upon the lands chargeable therewith, and distrain for the same; and it was thereby further agreed that the said John Wilson and his successors, rectors of the church of Aston, should have certain privileges of taking away stone, gravel, and mortar, and of using a certain pool of water, and other small privileges and exemptions therein mentioned; in consideration of all which premises the said John Wilson did thereby for himself, and as much as in him lieth for his successors, rectors of Aston aforesaid, covenant and agree to and with the said William Plowden, his [46] heirs and assigns, that all those parcels and pieces of land theretofore reputed and taken as or for the glebe land of or belonging to the church of Aston, and which lie in the late common field of Aston aforesaid, and which were theretofore in the possession of the said John Wilson, his tenant or tenants, and the said parcel of ground therein-before mentioned to lie in the said close called Aston close in Apple-tree aforesaid, (except such parts and parcels thereof as did lie in the said parcels of ground and meadow thereby agreed and appointed for glebe, and which were to be conveyed to the said John Wilson and his successors as aforesaid,) should from thenceforth be possessed and enjoyed by the said William Plowden and his heirs, as his and their own proper estate for ever; and also that all and singular the lands, tenements, and hereditaments whereof the said William Plowden was then possessed or owner in Aston aforesaid, and every of them, should be free and discharged for ever of and from the payment of all and all manner of tenths, tithes, and oblations, obventions, modus, compositions, and all other dues theretofore due and payable out of the estate of him the said William Plowden in Aston aforesaid, (except and other than as aforesaid, and also except such tithes and dues as were purely personal and did not arise out of the estate of the said William Plowden, such as are the Easter roll and fees due for marriages, churchings, and mortuaries); and that such act and acts as counsel should think reasonable should be made and done by the said John Wilson, but at the costs and charges in the law of the said William Plowden, his heirs, executors, or adminis-[47]-trators, for the better performance of the agreement therein-before contained, and on the part and behalf of the said John Wilson to be done and performed."



On the 16th of March 1713, in pursuance of a petition presented by the said William Plowden as lord of the manor and patron of the church of Aston, and also the said John Wilson as rector of the said church, to the lord bishop of Peterborough the diocesan, to appoint commissioners to make inquiry into the goodness and value of the lands on both sides proposed, and to consider and report to his Lordship whether the articles of agreement would be for the then present and future advantage of the said rectory and the then present and succeeding rectors thereof, a commission, dated the 1st day of April 1714, was duly issued by the Bishop of Peterborough, addressed to the chancellor of the diocese and the other commissioners therein named, to inquire whether the articles of agreement and the covenants therein mentioned were reasonable and equal, and in no ways detrimental to the church of Aston aforesaid, and to the then rector there and his successors, rectors thereof.

On the 10th of April 1714 the commissioners returned the said commission with their certificate to the bishop, and thereby certified that, in obedience to the said commission, they did meet and sit in the parish church of Aston on Tuesday the 6th day of that instant April; and upon the examination of divers persons upon oath, then and there found that the glebe lands of and belonging to the said rectory of Aston before the said inclosure consisted of five yard lands, and were worth about £40 per annum, and that the tithes of the open field land belonging to the said William Plowden before the said inclosure were worth [48] about £38 per annum, and that the tithes of the old inclosure lying within the precincts of Aston aforesaid, and belonging to the said William Plowden, were worth about £18 per annum. And they also then found that the several parcels of land and meadow ground lying within the fields of Aston aforesaid as were then inclosed, and by the said articles between the said William Plowden and John Wilson agreed to be settled upon the said John Wilson and his successors, rectors of Aston aforesaid, for ever in lieu of tithes, and the said glebe lands consisted of about 140 acres, and were worth, one year with another, about £130 per annum. And they did also further certify his Lordship that the exchange of the several parcels of land particularly mentioned in the said articles of agreement between the said Mr. Plowden and Mr. Wilson, and also the annual payment of £40 out of the estate of the said William Plowden lying in Aston aforesaid to the said Mr. John Wilson and his successors, rectors of Aston aforesaid, in lieu of the glebe lands belonging to the said church and rectory, and also in lieu of all manner of predial tithes issuing and payable out of the estate of him the said William Plowden lying in Aston aforesaid, would be no ways prejudicial or detrimental to the said Mr. John Wilson or his successors, rectors of Aston aforesaid, but would be an improvement of and augmentation to the said church and rectory of above £60 per annum.

On the return of the said commission the then bishop of Peterborough, by an instrument under his hand and episcopal seal, dated the 17th day of May 1714, by virtue of his authority, ordinary and episcopal, granted his licence for carrying into effect the said articles of agreement.

[49] William Plowden, in Michaelmas term 1714, exhibited his original bill of complaint in the Court of Chancery against John Wilson and the bishop of Peterborough, in order that the said inclosure, exchange, and articles of agreement might be established and carried into effect by the decree of the Court of Chancery. The bishop of Peterborough and John Wilson put in their answers thereto.

The cause being at issue came on for hearing on the 25th July 1715 before Sir John Trevor, the then Master of the Rolls, who made a decree therein, and thereby ordered and decreed that the said articles of agreement entered into between the said William Plowden and the said John Wilson should be performed, and that the said exchanges of the said lands should be confirmed and made perpetual, and that the said parties should hold and enjoy the said premises according to the said exchange, and that conveyances should be made pursuant thereto.

From the time of the agreement all parties acted under the agreement; the parties to the agreement and those claiming under them respectively enjoying the benefits conferred by the agreement until Michaelmas 1832, when the respondent refused any longer to receive the rent-charge of £40.

Some years after the date of the agreement William Plowden sold the advowson of the rectory of Aston to the president and scholars of Saint John's College, Oxford, who are the present patrons of the rectory. In the month of June 1833 the respondent

gave notice to the appellants, Thomas Mattingley, William Budd, George Bliss, and Charles Cowper, tenants to the appellant Edmund Plowden of the lands in Aston, of [50] which the said William Plowden was seised at the time of the said agreement of the 1st of March 1711, including the glebe lands received by the said William Plowden under that agreement, to pay tithes in kind in respect of those lands.

By the act of the second and third of William the Fourth, cap. 100. section 2. it is enacted, that every composition for tithes which had been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which had not since been set aside, abandoned, or departed from, should be and the same was thereby confirmed and made valid in law.

By the third section it is provided that this act should not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned now commenced, or which might be thereafter commenced during the then session of parliament, or within one year from the end thereof.

The respondent, on the 16th of July 1833, filed his bill in the Court of Exchequer against the appellants, Thomas Mattingley, William Budd, George Bliss, and Charles Cowper, and thereby stated that in the month of August in the year 1831 he was duly presented, instituted, and inducted into the rectory of Aston, and that he had been, ever since his said presentation, institution, and induction, and was then entitled to all the tithes both great and small within the rectory and parish; and the bill prayed that the defendants might be decreed to come to a fair and just account with the respondent for the single value of the tithes of all and every of the titheable matters and things aforesaid, and [51] to pay to the respondent what upon such account might appear to be due to him.

The said last-named appellants by their answer insisted upon the agreement, the confirmation by the bishop, and the decree establishing the agreement, and that they had no notice to set out their tithes previously to June 1833; and they insisted that the agreement was entire and ought not to be partially vacated, and that the appellant, Edmund Plowden, who was then lord of the manor of Aston, ought to be made party to that suit, and that the said Court could not make any decree respecting the matters therein stated until Edmund Plowden should be made a party thereto.

The respondent took exceptions to the last-mentioned answer principally on the ground that the defendants had not given a full account of the tithes arisen on their respective farms; and the last-mentioned defendants put in a further answer to the said original bill on the 14th of August 1834.

On the 15th day of January 1835 the respondent amended his bill by making the present appellant Edmund Plowden a defendant thereto, and by alleging that many years ago some agreement was entered into between William Plowden, the ancestor of the said Edmund Plowden, and the then rector of the said parish, by which the lands mentioned in the bill to be in the occupation of the defendants became exempt from the payment of tithes in kind, or whereby the tithes became payable to the said Edmund Plowden and those who claimed under him; and by charging that such agreement, if any such there was, was illegal and not binding in law upon subsequent rectors of the said parish.

The appellant Edmund Plowden appeared to the [52] bill, and on the 11th day of May 1835 put in a plea to the bill, which, after setting forth the agreement of the 1st of March 1711, the confirmation thereof by the Bishop of the diocese, and the decree of the Court of Chancery, and the several sections of the act of the second and third of William the Fourth, cap. 100, stated that the rectors of Aston-le-Walls had, ever since the agreement of the 1st of March 1711, held and enjoyed the lands and privileges thereby allotted and given to them and received the annuity of £40 per annum in full satisfaction of all tithes of the lands of which tithes were demanded by the bill, and that the only lands occupied by the other defendants to the bill within the parish of Aston-le-Walls were the lands in Aston of which the said William Plowden was seised at the time of making the said agreement, including the glebe lands thereby allotted to him; and the said appellant averred that the said composition for tithes made and contained in and by the said agreement, and confirmed

by the aforesaid decree, had not since been set aside, abandoned, or departed from, and that the discharge from tithes thereby effected did exist and was acted upon at the time of the passing of the said statute; and therefore he pleaded the matters aforesaid in bar to the said respondent's bill.

On the 26th day of June 1835 the plea was disallowed by the Chief Baron, who upon a re-hearing confirmed his former judgment, but without costs.

The appellant Edmund Plowden then put in his answer to the said amended bill, and insisted upon the same grounds of defence which had been insisted upon by the other defendants, and also claimed the benefit of the statute of the second and third of William the [53] Fourth, cap 100; and also insisted that the respondent could not have any decree for tithes until he had restored to the appellant Edmund Plowden the lands and privileges which were then held by the respondent under the agreement, and taken back the ancient glebe of the rectory, which he the appellant was willing to restore in case the agreement should be avoided.

On the 8th of February 1837 the cause was heard before Mr. Baron Alderson.

On the 15th day of February 1837 a decree was made by Mr. Baron Alderson, whereby it was referred to Richard Richards, Esquire, one of the masters of the Court, to take an account of what was due to the said respondent Henry Thorpe from the said appellants, Thomas Mattingley, William Budd, George Bliss, and Charles Cowper respectively, for and in respect of the single value of the tithes of all and every the titheable matters and things in the said bill mentioned; and it was ordered and decreed, that what the said master should find to be due from them respectively upon taking the aforesaid accounts, be answered and paid by the said appellants respectively; and it was further ordered, that it should be and it was thereby referred to the said master to tax the said respondent his costs of the said suit as against the said appellants Thomas Mattingley, William Budd, George Bliss, and Charles Cowper, and that such costs, when taxed, be paid by the said appellants, Thomas Mattingley, William Budd, George Bliss, and Charles Cowper to the said plaintiff; and it was further ordered, that the said respondent's bill be dismissed out of the said Court as against the said appellant Edmund Plowden, but without costs; [54] with the usual directions for production of books and examination of witnesses.

From the orders overruling the plea Edmund Plowden appealed, and from the decree all the appellants appealed.

Mr. Boteler and Mr. Bethell for the Appellants.—The agreement is entire; the rector can have no account of tithes until he restores the advantages he takes under the agreement. Instead of a bill for a simple account of tithes it ought to have been a bill to set aside the agreement to which the rector and ordinary ought to have been parties; but by the statute no proceedings could have been taken against Mr. Plowden in this suit within the time prescribed by that act, nor was there sufficient notice to determine this agreement. In the *Attorney General v. Cholmeley* (2 Eden, 304) land was given for land, and tithes for annuity or money payment; the land-owners and rector were the only parties to the agreement, and the patron was not a party to the suit in which the agreement was confirmed by decree. Where a legal right is asserted a court of equity takes care that complete justice is done. In usurious transactions relief is only granted upon the terms of paying what is actually due with interest. In this case the rector partly acts upon the agreement, and partly seeks to set it aside, keeping the land and asking for an account of the tithes. It is vain to say that the land is not distinguishable; the Court would see that the value of the lands to be given up was properly ascertained.

[55] Mr. Swanston and Mr. Griffith Richards for Respondent.—A bill for an account of tithes is not an equitable proceeding: it is the assertion of a legal right, in respect of which an account is directed in a court of equity. Restitution cannot be raised in this suit; if the appellants are entitled to any equity a proper proceeding may be taken by them for that purpose. [Lord Chancellor.—There is no notice to terminate the composition; therefore at the time of the bill filed there would be nothing due: so long as the rector chooses to act under the agreement it is good.] Our proposition is, that the agreement is altogether void. The clergyman is entitled to tithes in kind from the time the notice is given. [Lord Chancellor.—However invalid a modus may be, if the rector received the modus he could not receive the

tithes in kind.] This case is not distinguishable from the *Attorney General v. Cholmeley*. It is said that Mr. Plowden ought to be made a party to the suit; if he had been made a party the bill must have been dismissed against him. In a simple bill for tithes the owner of the inheritance need not be a party. But then it is said, he was not made a party to the record until after the time prescribed by the act had elapsed. The act applies only where no suit is depending. If the act be construed literally in case of a devolution, it would apply to the representatives of parties who died pending the suit.

Lord Chancellor (3d Feb.).—The question before your Lordships arose upon an appeal from a decision of the Court of Exchequer, by which a decree was made directing an account of tithes generally against certain persons who were occupiers of lands within the parish. [56] Mr. Plowden, who it appears was tenant for life and landlord of the lands in question, had been made a party to the suit; but he having pleaded, and that plea being overruled, he remained a party at the hearing, and at the hearing the bill was dismissed against him. According to the proceedings, therefore, as they stand, it was an ordinary decree for tithes against the occupiers of the lands.

The bill was filed on the 16th of July 1833. and to the bill as originally filed there were no parties defendants except the occupiers of the lands. On the 12th of December 1833 those occupiers put in their answer, and stated, what was afterwards proved, and which constitutes the question in the cause, that in the year 1711 an arrangement had been entered into between a Mr. Plowden, who was then the owner of the fee, with the then rector, by which certain lands, the property of Mr. Plowden, were conveyed to the benefit of the church, and certain glebe lands belonging to the church were assigned to Mr. Plowden, and other lands belonging to Mr. Plowden were to be held for the future tithe-free. It appears that this arrangement was afterwards submitted to the consideration of the bishop of the diocese, the bishop of Peterborough, and that, after an investigation as to the terms of that arrangement, it was sanctioned by the bishop; and it appeared also that it afterwards became the subject of a suit in the Court of Chancery, to which the patron, ordinary, proprietor, and rector were parties, and that it ended in a decree establishing this arrangement.

It appears, and I now state what was proved on the investigation which took place before the commissioners appointed by the bishop, that the glebe lands taken by [57] Mr. Plowden were of the value of £40 a year, and that the tithes were of the value of £56 a year; that the lands given by Mr. Plowden to the church were of the value of £130 a year; and that there was, in addition to those lands so given to the church, a rent-charge of £40 a year upon the other properties belonging to Mr. Plowden.

It appears that from that time down to the time when this bill was filed, or at all events until very shortly preceding the time when this bill was filed, all parties acted upon the faith of that agreement. It appears that the present incumbent, the present plaintiff, was instituted to this living in the year 1831; it appears that he received the rent-charge of £40 a year, including the payment to Michaelmas 1832; it also appears, and was proved by two witnesses, namely, Willifer and Cowper, that he had at all times remained in possession of the lands, and that at the time the depositions were taken he was in actual possession of those lands which had by Mr. Plowden been devoted to the church in exchange for the advantages he derived under the agreement in respect of his estate.

Now, on looking to the agreement, which it is very material should be very accurately examined and compared with the evidence before the commissioners appointed by the bishop, it appears that, inasmuch as the value of the tithes released exceeded the £40 per annum of rent-charge, and that the value of the lands given by Mr. Plowden exceeded the value of the glebe lands taken by a sum equal, or very nearly so, to £90 a year,—if the £40 a year had been in lieu of the tithes, it would have been an inadequate compensation for the tithes, [58] even according to their then existing value, the tithes being £56 a year and the rent-charge £40. If the lands were to be changed for the glebe lands, it would appear that that could not be a contract, inasmuch as the glebe lands were of the value of £40 a year, and the lands granted to the rector by Mr. Plowden were of the value of £130 a year. It

is quite clear, therefore, that some part of the lands granted by Mr. Plowden to the rector were in consideration of the discharge of his other lands from tithe. It is most important to keep that fact in view when you come to consider how far the authority, which has been the guide of the Court below upon this subject, can be considered as applicable to the present case.

Now, we find that the present rector succeeding to the rectory found this agreement in operation not binding as contended, and truly contended, because the statute prevented parties, notwithstanding all the solemnities which had accompanied such a contract, giving effect to a discharge from tithes by an agreement which had been thus entered into; but it is perfectly certain that, even if there had been an ordinary composition, the party succeeding to a rectory, acting on a composition made during the time of his predecessor, although he may have had the power to get rid of it, must be considered as so far becoming a party to that arrangement that he cannot, as a matter of course and at once, treat those with whom the contract was subsisting as if no such agreement had been made. But at all events he cannot do this: he cannot claim a compensation for the discharge of tithes, and come into a court of equity to ask for payment of those tithes. Now, it appears that the rector received the £40 till Michaelmas 1832, [59] and that he still claims the lands; that he gave no notice of any kind till June 1833, and that in the month of July following he filed his bill.

In the case of *Hewett v. Adams*, in 2d Brown's *Parliamentary Cases*, page 64, this House dismissed a bill for want of proper notice to determine a composition, although the defendant disputed the rector's right to make the composition; and that Lord Thurlow considered as a binding authority in a case in which the defendant had set up a modus, which was the case of *Bishop v. Chichester*, in 2d Brown's *Chancery Reports*, page 160. In this case there is no question about determining a composition, which, though void against successors, may be adopted, and become binding upon them till avoided, because the rector in this case is still in possession of the lands given in lieu of the tithes. It is said that the Master in taking the account has not gone beyond Michaelmas 1832, when the last payment of the rent-charge was received; but why is the receipt of the rent-charge to stop the account, if the possession of the lands is not to defeat the plaintiff's title to it? While the plaintiff retains the substitute for the tithes he cannot claim the tithes; therefore there was nothing due when the bill was filed. There is, however, a distinct ground of defence growing out of this state of things: the plaintiff holds the lands given in exchange for the tithes by the conveyance of 1711, and the decree gives to the plaintiff the tithes out of the lands agreed to be discharged, but leaves him in possession of the lands given to him as the consideration of the discharge. Equity thus gives its assistance to work the great injustice of restoring to the plaintiff the thing sold without requiring repayment of the consideration. [60] This is contrary to one of the first principles of equity, "that he who seeks equity must do equity."

It was said, indeed, that in the case of suits for tithes a court of equity only gives effect to a legal title, and that this principle therefore does not apply to this case. It is quite immaterial what is the nature of the demand; it is the exercise of its jurisdiction which the court withholds, unless the party seeking its exercise will do what the court thinks just. I lately, in the case of *Sturges v. Champness*, in *Chancery*, had occasion to review the authorities upon this subject, and this was the principle upon which I acted. I think it impossible, therefore, to give to the plaintiff any assistance in equity, without seeing justice done to the other parties to the agreement of 1711. If that were possible in this suit, and if there were no other fatal objections to it, the question would be what such justice required. The agreement was, to give up the land in fee, and to discharge for ever Mr. Plowden's other lands from tithes. The late defendant, Mr. Plowden, was only tenant for life, but if the lands given to the rector are to be restored to Mr. Plowden's estate, and the ancient glebe taken out of that estate and restored to the rectory, it is obvious that the owner of the inheritance must be a party to this proceeding. But there was no such person before the court at the hearing, although the tenant in tail has (in what right does not very well appear) raised this appeal. We must, however, look at the case as it existed at the hearing; this could not be cured by adding him as a party, because the bill makes no case, and asks no relief, for the purpose of raising any such equity.

It has been supposed, however, that there is authority [61] to support this decree, however opposed it may be to those well known principles of equity to which I have adverted; and that case is the *Attorney General v. Cholmley*. From the report in 2d Eden 704, it appears that the owner of the land as well as the patron and ordinary were parties, and Lord Northington proceeded upon this: that by the agreement the land given to the rector was an exchange for the glebe, and the money payment in lieu of the tithes, and that the contracts, though contained in one agreement, were distinct. That decree, therefore, did not, as this does, give to the rector the tithes, and leave him in possession of what had been given to the rectory for the purchase of them. It is clear that if this had been so, and he had not had the power of restoring the parties to the situation in which they would have stood if no such agreement had been entered into, he would not have made the decree for the payment of the tithes. The observation that he makes at the close of his judgment is well worthy of remark; he says, "If the parties had made an allowance for the future improved value of the tithes, they would have stood on a different footing, and I should not have been inclined to relieve them; they then would have been purchasers for a valuable consideration by allowing for the future improvements; the equity of the Court would have been suspended by setting up equity against equity, and I should have left the rector to his remedy at law." This does not appear to me to be inconsistent with the opinion he had before expressed, that the agreement was void; he only means that equity would not have interfered, and he obviously alludes to the maxim used by the defendant in that case, "*Ecclesia [62] meliorari, non deteriorari, potest*," and which he had before answered by stating that the agreement in question was unequal and injurious to the church, in not providing for the improved value of the tithes. In this case that is provided for, the land given to the church greatly exceeding the value of the glebe taken and of the tithes given up by it. To rescind the agreement altogether, if practicable, would be highly injurious to the church; to decree payment of the tithes without doing so, most unjust to the other parties to it.

The view I have taken upon this part of the case makes it unnecessary to observe on the construction put on the second and third William the Fourth, cap. 100. section 3. Had it been necessary to decide that question I should have found much difficulty in concurring in an opinion that a defendant against whom no proceedings were instituted until January 1835 could not claim the benefit of the third section, because the suit to which he was made a defendant by amendment had been commenced against others within the prescribed time.

These opinions I have formed on considering these papers and attending to the argument at the bar; and after communicating with the noble and learned Lord who was present during the discussion, I shall to-morrow move the judgment of the House upon this case. I can only say, that if that noble and learned Lord concurs in the opinion I have now expressed, the motion I shall submit to the House will be to vary the decree by dismissing the appeal with costs.

Lord Chancellor (6th Feb.).—In the case of *Plowden v. Thorpe* I have since had an opportunity of communi-[63]-cating with the noble and learned Lord who also attended the hearing, and I have from him authority for stating that he entirely concurs in the opinion I then expressed. The course which I propose to take will not entirely exhaust the case, inasmuch as the appeal not only embraces the final decree, but also embraces the order made by the Court of Exchequer upon the plea put in by Mr. Plowden. But I apprehend, if your Lordships agree in the opinion which I have suggested, namely, that the bill should be dismissed, you will not be called upon to give any opinion upon that plea, inasmuch as the object of the party appellant will be obtained as to all the substantial parts of the case. The utmost possible question which can be involved in the plea is a question of costs of the smallest possible amount, for whatever opinion might be formed upon the plea, which involves considerable difficulty on the construction of the act of parliament, your Lordships will doubtless think, differing from the opinion of the Court of Exchequer, that that plea, if allowed, ought to be allowed without costs, so that it will be the smallest possible amount of costs.

Decree in part reversed, and bill ordered to be dismissed with costs.

[64]

## FROM THE COURT OF CHANCERY, IRELAND.

WILLIAM DE MONTMORENCY, Esquire,—*Appellant*; HARVEY DEVEREUX, Esquire,—*Respondent* [20th, 24th, and 25th February, 1840].

[*Mews'* Dig. i. 61; iv. 688; vii. 231, 428; ix. 124; xiii. 1441; xiv. 1747, 1749, 1774. S.C. 7 Cl. and F. 188; 4 Jur. 403; 1 Dr. and Wal. 119; 2 Dr. and Wal. 410. As to lapse of time, see *Clanricarde v. Henning*, 1861, 30 Beav. 175. Cited on point as to costs, in *Parker v. M'Kenna*, 1874, L.R. 10 Ch. 114, and see *Fyler v. Fyler*, 1841, 3 Beav. 550.]

Sir, William Ryves De Montmorency devises his real estate to Harvey Devereux, in trust to permit his natural son William De Montmorency to enjoy the same for ever, subject to his debts, and bequeathes his personal estate to William De Montmorency, and appoints Harvey Devereux, who had for fifteen years before his death been his land agent and general manager of his affairs, the executor of his will. On the 16th April 1829, two days after the death of the testator, William De Montmorency expresses his determination to give an estate at Cooldrina, devised to him by the testator, to Harvey Devereux, and to appoint him land agent and receiver of his estates. On the 18th of the same April Harvey Devereux brings to William De Montmorency deeds of lease and release, dated the 17th and 18th April 1829, ready drawn and prepared, whereby William De Montmorency, in consideration of Harvey Devereux's faithful services, and in discharge of all accounts between Sir William De Montmorency and Harvey Devereux, some of them being unsettled, conveys the estate at Cooldrina to Harvey Devereux in fee, and on the same day, by letter, appoints him the agent of his estates, at a salary of £200 a year, and promises, in case of his removing him without sufficient cause, to give him the same salary. Shortly after the death of the testator a relation of the testator's declared that he intended, as heir at law, to lay claim to [65] the testator's estates. On the 2d of June 1829 Harvey Devereux proved the will of the testator at Dublin, and on his return home from thence, accompanied by William De Montmorency, made a speech to the tenants of the estates, stating that he was in possession of a secret which might defeat William De Montmorency's title to his estates, but that it should remain with him; and if any one claiming a right to the estates should go to law he would defeat him, as he was always successful in any cases in which he was concerned.—Held, that if the transaction had been complained of in reasonable time it would have been set aside by a court of equity, but inasmuch as in October 1830, upon the investigation of the accounts between William De Montmorency and Harvey Devereux by their respective solicitors, the deeds of 1829 were distinctly called to the attention of William De Montmorency's solicitors, and were adopted by them in the settlement of those accounts, and inasmuch as in December 1830 William De Montmorency had confirmed them by executing another deed, the draft of which had been approved by one of his solicitors, and in 1831 called upon Harvey Devereux to pay a debt due from his father which Harvey Devereux by the deed of 1830 had undertaken to pay, and in 1832 wrote a letter to Harvey Devereux approving of the deeds of 1829, and in 1833 set up the deeds of 1829 as a defence to an action for costs which were discharged by those deeds, and succeeded in that defence, and did not complain of the deeds till 1835, when he filed his bill to set it aside, it was held that William De Montmorency had recognized and confirmed the deed of 1829; and the judgment of the court below, dismissing the bill without costs, was affirmed.

Sir William Ryves De Montmorency, by his will dated the 13th of April 1829, devised and bequeathed his real and personal estates situate in the county of Kilkenny, together with his estate called Cooldrina in the same county, and all other his real and personal [66] estate, to the respondent Harvey Devereux, his heirs, executors, and administrators, in trust only to permit the appellant William De

Montmorency, and his heirs and assigns, to have, hold, take, and enjoy the same, and all the rents, issues, and profits, and other benefits and advantages of the same for ever, subject to testator's lawful debts and funeral expenses, and £50 a year payable to Richard Jordan, jun., during his natural life, as therein mentioned; and as to his personal and chattel property, consisting of £3500 late currency, charged and chargeable on the Barrowmount and other estates of the late Ralph Gore, esq., in the county of Kilkenny, and of the rents, household furniture, books, paintings, and other his chattel or personal estates, he thereby bequeathed the same unto the appellant, whom he appointed residuary legatee; and the testator thereby appointed Harvey Devereux executor to his last will and testament.

On the 14th April 1829 Sir William Ryves De Montmorency died.

On the 17th of April Harvey Devereux delivered up possession of the real and the freehold estates of the testator to William De Montmorency, who was the natural son of the testator.

The estates were, at the time of the death of the said Sir William Ryves De Montmorency, subject to judgment debts to the amount of £10,000 or thereabouts, due to John Smithwick of the city of Kilkenny, esq., the father-in-law of Harvey Devereux, under and by virtue of several judgments obtained by John Smithwick against Sir William Ryves De Montmorency in his lifetime, and for the better securing which debts the appellant afterwards executed to the said John Smithwick [67] a deed of mortgage, bearing date the 18th day of December 1830, of the estates in the county of Kilkenny.

Harvey Devereux, from the month of October 1815 up to the time of the death of Sir William Ryves De Montmorency, was his land agent and general manager of his affairs, from whom he received a salary of £100 per annum as land agent of part of the estates till the end of the year 1818, and from thence till the time of Sir William Ryves De Montmorency's death £200 per annum, on his undertaking the agency over all the estates. The last account settled between Sir William Ryves De Montmorency and Harvey Devereux was settled on the 14th of November 1821, though four several accounts from that period up to the 24th October 1825, when the last account was furnished, were delivered by Harvey Devereux to Sir William Ryves De Montmorency, but the same were not settled and signed upon the day of Sir William De Montmorency's death. William Bayley, being then at the testator's residence, and entitled to an estate at Kilcreene in the county of Kilkenny subject to the testator's life estate therein, insisted upon getting possession of the title deeds and papers relating to the Kilcreene estate; but upon its being found that the title deeds of that estate were mixed up with those relating to the testator's other estates, it was agreed between William De Montmorency and William Bayley that all the deeds and papers should be taken home by Harvey Devereux, in order that he might make a selection, and hand over to William Bayley such of the deeds and papers as related to the Kilcreene estate. With that view all the deeds and papers were taken by Harvey Devereux. On the 16th of April 1829, two days after the death of Sir [68] William Ryves De Montmorency, William De Montmorency stated to Dr. Cullinan, who had himself received a deed of gift from the appellant, and which was prepared by Maher, the partner of the respondent, that he had determined upon giving Harvey Devereux the estate and lands of Cooldrina, and also to employ him as his land agent and receiver at the same salary as that paid by his father. On the 18th of April 1829 William De Montmorency wrote the following letter to Harvey Devereux:—

“Upperwood, 18th April 1829.

“My dear Sir,—It was the anxious wish of my poor father that you should continue during your life to manage my affairs as agent, in the same way as you did so many years for him, at the same salary. His confidence and esteem for you was evinced by the appointing you trustee to his will, and desiring I should give you the Cooldrina property. I have now to hope and request you will continue my agent and manager of my affairs, and I now appoint you to that situation during your life, at the former salary of £200 a year, on the following conditions: that you shall faithfully and attentively discharge the duties of such office, and pay over and account to me at least once in every year for all rents and other monies of mine that may get into your hands; and as an inducement to you to accept such, I pro-



mise not to remove you, and if I shall do so without just cause at any future time, I bind myself to allow and pay you that salary.—I am, my dear Sir, yours very truly,  
 “WM. DE MONTMORENCY.”

[69] On the same day Edmond Smithwick, the brother-in-law of Harvey Devereux, brought to the house of William De Montmorency certain deeds of lease and release ready drawn and prepared for execution, the release bearing date the 18th of April 1829, and made between William De Montmorency of the one part and Harvey Devereux of the other part, whereby, after reciting that Sir William R. De Montmorency had directed and requested his son to give to Harvey Devereux the estate of Cooldrina, of the value of £100 per annum late currency, in consideration of his faithful services, and in full discharge and acquittance of all dealings or accounts, claims or debts, between Sir William Ryves De Montmorency and Harvey Devereux, it was witnessed, that in consideration of such direction and the premises, and in consideration of 10s. paid by the said Harvey Devereux, the said William De Montmorency conveyed the said estate of Cooldrina to Harvey Devereux, his heirs and assigns. Shortly after the death of Sir William Ryves De Montmorency there was a strong rumour prevalent in the county of Kilkenny that Lord Crofton, who was a relation of the testator, and Lord Crofton himself declared, that he intended, as heir-at-law, to lay claim to the testator's estates at Upperwood.

On the 2d of June 1829 Harvey Devereux proved the will in Dublin, and two witnesses proved that Harvey Devereux, accompanied by William De Montmorency in a carriage, on their return home addressed the tenantry, where 500 persons were assembled, in a speech, wherein he said that he alone was possessed of a secret which would disturb the appellant in the title to his estates, but it should remain with him; and [70] if any persons claiming any right to the estates should go to law, he would take care to defeat them, as he was always successful in all cases in which he was concerned. Another witness proved that Harvey Devereux had told him that he knew of circumstances connected with the estates that would ruin William De Montmorency's claims or prospects in respect thereto, of which no other person was aware but himself. He also added, that William De Montmorency was not using him well, but at the same time he never would injure him. Harvey Devereux acted as the plaintiff's agent from the month of April 1829 till the month of December 1830, when his agency for the plaintiff ceased. On the 5th October 1830 the accounts between the plaintiff and defendant were the subject of negotiation. Messrs. Montgomery and Aicken were employed on behalf of the plaintiff, and Maher, the partner of the defendant on his behalf, to enter into an investigation of the accounts between them. At first the inquiry was not confined to the accounts subsequent to the decease of Sir William Ryves De Montmorency, though they were afterwards confined to those subsequent to his decease, as appears by the following letters written by Mr. Aicken:—

“Dublin, 13th October 1830.

“My dear friend,—I wrote to you again by last evening's post; Mr. Smithwick, attorney, I hoped to have seen ere this; I think on his arrival the mortgage will be executed. It appears clearly that all interest to and for the 1st November 1827 was included in the bond of that date, amount £1570 16s. 8d.; surely it will be easy to calculate the interest from that date. [71] It is said that an account of same date was stated and settled between the parties, and that it is in your hands. Such would be satisfactory; bring it up when you come, also the conveyance to you of Cooldrina, in which, it is said, is embodied a general release as between you and the present Mr. De Montmorency. I pray of you by no means to omit bringing up this deed, and, in a word, all such other deeds, papers, and documents as relate to the accounts, which I think (as I heretofore mentioned) may be yet amicably and happily settled, on which occasion my honourable, honest, and kind offers shall not be wanting. I think it would be well if you consulted Nixon on the subject matter of the notice of which I sent you a copy in my letter of yesterday, and know from him whether he will consent to such submission of reference as therein mentioned being entered into and executed; if not, answers by you and Mr. De Montmorency must be immediately given in. If possible, let me know this by return of post, and in case of Nixon's refusal endeavour to get his consent for three weeks time for answering on the terms

of appearing and rejoining gratis, and not suffering a conditional decree.—Most truly yours,

SAMUEL AICKEN.

"H. Devereux, esq.

"I pray you to lose no time in coming up."

"Hume Street, 12th November 1830.

"My dear Maher,—I am authorized to say, that as Mr. Devereux has agreed not to bring forward or make any charge against Mr. De Montmorency for any money trans-[72]-actions or dealings which were had or took place between Mr. Devereux and the late Sir William, and that same shall be for ever done away with, that he, Mr. De Montmorency, will accede to the arrangement proposed this morning; I therefore submit to you, that an entire new account should be prepared on the part of Mr. Devereux, and be confined to such money transactions and dealings as took place between Messieurs Devereux and De Montmorency since Sir William's death, which account, I should hope, may be made out, produced, gone into, vouched, and finally settled on the meeting appointed for to-morrow.—Most sincerely yours,

"John Maher, esq.

SAMUEL AICKEN."

After a laborious investigation of these accounts Mr. Montgomery, finding that they would occupy a considerable time, proposes to strike off above £500 from the defendant's demand, and thereby settle all matters between them. To this proposal the defendant agrees, and more than £500 is struck off from his demand; whereupon a deed, dated the 18th of December 1830, is made between Harvey Devereux of the one part and William De Montmorency of the other part, the draft thereof having been settled and being in conformity therewith, which witnessed, that all accounts of whatsoever nature or kind theretofore or then pending between them in relation to any dealings whatsoever had been and were then finally settled, as well those relating to such dealings or transactions as took place between Harvey Devereux and the late Sir William R. De Montmorency as those between Harvey Devereux and William De Montmorency; and that for peace [73] sake, as well as to avoid litigation and expense, William De Montmorency had agreed to secure to the said Harvey Devereux the principal sum of £2700 in full for the balance due on such accounts by two bonds, the one payable in three years at five per cent. per annum, and the other in five years at six per cent. per annum; and that the said Harvey Devereux thereby consented and agreed to accept said sum, it being, however, understood and declared that the said Harvey Devereux was to pay and discharge the amount of his two drafts or bills of exchange theretofore drawn upon and accepted by the appellant for the sums of £450 and £400, which two bills had been passed by the said Harvey Devereux to the Provincial Bank in Kilkenny, and had not been paid when same became respectively due, and were then in the hands of Messrs. Pierce and David Mahony as attornies for said bank, who had taken proceedings at law against William De Montmorency for the recovery of the amount thereof; and that said Harvey Devereux was also to pay whatever costs and charges might have been incurred upon said bills. And it was agreed by William De Montmorency that he would pay off and discharge all such just and legal demands upon the late Sir William R. De Montmorency as had not been discharged by Harvey Devereux, and credited to him in the accounts theretofore furnished by him to William De Montmorency, and examined by him and his solicitors; and that he would indemnify Harvey Devereux and his estates, real, freehold, and personal, against the payment of the same; and the said Harvey Devereux thereby undertook and agreed to save harmless and keep indemnified at all times thereafter the appellant of, from, and against all debts and other demands of [74] whatsoever nature or kind which were set forth in the said Harvey Devereux's account, as had been theretofore paid off by him for or on account of the said late Sir William R. De Montmorency or the appellant, and at all times thereafter to aid and assist the appellant, if it should become necessary so to do, in resisting the payment thereof, if any demand should at any time thereafter be made in respect to the same. And the said Harvey Devereux thereby undertook, by deed or other instrument, as counsel should or might advise, to assign and make over to the appellant all and every the estates and properties devised and bequeathed by the will of the said Sir William Ryves De Montmorency

unto the said Harvey Devereux as trustee or otherwise, save and except the lands of Cooldrina otherwise Backweston, situate near Leixlip, in the counties of Dublin and Kildare, which the appellant had theretofore conveyed to said Harvey Devereux, and the conveyance whereof he thereby fully and absolutely confirmed. And the said Harvey Devereux thereby also covenanted and agreed to allow his name, either as personal representative of the late Sir William Ryves De Montmorency, or, if necessary, notwithstanding such proposed assignment, as trustee in his will, to be thereafter used in such manner and for such purpose as it might be necessary, and as counsel should or might advise upon, on immediately afterwards being indemnified, in such manner as counsel might advise, against the consequences of allowing his name to be used; and also to give and afford to the appellant all information in his power at all times touching or relating to the estates and properties of the said late Sir William Ryves De Montmorency or of the appellant; and that the said Harvey [76] Devereux should, on the perfection of said bonds therein-before stated and the execution of that deed, hand over to the appellant all deeds and papers relating to the estates, properties, affairs, or business of the said late Sir William Ryves De Montmorency or the appellant, of which the said Harvey Devereux had possessed himself, save and except those relating to the lands of Cooldrina, and likewise give his assistance to enable the appellant to recover payment of all arrears of rent then due and owing out of the several estates devised to the appellant by the will of the said Sir William Ryves De Montmorency, save and except the lands of Cooldrina, and also such parts of the arrears of rent as were due and owing out of the estate of Kilcreene at the time of the said Sir William Ryves De Montmorency's decease, and that then remained due and owing thereout.

The draft of the deed was approved of by Mr. Montgomery, but he declined witnessing the deed, because his own claims were not recognized, and because, the plaintiff not being satisfied with the arrangements, he thought by so doing he might bind William De Montmorency; and for the same reasons he prevented Mr. Malone, the then agent of William De Montmorency, from being an attesting witness. At the same time the deeds and papers in the hands of Harvey Devereux were, by the direction of William De Montmorency, handed over to John Robert Malone. In pursuance of the last-mentioned deed the bonds therein mentioned were executed by the plaintiff William De Montmorency. On the 16th November 1831 William De Montmorency writes to Harvey Devereux the following letter:—

[76] “Upperwood, 16th Nov. 1831.

“Dear Harvey,—Mrs. Darby, the widow of George Darby, called on me this morning for the balance of an account alleged by her to be due to her late husband of my father. By the deed executed between you and me you undertook the payment of all debts due of my late father except certain debts in and on the back of said deed excepted, and Mrs. Darby was not amongst those excepted. You will therefore please to let her know that I am not her debtor, if upon investigation any thing be really due to her, and believe me,—Truly yours,

W. DE MONTMORENCY.”

“Directed to H. Devereux, esq.”

And on 14th October 1832 another letter, wherein he says,

“Upperwood, 14th Oct. 1832.

“My dear Harvey,—I understand that some evil-minded person has told you lately that I repented giving you Cooldrina. I can assure you I never did say so, nor either did I ever repent giving it to you; and whoever told you so told you a great falsehood. I should feel sorry that you should think for a moment that I should say so. I only wish that Cooldrina was better for your sake, and I wish it was able to produce you ten times as much as it is; and now believe me, my dear Harvey, yours obliged,

W. DE MONTMORENCY.

“Directed to H. Devereux, esq., Kilkenny.”

[77] In April 1833 Mr. Maher, who was the partner of Mr. Montgomery in the business carried on in the courts of Dublin, but not in business done by them individually in other matters, brought an action against the plaintiff William De

Montmorency for a bill of costs, which included not only costs individually due to him, but costs due from the plaintiff's father to the partnership, and which had been released and settled by the deed of 1829. To this action William De Montmorency set up as a defence the deed of 1829, and got the benefit of the defence by being protected against those costs incurred in the lifetime of his father and due to the partnership of Devereux and Maher.

Under these circumstances William De Montmorency, on the 16th of April 1835, filed his bill in the Court of Chancery in Ireland against the respondent Harvey Devereux, stating the will and deeds before mentioned, and that immediately after the death of Sir William R. De Montmorency a report was circulated, at the instance of Harvey Devereux, that Lord Crofton intended to set up a claim to Sir William R. De Montmorency's estates as his heir-at-law, and to institute proceedings to impeach his will; and that, the day after the interment of Sir William R. De Montmorency, Harvey Devereux had sent his brother-in-law Edmond Smithwick to Upperwood, to inform the plaintiff that Lord Crofton was in the neighbourhood inquiring for Harvey Devereux and John Smithwick his father-in-law, who had kept out of his way, but in the most earnest manner he advised the plaintiff to make a friend of his brother-in-law Harvey Devereux.

That upon the said last-mentioned occasion the said Edmond Smithwick produced ready prepared, a power [78] of attorney between William De Montmorency and Harvey Devereux, appointing him collector of his rents, and also a deed by which he gave him £200 a year in case he discontinued him as his agent, and also a conveyance of the 1st of April 1829.

That in consequence of the impression made upon his mind by the said Edmond Smithwick, that the said Harvey Devereux could either take from or leave the said estates with him, the appellant executed said power of attorney, and said annuity deed, and said conveyance, dated the 18th day of April 1829, so produced to him, without receiving any consideration whatever for the same.

That he was grossly deceived and imposed on in said transaction, and was prevailed on to execute said annuity deed and said conveyance of said lands of Cooldrina by unfair means and practices used by and on behalf of the said Harvey Devereux; and the said Harvey Devereux having assumed the possession of said estates of said testator, and being in possession of all the deeds, papers, and writings relating to said estates, and refusing to put the appellant into possession of said estates unless he would execute said several instruments; and that he never gave any directions whatever or instructions to any person to prepare said power of attorney, or said annuity deed, or said conveyance of said lands of Cooldrina, nor were the same or either of them prepared by any person employed by or on behalf of the appellant, but said power of attorney, annuity deed, and conveyance were drawn or prepared by or under the order or directions or from the instructions of said Harvey Devereux, and said power of attorney and annuity deed and conveyance [79] were brought and produced to the appellant by said Edmond Smithwick ready drawn and prepared for execution.

That after the execution of said instruments the said Edmond Smithwick declared that the appellant had thereby made a friend of the said Harvey Devereux, who immediately after, but not until said deeds were actually executed, gave possession of said estates and properties, except said estate in the county of Dublin, to the appellant.

That Harvey Devereux had addressed the tenantry in a speech to the effect before mentioned.

That he continued the said Harvey Devereux his agent for a year and a half, when he found it necessary to discharge him from his agency; and having done so, and thereupon a settlement of the said Harvey Devereux's accounts as his agent and on foot of various advances made for appellant having taken place, the appellant appeared indebted to the said Harvey Devereux in a sum of £2700; but such settlement of accounts was confined to those between the appellant and said Harvey Devereux as his agent from the time of the execution of the power of attorney so obtained as aforesaid to the discharge of said Harvey Devereux from the agency, and for sums of money received by the said Harvey Devereux since the death of said testator on account of rent due to testator in his life-time, but did not contain any account whatever on foot of the personal estate or effects of said testator.

That the said Harvey Devereux thereupon required the appellant to execute the two bonds before mentioned, and also required him to execute the deed of the 18th day of December 1830.

[80] That the said last-mentioned deed and bonds were drawn up at the office of Messrs. Aicken and Montgomery, appellant's solicitors, who, perceiving that there was no settlement of accounts on foot of the rents received by the said Harvey Devereux during his agency with the said Sir William Ryves De Montmorency, or on foot of the assets of the said Sir William, declined to witness the execution of said deed, and would not permit John Robert Malone, appellant's then agent, to witness same.

That although the said deed purported to confirm the said conveyance of 18th April 1829, yet appellant submitted that said deed of April 1829 was not in any manner confirmed by said deed of 18th of December 1830, or did not operate as a release to said Harvey Devereux as executor of said testator, inasmuch as appellant executed same under the impression that the said Harvey Devereux had the power to invalidate his title to said estates, and inasmuch as he appeared then indebted to him in a large sum of money, for the recovery whereof the said Harvey Devereux threatened to take legal proceedings, and refused to give up the agency until paid; and appellant was then in very embarrassed circumstances, and the said Harvey Devereux was in possession of all the title deeds, papers, and writings relating to appellant's said estates, and all which he retained in his possession, except the tenant's leases of said estates in the county of Kilkenny; and inasmuch as the said John Smithwick, who was the father-in-law of the said Harvey Devereux, was then a creditor of appellant to a large amount on foot of said judgments, and to further secure which he compelled appellant to execute to him a mortgage of said estates [81] in the county of Kilkenny on the same day with said alleged confirmation; and appellant submitted that said deed of the 18th of December 1830 should not be considered a release to the said Harvey Devereux as executor as aforesaid, inasmuch as no account was furnished previous thereto of the dealings between the said Harvey Devereux and the said Sir William Ryves De Montmorency in his lifetime, or on foot of the personal estate of said testator.

That the said Sir William Ryves De Montmorency was entitled to a life estate in certain lands called Kilcreene in the city of Kilkenny, with remainder to William Bayley, esq., and that a large arrear of rent of said lands of Kilcreene was due to the said Sir William at the time of his death from solvent tenants, but the said Harvey Devereux, being also agent to the said William Bayley as well as to the said Sir William, either neglected to receive, or, if he received the rents thereof, never accounted for same to appellant; and that had the said Harvey Devereux used due diligence he might have received the whole of said arrear of rent, and the more especially as the leases of said life estate were in the possession of the said Bayley or Devereux, and both of whom were fully aware of appellant's right thereto.

That the said Harvey Devereux also permitted the said William Bayley to retain a considerable portion of the land called Deckeland, held by the said Sir William Ryves De Montmorency under the corporation of Kilkenny for a long term of years, although the said Harvey Devereux well knew appellant's right thereto; but being the agent of said Bayley he either received himself for his own use, or suffered said Bayley to [82] receive, the rents of said last-mentioned lands since the death of the said Sir William in violation of the trusts reposed in him as the executor appointed by said will.

That having been so advised, he had lately paid off the said Smithwick the amount of said mortgage debt, with the view to his filing his bill to impeach said deeds, and which he could not sooner do under the circumstances therein-before stated.

That so well aware was the said Harvey Devereux of the impeachable nature of said transaction of the 18th of April 1829 that he had not made any claim on foot of said annuity of £200 to be paid him on his being discharged from said agency.

That he had caused various applications to be made to the said Harvey Devereux for all deeds, papers, and writings relating to the property of the said Sir William, and which said Harvey Devereux by said instrument of 18th December 1830 undertook to give up to appellant; and that he also caused application to be made to the said Harvey Devereux to come to an account with appellant on foot of the personal estate and effects of the said Sir William Ryves de Montmorency deceased, and to convey said lands of Cooldrina, otherwise Backweston; with all which applications the said Harvey Devereux had declined to comply.

That the said Harvey Devereux combining, etc. pretended that he had settled all accounts on foot of the rents of said estates or otherwise during the lifetime of said testator, and also as executor of said testator; whereas the said appellant by his said bill charged that the said Harvey Devereux never accounted with the said Sir William in his lifetime, nor with him, save as [83] therein-before mentioned; and the said Harvey Devereux pretended that the said conveyance of said lands of Cooldrina was a good and valid conveyance, and that he was entitled to the benefit thereof, whereas the appellant charged the contrary thereof to be the truth, for the reasons therein-before mentioned.

And it was by the said bill charged, that the said Harvey Devereux at other times pretended that the said Sir William in his lifetime was indebted to said Harvey Devereux in a large sum for costs, and that same formed part of the consideration of such conveyance of said lands of Cooldrina otherwise Backweston; whereas the said appellant charged that Messrs. Aicken and Montgomery were the solicitors and attorneys of the said Sir William in his lifetime, and that the said Harvey Devereux only acted as the attorney of the said Sir William in some trifling local matters; and that it was part of the agreement between the said Sir William and said Harvey Devereux that no charge whatever should be made by said Harvey Devereux for such costs, but that his acting as agent should be considered as compensation for same, and his salary was increased from £100 per annum to £200 per annum on that account.

And it was by the said bill further charged, that notwithstanding said agreement John Maher, who is the partner of the said Harvey Devereux as attorney and solicitor, in or about the 22d of March 1833 furnished a bill of costs, manifestly for business alleged to have been done for the said Sir William in his lifetime, and amounting to the sum of £576 or thereabouts, and afterwards commenced an action against appellant in His Majesty's Court of Exchequer for the [84] recovery of said costs; and said appellant paid unto the said John Maher the sum of £135 in discharge of said costs; and the appellant by his said bill charged that said costs were furnished and paid, and the said action was brought, with the privity and for the benefit of said Harvey Devereux.

And the said appellant further expressly charged, that if any costs were due to the said Harvey Devereux by the said Sir William in his lifetime, that same formed no part whatever of the consideration of said deed of 18th April 1829.

And the said bill prayed for an account of the personal estate of Sir William R. De Montmorency possessed by the respondent, and of all sums received by the respondent belonging to the said Sir William or his estate, during the lifetime of the said Sir William, as his agent, and of said testator's debts and funeral expenses, and for the application thereof; and that the clear residue thereof might be ascertained and paid to appellant; and that it might be declared that the said deed of conveyance of said lands of Cooldrina of the 18th day of April 1829 and said annuity deed were fraudulent and void; and that the said Harvey Devereux might be decreed to reconvey to appellant said lands of Cooldrina otherwise Backweston, and to come to an account of the rents and profits thereof received by the said respondent from the execution of said deed, and to pay over to appellant what should be found due to him upon the taking of such account; and that he might release said annuity; and that said deed of 18th of December 1830 might likewise be declared fraudulent and void so far as same purported to confirm said conveyance of 18th April 1829, or to release the [85] said respondent on foot of the accounts sought by the said suit; and that a receiver might be appointed to collect the rents of said lands of Cooldrina otherwise Backweston pending the suit.

Harvey Devereux by his answer stated, that the deeds were drawn up in conformity with appellant's directions, and were submitted by appellant before their execution to William Mannin, an attorney. He admitted that he gave to appellant no actual pecuniary consideration for the deed, but that in consideration thereof he consented to give up a claim to the amount of about £1600 for costs for business done as an attorney and solicitor for the testator in his lifetime, for which respondent had received no payment, and which he never afterwards claimed or charged in his accounts against appellant as residuary legatee or otherwise; but he denied that appellant was, as by bill most untruly stated, grossly or at all deceived or imposed on in said transaction, or that he was prevailed on to execute a letter by which he was appointed attor-

ney and said conveyance of said lands of Cooldrina, or either of them, by unfair or any other means or practices used by respondent or by any other person, as he believed; and he admitted that he had acted as the attorney and confidential law adviser of Sir William R. De Montmorency in all local matters.

On the 7th of February 1837 the cause came on to be heard, when the Lord Chancellor of Ireland dismissed the bill, without costs. From this decree William De Montmorency appealed.

Mr. Tinney and Mr. Pemberton for the Appellant.—All the accounts cannot be settled; the account between [86] the respondent and the testator from 1821 to 1829, and his account as executor and as agent to the plaintiff, are unsettled, and yet the bill is dismissed. He pretends to a knowledge of a secret which may dispossess the plaintiff of his property, and uses the influence which he obtains from the possession of this secret and his knowledge as an agent for the purpose of inducing the plaintiff to sign a letter by which he appoints him his agent, and to execute a deed by which he gives him part of his estate; and though the plaintiff only succeeded to £2000 a year out of £4700, he receives the same salary as the testator gave him, being at the rate of ten instead of five per cent., and is appointed for life.

The deed cannot stand: it was prepared by the defendant, and executed four days after the death of the testator. It is stated to be in discharge of all accounts between the testator and defendant, as if a balance were due from the testator, the presumption being the other way. Dr. Cullinan must be interested in favour of the defendant, he himself having received a gift from the plaintiff; and he mentions nothing of the settlement of accounts or of the appointment of respondent as agent. The defendant states, that he consented to give up £1600 costs, about which Dr. Cullinan says nothing, nor have they been proved to be due; and defendant states that the deeds were submitted for approval to Mr. Mannin, but he has not examined Mannin as a witness, nor has he proved that they were so submitted. Plaintiff executed the deed under an impression that the testator had enjoined him to do so, and that £1600 was due for costs. There is no attempt to prove either of these circumstances. In 1830 the plaintiff was involved in debt.

[87] The following cases were cited: *The Earl of Chesterfield v. Janssen* (1 Atkins, 354; 2 Vesey, sen. 158), *Crowe v. Ballard* (Brown's C. C. 117), *Murray v. Palmer* (2 Scholes and Lefroy, 486), *Cann v. Cann* (1 Pere Williams, 727), *Cooke v. Settree* (1 Vesey and Beama, 126), *Horlock v. Smith* (2 Milne and Craig, 495), *Waters v. Taylor* (2 Milne and Craig, 526), *Lewis v. Morgan* (4 Dow, 48), *Roche v. O'Brien* (1 Ball and Beatty, 340), *Dunbar v. Tredennick* (2 Ball and Beatty, 317).

Mr. Knight Bruce and Mr. Goldsmid for the Respondent.—This is a bill to open accounts, not alleging any error, or any discovery of any fact not known in 1830; pressure is the only objection stated to the deed of 1830. Defendant alleges that every account and voucher was delivered up in 1830, and yet not one is produced, and no error is alleged, nor is there any ignorance. The letters written by the plaintiff show that he was aware of the transactions; the speech was made in June after the first deed was executed. The defendant dismissed himself from the agency, and has never claimed nor does he now claim the annuity. In all the cases cited as to confirmation there was ignorance and pressure.

Lord Chancellor.—My Lords, this case has occupied so much time in the discussion, and has been discussed at such various intervals, that I have had an opportunity, since it was first opened, of carefully examining the whole of the proceedings and the evidence on each side. As the noble and learned Lord here present concurs with me as to the course your Lordships ought [88] to adopt, there is no advantage in taking any further time to consider the case.

It is very important, considering the order that we shall have to propose to the House, and for the benefit of those who may not be conversant with the proceedings of the courts of equity, as the bar of Ireland are represented as not being, (I believe without any foundation, for I see no ground to suppose that the rules of courts of equity are not attended to there with great fidelity. I believe that the decisions of this House and the rules of courts of equity regulate their proceedings;)—but it is very important that all parties should have their attention called to the various parts of this case, that there may be no misunderstanding as to the grounds upon which this House proceeds in affirming the judgment of the Court below.

The transactions of 1829 are transactions that I cannot hesitate for a moment to say were highly suspicious at least, and such as, without much more explanation of them than has been afforded by the evidence in this case, could not possibly be supported by a court of equity, if a complaint had been made before any acts of confirmation had taken place.

We find that on the 14th of April 1829 the original proprietor of this property died, and we find that so early as the 16th it is stated that a conversation took place, in which the plaintiff stated that he had determined to part with the estate in the way in which he afterwards did; but as early as the 18th, four days only after the death of the original proprietor, we find a deed executed by which an estate, part of the property inherited by the plaintiff, is conveyed over to Mr. Deve[89]-reux, who had been the agent, and who represented that he had also been the confidential law adviser of the testator,—we find that that deed conveyed all the estate in discharge of all accounts which had been pending between the testator and himself.

Now the objections to that are very obvious: in the first place, the great haste with which it was done, and the relative situation of the parties, the one the manager of the property,—perfectly conversant, therefore, with all circumstances connected with the property, and who procures this conveyance to himself. It professes to be as a settlement of all accounts, although it was perfectly impossible, from the nature of the case, and from the circumstances that took place, that there could have been any examination of those accounts.

Then there is another fact, not brought out very distinctly in the evidence, but, as far as the evidence applies to it, giving rise to a strong suspicion of influence of a very improper nature exercised by the defendant over the plaintiff at that time, namely, the supposed possession of a secret by which, according to the representations of the witnesses, he thought he had the power of depriving the plaintiff of his estate;—some secret with regard to the title, which, if revealed, would show that the plaintiff had no title. Now, if that really existed, and if that really was used for the purpose of obtaining the conveyance of the estate, it would be as gross a fraud, and as violent a breach of duty on the part of the agent Devereux, as any thing that can possibly be stated.

The case upon this point stands in a very singular position, and the evidence is of a very extraordinary character. There is no evidence of such a representa[90]-tion having been held out to the plaintiff; the evidence is of a speech made by this agent at a meeting of the tenants and inhabitants of the estate, upon the plaintiff making his entry and taking possession upon the death of the testator. He is there represented as having stated publicly that he was in possession of a secret,—that the heir-at-law would not succeed, who evidently had been making some inquiries, probably with a view of making some claim. The agent is represented as having stated publicly, that he was in possession of a secret by which the plaintiff's title might be defeated, but that that secret he would keep to himself; and that, as he was so fortunate as to succeed in all contests in which he was engaged, no danger could arise to the plaintiff. Now that is stated by witnesses; two witnesses speak to having heard the speech delivered, and another witness speaks to similar expressions having been used at different times.

My Lords, I do not see what possible motive there could be,—none has been suggested at the bar, and I am unable to suggest to myself any possible motive for that declaration. If, indeed, there was no foundation for it, of course, in addition to the objection of its being a falsehood, it was a gratuitous slur upon the title of his employer; because, if there was no objection known to him to the plaintiff's title, one cannot conceive any thing more absurd or injurious to the plaintiff's interest than proclaiming that there was, although nobody was likely to find it out. On the other hand, if he was possessed of this secret, and nobody else knew it, one cannot conceive any folly greater than to say, at a meeting of 500 persons, that there was an objection to the title, leaving all those persons to find it out;—an [91] objection which might probably become known to those who might be affected by the failure of the plaintiff's title. However, there is no distinct evidence of this having been used as a means of obtaining the deed, though there are strong suspicions that it might have been.

Now all these circumstances, although not amounting to positive proof of fraud,



yet are so full of suspicion that, considering the situation in which the parties stood towards each other, and considering the haste with which the deed was prepared and executed, and considering what was stated to have passed, I think, if the transaction had been complained of within a reasonable time no court of equity could have hesitated in setting aside these transactions, unless a very different explanation had been given of them than that which has been afforded in this suit. But, however, it must be observed, that there is no positive evidence of fraud; there is no distinct evidence of misrepresentation, or of influence used by the possession of the secret, although there is very strong suspicion that each of these acts might have been brought to bear; as means of obtaining the deed in question.

All those facts, however, were of course known, or might have been known to the plaintiff himself; and that which appears extremely suspicious upon the face of the transactions as they stand might have been capable of explanation, or there might have been a knowledge of circumstances which would lead those who were acquainted with all the facts to a different conclusion from that to which they might have been led by the mere circumstances of suspicion to which I have alluded; for instance, the plaintiff must have known [92] whether the supposed secret as to his title was or was not used as a means by which the deed of 1829 was obtained. He knew or had the means of knowing, or those whom he employed had the means of knowing, what was the state of the account between the father and Mr. Devereux; and if they did not think proper to use those means in their power, those that suffer by their negligence ought not to be heard to complain.

My Lords, the subsequent transactions are of a character which seem to me to render it perfectly impossible for a court of equity to open the transactions of 1829, if there be such a doctrine in a court of equity as that confirmation will make that valid which in its origin was voidable (though not void) upon grounds for equitable interference.

My Lords, this deed was executed in 1829. It appears that this deed beyond all doubt operates, as long as it stands, as a conclusive settlement of accounts. Whether those accounts were investigated or not, is not material for the purpose, because the deed, so long as it stands, is a conclusion of all question of account anterior to the death of the father: such are the terms of it. It appears that so early as in the month of October 1830,—whether upon the application of the plaintiff, or whether by desire of the defendant, is matter of some doubt upon the evidence,—there was a negotiation going on between the defendant and the then solicitors of the plaintiff. The plaintiff was then represented by Messrs. Montgomery and Aicken; Mr. Maher, being the partner of the defendant, was the party negotiating on his part, and Montgomery and Aicken were the parties negotiating on the part of the plaintiff.

[93] My Lords, it appears that this was not done in haste; there was ample opportunity afforded of making inquiry into all the circumstances that were material to be inquired into as to the transaction of 1829. It appears that the negotiation commenced on the 5th day of October 1830, and the first object was an investigation of the accounts between the defendant and the plaintiff. In the first instance it does not appear that the inquiry was confined to accounts subsequent to the death of the father; there was a general inquiry how matters stood between the plaintiff and the defendant, and it is to be observed that, inasmuch as the plaintiff was residuary legatee of the testator, any item of account as between the defendant and the testator would be immaterial in a final settlement of account between the defendant and the plaintiff; because, whatever the defendant owed to the estate of the testator would, under the circumstances that have taken place, namely, the plaintiff being residuary legatee of the testator, be an item of account between the plaintiff and the defendant.

Now, Mr. Maher tells us, that in the month of October 1830 he, on behalf of the defendant, and Montgomery and Aicken, on the part of the plaintiff, came to this investigation of the accounts; and the letters, which are extremely important, of the 13th of October and the 12th of November 1830, which have been relied upon in reply on behalf of the appellant, appear to me to be extremely important evidence on behalf of the respondent. The first is the letter of the 11th of October, signed "Samuel Aicken," one of the parties acting for the plaintiff: he says, that Mr. Maher, who is the person acting on behalf of the defendant, had not been [94]

able to come to any conclusion with respect to the accounts; these, no doubt, are the accounts between the plaintiff and the defendant, that leave it ambiguous, except that the accounts had been the subject of discussion between Aicken and Maher.

Then, on the 13th of October, the same person writes to the defendant himself, in which, after alluding to another matter with regard to the mortgage, he says, "Bring up with you the conveyance of the Cooldrina estates, in which, it is said, is embodied a general release as between you and the present Mr. De Montmorency. I pray of you by no means to omit bringing up this deed, and in a word all such other deeds, papers, and documents as relate to the accounts which I think (as I heretofore mentioned) may be yet amicably and happily settled; on which occasion my honourable, honest, and kind offers shall not be wanting."

Now, that of course accordingly must have been done; there is no evidence of its being done, but he asks for information, and we must assume that the deeds relating to the Cooldrina estate were produced, which it had become material, in the investigation of the account between the plaintiff and the defendant, should be brought up, in order that Mr. Aicken, acting on behalf of the plaintiff, might see how far it was material in that settlement of account which he was making on behalf of the plaintiff, and which settlement of account necessarily depended upon the state of the accounts between the defendant and the estate of the plaintiff's father. This, therefore, proves that the attention of the legal advisers of the plaintiff was distinctly called to that [95] deed, which deed is material for the present purpose, as it operates as a settlement of account up to the death of the father.

Now, it appears from the evidence of Mr. Montgomery that the account subsequently investigated was confined to the transactions after the death of the father. It naturally would be so, unless those who were then advising the plaintiff thought that there was a case for setting aside the transactions of 1829; because, from the fact of the transaction of 1829 barring all inquiry as to the antecedent accounts, if they had thought there was a case in which it was the interest of their client to open the accounts antecedent to 1829, then was the time, when it was their bounden duty to inquire into the transaction of 1829; and if they thought there was any case which justified them in advising the plaintiff to question those transactions, that was the period when proceedings ought to have been instituted for carrying that object into effect. Instead of which, being furnished with a deed that closed the transactions up to the death of the plaintiff's father, his legal advisers, with full knowledge of that deed of 1829, proceed to investigate the accounts subsequent to the death of the father, making no inquiry, as far as appears, as to the antecedent accounts as between the plaintiff and the defendant. It cannot be supposed that they were so negligent of their duty, or so inattentive to the interests of their client, that they did not inform themselves what the history of that transaction was, and what the nature of that account was. It was their bounden duty to do so, and we may presume that they did so. It is due to professional men to suppose that they did attend to the interests of their client, and that they satisfied themselves [96] that what they were doing for their client was what it was for his interest to do.

Then, in the subsequent history of these transactions Mr. Montgomery, acting for the plaintiff, goes on, and a laborious investigation of the subsequent accounts takes place. He then tells us, that, finding this extremely troublesome, and that it would occupy a considerable time, he said, "If you strike off £500 from the accounts, that will leave £2700 due from the plaintiff to Mr. Devereux; that it shall be taken as the final balance." That is accepted; and I assume, as there is nothing else to which it could refer, that that is the proposal referred to in exhibit M.,—a letter written by Mr. Aicken, in which he says, "I am authorized to say, that as Mr. Devereux has agreed not to bring forward or make any charge against Mr. De Montmorency for any money transactions or dealings which were had or took place between Mr. Devereux and the late Sir William, and that same shall be for ever done away with, that he, Mr. De Montmorency, will accede to the arrangement proposed this morning." Whether this refers to that proposition of Mr. Montgomery or any other, is not material. The subsequent account, it is admitted on all hands, is not matter of contest in this suit, but a certain sum was agreed upon as the final balance due from the plaintiff to Mr. Devereux; upon the assumption that the deed of 1829 operated as

a final conclusion between the parties as to all transactions anterior to the death of the father.

My Lords, accordingly a deed was prepared, and we have the draft; and the draft of the deed, in conformity with that which had been settled, states, "That all [97] accounts of whatsoever nature or kind heretofore or now pending between them in relation to any dealings whatsoever have been and are now finally settled, as well those relating to such dealings or transactions as took place between the said Harvey Devereux and the late Sir William De Montmorency baronet, as those between said Harvey Devereux and said William De Montmorency; and that for peace sake, as well as to avoid litigation and expense, said William De Montmorency has agreed to secure to the said Harvey Devereux the principal sum of £2700, in full for the balance due on said accounts, by two bonds."

This is in October 1830, when there had been ample time to review the transactions of the preceding year, when there was no haste in the conclusion of the transaction, when the plaintiff had the advice of the professional persons whose names I have mentioned, when their attention had been drawn to the transaction of 1829; and, assuming they were not parties to any conspiracy against their client, which is not suggested, but that they were doing their duty towards the person on whose behalf they were acting, they had deliberately come to a ratification of that which had taken place in the preceding year, and Mr. Montgomery approves of that draft on behalf of his client. He therefore tells his client by that approval, I have done my duty towards you; I have investigated all the transactions which concern the account between yourself and Mr. Devereux, which necessarily included the transactions of the period anterior to the death of the father, as well as those subsequent; I approve of this draft on your behalf, and I, as your legal adviser, sanction your [98] executing that deed, which upon the face of it recites a settlement of all accounts, as well those anterior to the death of the father as subsequent.

Now, my Lords, if the transaction were actually void in itself, there can be no confirmation of a transaction void in itself. But a transaction voidable only from circumstances of suspicion, however strong, may undoubtedly be confirmed by a subsequent deliberate act of the party who might originally probably have succeeded in having it declared void. It was subsequently investigated; it was subsequently considered by the party's professional advisers, and with their assistance, and with all due deliberation, he came to the conclusion that it ought to be confirmed.

Now, that deed contains a confirmation in terms of the conveyance of Cooldrina; it is necessarily part of the transaction to confirm the agreement. At the same time it must be observed, that it is introduced in this deed as an exception from the undertaking to convey other estates. The defendant, being trustee of the estates, upon this final settlement for the cestuique trust having claimed security for what he conceived to be due to him, he undertakes to denude himself of the trust, and to put into possession of the legal title that cestuique trust for whom he held the legal estates; and he therefore covenants to convey the estate, excepting that estate of Cooldrina, and he agrees to give up the deeds, except the deeds of Cooldrina. It is not, therefore, foisted into the deed merely for the purpose of confirmation, but it is a necessary exception out of that covenant which the defendant was necessarily called upon to execute when he came to the final settlement between himself and the plaintiff. But there is not [99] only a settlement of the accounts anterior to the father's death, but the conveyance of the estate is now proved to be brought under the attention of the plaintiff's legal advisers, and with their concurrence and with their advice he confirms it.

My Lords, it would be extremely difficult under these circumstances, if nothing more had taken place, unless he had said, you Messrs. Montgomery and Aicken have conspired with the defendant, and you have imposed upon me, and induced me to execute this deed in confirmation of a prior transaction. If that had been the case he had attempted to make, one could have understood it; but how, with the concurrence of Messrs. Montgomery and Aicken,—how, coming forward with them and employing them as his legal advisers, he can repudiate this deed of 1830, has appeared to me from the first to be a matter which involved the plaintiff in a difficulty that was perfectly insurmountable.

But there is another circumstance which proves that this was not done behind the back of the plaintiff, or without his knowledge and concurrence, but that he was

perfectly privy to what was going on under the immediate direction, no doubt, of his legal advisers,—but at the same time communicated to him, and his concurrence asked, and that is the tenor of the subsequent letters. It is not that any letters subsequently written can add to the validity of a transaction formerly entered into, as in that deed of 1830, but the value of these subsequent letters is, to show that the plaintiff clearly understood what he had done, and that for a considerable time after that period he never questioned the propriety of the transactions into which he had [100] entered. On the 10th of November 1831 he is called upon, (it being part of the transaction of 1830 that Mr. Devereux had brought certain debts to account in his transactions with the testator,) he was called upon to show that such investigation of those transactions had taken place as exonerated him from being liable to the payment of those debts. There were certain debts excepted, which he had not taken credit for, and other debts he had taken credit for, and was bound to see to the payment of them.

There is a letter of the 16th of November written by himself to the defendant, in terms not of hostility, but the contrary, and so far consistent with the case made by the appellant; and in this letter of the 16th of November 1831, which he addresses "Dear Harvey," he states that he has been called upon to pay a debt, and he states, "By the deed executed between you and me you undertook the payment of all debts due of my late father, except certain debts in and on the back of the said deed excepted." Therefore he tells him that he Devereux was to be looked to, and not the plaintiff, for the payment of that debt. Now, after this can it be said that he did not know what he had done, or that knowing what he had done he had no intention of confirming it?

The next letter is also undoubtedly open to the observation which has been made upon it; it may have arisen from the continued pressure of Mr. Devereux upon the plaintiff, but there is no such thing proved at that time. That letter in terms recognizes the transaction, but it also proves this,—indeed it is apparent upon the face of the whole transaction,—that it was not merely in consideration of the balance supposed to be [101] due at the time of the father's death, but that it was partly on account of the settlement of the accounts, and partly stated to be in consideration of a wish which the plaintiff's father had expressed that he would convey to Devereux the estate in question. He says, "some evil-minded person has told you lately that I repented giving you Cooldrina. I can assure you I never did say so; no, neither did I ever repent giving it to you, and whoever told you so told you a great falsehood."

My Lords, that brings it down to October 1832. Then there is a transaction which has been adverted to, and which is in evidence, of a later date, namely, the transaction of April 1833; because here we find the plaintiff and the defendant in opposition to each other. Mr. Maher, the partner of Mr. Devereux, brings an action for a bill of costs. That is not a very friendly proceeding, and it was not likely, therefore, that under those circumstances there should be any very kindly feeling between the parties; nor was it very likely that the plaintiff should be then acting in what he did under any influence of fear as to what the defendant might do with regard to the title of the estate. It might have been a very improper proceeding, and certainly was a very improper proceeding on the part of the plaintiffs in the action, because they were then claiming costs due to them from the plaintiff's father which had been the subject of arrangement long before, and their title to which they had deliberately relinquished. But who is it that sets up the benefit of the settlement of 1829? Why, the plaintiff himself. He says, You are calling upon me to pay costs, which costs by the transaction of 1829 you have waived all title to. He is the party who [102] in 1833 was claiming the benefit of this arrangement. Whatever ambiguity there may be in the language of Mr. Maher's deposition, the result, as I understand it, is, that the plaintiff, then the defendant, set up this defence, and got the benefit of this defence, and he was accordingly protected from all costs incurred in the lifetime of the plaintiff's father, and due from the plaintiff's father to Mr. Devereux and Mr. Maher. Whatever costs there might be due to Mr. Maher individually, is not the subject of the claim of Mr. Devereux, but that, so far as regarded the costs due to the partnership of Devereux and Maher, the plaintiff got the benefit of that defence. Having set up the arrangement of 1829, which he now impeaches, he got the benefit of it, and was relieved from

the costs incurred in the lifetime of his father. That took place in 1833, and nothing more is heard of this complaint of the transaction of 1829 until a bill is filed in 1835.

My Lords, having gone through the history of this transaction, and shortly called your attention to the periods at which the circumstances of the case must have been matter of investigation by the plaintiff, and the mode in which upon those occasions he has dealt with these facts, showing that, in 1829, in every subsequent transaction he has recognized what had taken place, that he has confirmed it, and acted upon it in the years 1831, 1832, and 1833, and never complained of it till 1835; it appears to me that, although the transaction was questionable in its origin and suspicious in its commencement, it is not now capable of being complained of; that, therefore, it will be the duty of your Lordships to confirm the decision of the Court below.

[103] My Lords, the Court below dismissed the bill without costs; and I think they did right, because, however transactions may be confirmed, if they have their origin in circumstances so suspicious, as between a client and a solicitor, as these transactions were in their origin, I think that if the solicitor or agent ultimately escapes, by confirmation on the part of his client, in preventing those transactions being entirely set aside, he never can complain of being put to the cost of having those transactions investigated. The same ground, therefore, which induces me to think that the Court below did right in dismissing the bill without costs, induces me to submit to your Lordships that this decree should be affirmed, but that it should be affirmed without costs.

There is one other part of the case to which I wish to call the attention of the counsel for the appellant, which is, to that letter undertaking to pay a salary of £200 a year. It does not appear that that now is of any value to the parties. Whatever, therefore, your Lordships may think right to do with reference to that letter would not make any difference as to the costs; at the same time it is a contract which, under these circumstances, undoubtedly ought never to have been taken. It appears to have been left in the hands of Mr. Devereux; and, if the plaintiff therefore requires it, I will submit to your Lordships that the decree should direct the document to be delivered up. It can make no difference as to the costs below or as to the costs here.

Lord Wynford.—My noble and learned friend has gone so fully into this case that it is scarcely necessary for me to say more than that I concur with him. I will, however, trouble your Lordships with one or two [104] observations. There is no dispute here as to any question of law. There is no doubt that the transaction did not render the deed altogether void, but merely voidable, and being voidable it may certainly be confirmed by what took place afterwards. If the deed of 1829 was executed (which probably there may be some reason to suspect) under the supposition that the defendant was in possession of some secret which he might use for the purpose of defeating the plaintiff's title to the estate, a fear of that sort, arising from a threat on the part of the defendant, would invalidate any transaction that took place under the influence of that fear. I would state, however, that there is no evidence of any threat on the part of the defendant to make use of any knowledge which he might possess for the purpose of injuring the plaintiff; on the contrary, it is admitted on all sides that, although it is said by some of the witnesses that he boasted that he was in possession of this secret, he uniformly said that he would keep it within his own breast, and that he would never use it to injure the plaintiff.

My noble and learned friend has stated, that upon another occasion, besides what took place at the bonfire meeting, he alluded to this secret. What he said at the bonfire meeting is, as it is represented on the part of the plaintiff, very extraordinary, and it is scarcely possible to believe that it can be true. It is material to observe that the defendant gives a very different account of what he said at the bonfire meeting. On the part of the plaintiff it is stated, that the defendant said he could at any time, by disclosing the secret, defeat the plaintiff's title. What could possibly have induced him to say any such thing one cannot conceive, but, according to his own account, what he did say [105] was very different from what he is represented to have said by the evidence given on the part of the plaintiff, for he states in his answer that what he did say was: that it would be useless for my Lord Crofton to bring forward his claim as heir-at-law, as he was in a condition to

disprove that claim. Now, if he said that, certainly it was sufficient to produce the effect which he says he intended to produce, to prevail upon the tenants of this estate not to be frightened at any claim set up by Lord Crofton. But notwithstanding this, unquestionably what my noble and learned friend has said is very true, that on the very day of the funeral of Sir William De Montmorency something at least very indelicate was said on the part of the plaintiff, if not exciting very great suspicion. in this affair, of his endeavouring to get possession of this estate conveyed to him, and also as himself being the attorney who was to prepare the deed himself, and writing that very extraordinary letter, by which £200 a year was to be secured to himself; and I quite agree with my noble and learned friend that if proceedings had been instituted to set aside this deed,—the deed which followed upon that conveyance,—it seems to me impossible that that deed or that that letter securing £200 a year could possibly have stood. Therefore I say, if the transaction had ended with the deed executed in 1829, it appears to me it could have been set aside. But the question is, has that deed which was only voidable, been confirmed by that which has subsequently occurred? Now, the deed of 1830 is certainly a direct confirmation of it, as strong confirmation as it is possible to be. In that deed it is stipulated that all securities belonging to Sir William's property should be delivered up, except the deeds relating to the estate [106] of Cooldrina. Why were they not delivered up? Because the estate of Cooldrina by the deed of 1829 had been conveyed by the plaintiff to the defendant. It would, therefore, have been improper to deliver up those deeds, because those deeds were the muniments of the property which had by the previous transaction, so confirmed by this, become the property of the plaintiff. But that is not all: then follow two letters in 1831 and 1832, and the subsequent transaction in 1833. By the first of those letters in 1831 he claims to take advantage of this very deed, which he now attempts to set aside; and then in the second letter in 1832 he says, he never since the execution of the deed of 1829 had said one word to the effect that that deed had been improperly obtained; quite the contrary, he never thought of it, and that that man must have spoken falsely who had ever conveyed to the mind of the defendant the idea that he ever thought that deed void.

Now, it strikes me, that, supposing an undue impression to be excited in a man's mind, it is often difficult to prove the precise time when that improper impression was got rid of. But a circumstance had taken place, before the writing of either of these letters, which clearly showed that that impression must have been got rid of before that time; both these parties were desirous of putting an end to the connexion with regard to the agency of the estates. Now, if that impression had continued in the mind of the plaintiff, that the defendant was in a condition to take that estate from him, or to enable any one to take that estate from him, whenever he thought proper, would he not, upon any terms whatever, have kept this person still in his employment? But it appears that the one was desirous of quitting [107] the employment, and that the employer was desirous of getting rid of him. Now, this clearly shows that all fear on the part of the plaintiff must have been got rid of at that time. Yet after this he writes the two letters which your Lordships have heard; therefore, whatever suspicion there may be with respect to that which took place in 1830, as to the continuance of this fear as to the title to the estate, it is clear that that impression must have been got rid of before the writing of either of the letters in 1831 or 1832, for before either of those letters was written all connexion whatever had been terminated between the plaintiff and the defendant.

But, I must say, with respect to the deed of 1830, it seems to me, that if that deed were to be set aside, as was very properly said by one of the counsel at the bar, I do not know what deed is to stand. There is no particular error pointed out; matters were investigated before this deed was executed; there was no want of legal assistance; it seems to me, on the contrary, that if there was any thing to complain of, there were rather too many present; there were a great number of attorneys present, some concerned for one party, and some concerned for another; and it is positively sworn that all parts of the transaction were minutely and thoroughly investigated before the deed was executed. It appears to me that if this were to be set aside, no transaction which takes place between man and man could be considered as final. but parties must be for ever exposed to have transactions ripped up in a court of

equity, if these accounts are not to be considered as void, closed under this agreement which took place in 1829.

[108] I therefore, my Lords, agree with my noble and learned friend, that the decree of the Lord Chancellor of Ireland in every part ought to be affirmed. It is undoubtedly the practice, that where an appeal is made against a decree, and the judgment of the court below is affirmed, that appeal ought to be dismissed with costs; but I think, with my noble and learned friend, that this case forms an exception to that general rule,—that there is so much to blame in the conduct of this defendant, in the beginning and up to the year 1829, that the plaintiff was fully justified in appealing to the Court of Chancery in Ireland, and even in coming to this House, to have the matter thoroughly investigated. Under these circumstances it appears to me, that it would be hard and unjust to visit such a plaintiff, who is acting under such circumstances, with costs. I therefore concur with my noble and learned friend, in thinking that this appeal should be dismissed without costs.

With respect to that instrument to which reference has been made, undoubtedly it ought to be given up, though it was distinctly stated, as understood on both sides at the bar, that that instrument, wretched instrument as it is, was not intended to be carried into execution. I am glad that the party had so much modesty and moderation as never to attempt to carry it into execution; it never has been executed; nothing has been attempted to be obtained upon it, but the party is afraid that there may be bounds to that moderation, and that the period may come when he may be in danger of being called upon for the payment of that sum of £200 per annum; and it is certainly extremely proper that he should have full security against any danger of that sort.

[109] Mr. Tinney.—If your Lordships please, we would have an order to deliver up that instrument; I dare say the parties will give it us.

Mr. Goldamid.—If it is in our possession. We do not know that it is.

Lord Chancellor.—The decree will be varied by directing the letter of April 1829 to be delivered up, and the rest of the bill to be dismissed, without costs.

It is ordered, That the said decree be varied by directing that the letter of the appellant to the respondent, referred to in the proceedings in this appeal, and dated the 18th of April 1829, be delivered up by the respondent to the appellant, and that in all other respects the said decree be affirmed.

#### [110] FROM THE COURT OF CHANCERY, IRELAND.

DUDLEY PERSSE Esquire and FRANCES PERSSE otherwise BARRY his Wife,  
DUDLEY PERSSE the younger, KATHERINE HENRIETTA PERSSE,  
MARIA PERSSE, RICHARD DUDLEY PERSSE, and ELIZABETH PERSSE,  
Infants, by the said DUDLEY PERSSE, their Father and next Friend,—  
*Appellants*; ROBERT PERSSE, ROBERT HENRY PERSSE, the Honourable  
JOHN PRENDERGAST VEREKER, JAMES LAMBERT, Sir JOHN BURKE,  
ANTHONY RICHARD BLAKE, JOHN MARTYN, and the Earl of ROSSE,—  
*Respondents* [13th, 17th, 18th, and 20th February, and 7th May, 1840].

[*Mews' Dig.* iii. 212, 2025; vi. 802; xii. 833; xiv. 357. S.C. 7 Cl. and F. 279; 4 Jur. 358; and see 5 H.L.C. 671; 2 Jur. (N.S.), 551; 4 W.R. 629. As to consideration (7 Cl. and F. 316, 317), see *Scott v. Scott*, 1854, 4 H.L.C. 1076; *Williams v. Williams*, 1865, L.R. 2 Ch. 294. As to family arrangements, see notes to *Stapilton v. Stapilton*, 1 Wh. and T.L.C. 223; and *Hoghton v. Houghton*, 1852, 15 Beav. 300.]

It is not competent for a defendant, failing in the defence made, by his answer to set up another defence dependent upon matters of fact not put in issue by his answer, and which the plaintiff has no opportunity of disproving or explaining.

Robert Persse being heir presumptive to R. P. Persse, who was then supposed to be a lunatic, and being under an apprehension that unfair means might be resorted to, in the then state of mind of R. P. Persse, to deprive the family of the succession to the estate, agrees with his eldest son, "Dudley Persse, that D. Persse should sue out a commission of lunacy against R. P. Persse, and carry on such other suits and law proceedings as should be [111] necessary, in the name of Robert Persse, at the expense of Dudley Persse; in consideration of which agreement, and natural love and affection, R. Persse covenants that after the death of R. P. Persse the estates which should thereupon descend to him should be conveyed to himself for life, remainder to his son for life, with remainder to his first and other sons in tail male. The son, at his own expense, and in the name of his father, sued out the commission under which R. P. Persse is found a lunatic, who soon afterwards dies; whereupon the father succeeds as heir to the lunatic's estates. Upon a bill filed by the son to carry into effect this agreement, specific performance decreed, and held that the agreement was not voluntary, void for champerty or maintenance, or illegal, either for want of mutuality, or as being a fraud upon the great seal in lunacy; and considering the ages and situations of the parties, the father being sixty-two and the lunatic forty, and the objects to be gained by the prosecution of the commission of lunacy, that the consideration for the deed was not inadequate; but that deeds for carrying into effect family arrangements are exempt from the rules which affect other deeds, the consideration being composed partly of value and partly of love and affection.

The respondent, Robert Persse, being tenant for life of the Roxburgh estate, situate in the county of Galway, with remainder to his eldest son, the appellant Dudley Persse, in tail, by settlement of the 1st May 1823, conveyed the same to Dudley Persse in fee, subject to an annuity of £800 payable for his own life, the payment of his debts amounting to £17,000, and to a charge of £6000 for portions for his younger children. The yearly value of the Roxburgh estate was about £4500, and the consideration for the deed was fixed by the stamp office at the sum of £29,250.

[112] By settlement dated the 11th of November 1826, and made in contemplation of a marriage, which was afterwards had, between Dudley Persse and Katherine O'Grady, the daughter of the Chief Baron of the Court of Exchequer in Ireland, Dudley Persse, being seised in fee of the Roxburgh estate under recoveries suffered in pursuance of the deed of 1823, conveyed the same to trustees, (subject, in common with several other lands, to the annuity of £800,) to Dudley Persse for life, with remainder to trustees to preserve contingent remainders, and after providing an annuity by way of jointure for Katherine O'Grady, and £10,000 for the portions of younger children, to the first and other sons of the said Dudley Persse in tail male.

In 1827 the respondent Robert Persse, being then of the age of sixty-five, was heir presumptive to Robert Parsons Persse, then of the age of forty; and in the event of Robert Parsons Persse surviving the respondent Robert Persse, the appellant Dudley Persse would have been the presumptive heir of Robert Parsons Persse. Robert Parsons Persse, who was then supposed to be a lunatic, was seised in fee of the Castleboy estate in the county of Galway, which was of the value of about £2000 a year. Apprehensions being at that time entertained that unfair means might be resorted to, by persons taking advantage of the state of mind of Robert Parsons Persse, for the purpose of depriving the family of the succession to the Castleboy estate, and the respondent Robert Persse having expressed a wish that the Castleboy estate, which had formerly belonged to his family, should be re-annexed to the Roxburgh estate, it was agreed between the appellant Dudley [113] Persse and the respondent Robert Persse, that a commission of lunacy should be sued out against Robert Parsons Persse, in the name of Robert Persse, at the cost and expense of Dudley Persse. Robert Persse had been a bankrupt, and had not the necessary means for prosecuting the commission. Under these circumstances a deed, of the 8th day of December 1827, was executed by Robert Persse of the one part and Dudley Persse of the other part, whereby, after reciting that Robert Persse would, after the decease of the said Robert Parsons Persse intestate and without issue, be entitled to the remainder or reversion in fee simple of the Castleboy estate, as heir-at-law to the said Robert Parsons Persse,



and that the appellant Dudley Persse had agreed, at the request of his father, to sue out a commission of lunacy against Robert Parsons Persse, and to institute and carry on such other suits and law proceedings as should thereafter become necessary, in the name of the said Robert Persse, if necessary, and at the sole and entire expenses and charges of him the said Dudley Persse; It was by the said indenture witnessed, that in pursuance and execution of the said agreement, and for and in consideration of the natural love and affection which Robert Persse bore to his son Dudley Persse, and in further consideration of the sum of 10s. to Robert Persse paid by Dudley Persse, Robert Persse did for himself, his heirs and assigns, covenant and agree with the appellant Dudley Persse, his heirs and assigns, that from and after the decease of the said Robert Parsons Persse the Castleboy estate should be conveyed and vested in Robert Persse for life, and from and after his decease be conveyed for the same [114] uses, estates, and limitations as the Roxburgh estate stood settled; and there was a covenant upon the part of Robert Persse for further assurance.

On the 22d April 1828 Dudley Persse at his own expense caused a commission of lunacy, upon the petition of Robert Persse, to be sued out against Robert Parsons Persse, who, after an inquiry which lasted fifteen days, was found a lunatic. On the 25th of October 1829 Robert Parsons Persse died, and an ejectment being brought by a person claiming under the will of the lunatic, the jury upon the trial found a verdict against the claim set up by the will; and thereupon Robert Persse entered into the possession of the Castleboy estate, which had descended to him by the death of Robert Parsons Persse. Dudley Persse, independent of what was allowed him out of the lunatic's estate for the costs incurred in the lunacy, paid the sum of £295.

In the year 1829 Katherine Persse, the wife of Dudley Persse, died, leaving the appellants, Dudley Persse the younger, Katherine Henrietta Persse, and Maria Persse, the children of the marriage between herself and Dudley Persse.

By indenture of the 9th day of June 1830, executed by Robert Persse of the first part, the respondent, the Earl of Rosse, of the second part, and the respondent Robert Henry Persse, the second son of the said Robert Persse, of the third part, after reciting that Robert Persse was seised in fee simple in possession of the estate of Castleboy, and reciting that the said respondent Robert Persse did, by indenture bearing date on or about the 1st day of May 1823, fully and sufficiently provide for and advance his eldest son, the [115] appellant Dudley Persse, and that Robert Persse was desirous of settling the remainder in fee of the Castleboy estate on Robert Henry Persse, his second son, on the terms therein-after specified, and to vest in possession on the demise of him, Robert Persse; and Robert Henry Persse agreed to purchase the same on such terms as were therein-after expressed; it was witnessed, that in pursuance of the agreement, and in consideration of £16,000 sterling to him, the said respondent Robert Persse, secured by the bond, with warrant of attorney for confessing judgment thereon, of Robert Henry Persse, bearing equal date therewith, Robert Persse conveyed the Castleboy estate to the Earl of Rosse and his heirs for ever, upon trust for Robert Persse for life, and after his decease in trust for Robert Henry Persse, his heirs and assigns for ever; and reciting, that the said sum of £16,000, so secured by the said bond and warrant of Robert Henry Persse, was thereby made payable to the executors, administrators, or assigns of Robert Persse on the expiration of twelve months after Robert Henry Persse, his heirs or assigns, should have been put into the actual and lawful and peaceable possession of the said lands and premises thereby conveyed and assured, with interest thereon at the rate of £5 per cent. per annum from the day of the death of Robert Persse, it was thereby further agreed between Robert Henry Persse and Robert Persse, that Robert Henry Persse would, on the expiration of twelve months from the day when he should obtain the actual possession of the said lands and premises thereby conveyed, pay unto Robert Persse, his executors, administrators, or assigns, the said sum of £16,000, and in the meantime would pay to Robert [116] Persse, his executors, administrators, and assigns, interest upon the said sum of £16,000 at the rate of £5 per cent. per annum from the day of the death of Robert Persse.

By a marriage settlement dated the 15th of July 1833, and made in contemplation of a marriage which was afterwards had between the appellant Dudley Persse and Frances Barry, Dudley Persse, in consideration of the marriage portion of the said Frances Barry, amounting to upwards of £20,000, conveyed the reversion in fee expectant upon the determination of the estate in tail male, limited to the first and

other sons of Dudley Persse by his first wife, Katherine O'Grady, by the settlement of the 11th of November 1826, in the Roxburgh estate, to trustees for 1000 years, for raising portions for the younger children of the marriage, and subject thereto to the appellant Dudley Persse for life, with remainder to the first and other sons of the marriage in strict settlement; and he covenanted, when he should become possessed of the Castleboy estate, to settle it to the same uses as he had settled the Roxburgh estate.

On 19th June 1835 the appellants, with the exception of the appellant Elizabeth Persse, who was afterwards made a plaintiff by amendment, filed their original bill in this cause, stating to the effect before mentioned, and stating that the said Robert Persse and Robert Henry Persse had cut a great deal of timber, both ornamental and otherwise, upon the Castleboy estate, and had ploughed up and burnt part of the estate; and praying that the indenture of the 9th day of June 1830 might be declared fraudulent and void, and might be brought into court and cancelled; and that [117] the respondents Robert Persse, and Robert Henry Persse, and the said Earl of Rosse might, in pursuance of the covenant of the respondent Robert Persse in the indenture of the 8th day of December 1827, be compelled by the decree of the Court to convey the Castleboy estate to and for the several uses and trusts specified and mentioned in the settlements of the 11th day of November 1826 and 15th day of July 1833, so far as the same were then capable of being effectuated; and that Robert Persse and Robert Henry Persse might be restrained by the order and injunction of the Court from cutting down any timber or other trees upon the said premises of Castleboy, or from burning any of the land, or from committing any other waste on the said Castleboy estate; and that an account might be taken of the waste committed by the said respondents Robert Persse and Robert Henry Persse, or either of them, on the Castleboy estate, and the value thereof ascertained, and that the sum due on the said account might be paid into court, and invested or otherwise disposed of, according to the rights of the parties thereto.

The respondent Robert Persse by his answers stated, that Dudley Persse had withheld the payment of the annuity provided by the deed of the 11th November 1826, and suffered a large arrear to become due, whereby he became embarrassed, and that Dudley Persse had withheld the payment of the annuity in order that, by taking advantage of Robert Persse's distress, he might carry into effect certain plans which he had formed as to extorting from Robert Persse his expectancy in the Castleboy estate; that he had executed the deed of the 8th December 1827 without being aware of its nature and effect; that he never intended to convey his expectancy in the Castleboy estate, but he only intended by the execution of the deed to charge the estates with the expense of prosecuting the commission of lunacy; that he was induced to execute the same by fraud and misrepresentation of the object of the deed, and without having received any valuable consideration, and that the same, being a voluntary agreement, ought not to be binding upon him; and he stated that Charles O'Connor, who prepared the deed, was not then or upon any previous occasion his solicitor, and that he executed the same without any professional advice.

On the part of the plaintiff it was proved that Charles O'Connor was the solicitor of Dudley Persse, and that he had suggested to Dudley Persse the necessity of suing out a commission of lunacy against Robert Parsons Persse, in order to save the estate to the family; and that, in consequence of communications conveyed by Charles O'Connor from Dudley Persse to his father on the 3d of December 1827, Robert Persse and Dudley Persse went to the house of Charles O'Connor in Dublin, when Charles O'Connor took down in writing Robert Persse's instructions, whereby he agreed to convey to Dudley Persse his expectancy in the estate of Castleboy in consideration of love and affection, reserving a life interest in the estate, and that Dudley Persse should have full power to proceed in his name in suing out the commission of lunacy.

These instructions were submitted to counsel as instructions for the preparation of the deed; the counsel wrote at the foot of the paper the words following:—

"I have not made Mr. Robert Persse's estate for life free from impeachment of waste, nor given him a leasing power, not being so instructed."

[119] The draft of the deed of 8th December 1827 on behalf of Dudley Persse was laid by Charles O'Connor before Waller O'Grady, a barrister, and brother-in-law of the appellant Dudley Persse, for his perusal and amendment, the instructions for

which purpose were written in the fold of the draft, and at the foot thereof were written, in the handwriting of Charles O'Connor, the words

“Quere { leasing powers?”  
          { impeachment of waste?”

Mr. Waller O'Grady introduced into the draft a recital of an agreement between Robert Persse and Dudley Persse, that Dudley Persse should sue out a commission of lunacy against Robert Parsons Persse, and carry on such suits and legal proceedings as should be necessary for the protection of the person and property of Robert Parsons Persse, at the sole cost and expense of Dudley Persse; and altered the draft by making Dudley Persse tenant for life, instead of tenant in fee.

A draft of the deed was afterwards submitted to Mr. Serjeant Blackburne by Charles O'Connor on behalf of Robert Persse, and appeared to be a copy of the draft as altered by Mr. Waller O'Grady, with the same instructions in the fold, except that the queries as to giving the respondent Robert Persse a leasing power and rendering him dispunishable of waste were omitted. Mr. Blackburne altered the draft, by making it a deed of covenant instead of an actual conveyance.

In the draft as settled by Mr. Serjeant Blackburne there remained in the covenant against incumbrances an exception as to leases to be made by Robert Persse; [120] Mr. Waller O'Grady, after the draft had been so settled by Mr. Serjeant Blackburne, struck out the exception as to leases to be made by Robert Persse, and made the following observation in the margin:—

“As the object is very much to unite the two demesnes of Roxburgh and Castleboy, it is not intended that either party should have leasing powers.

“W. O'G.”

It was proved that the deed of the 8th December 1827 was, on the day of its date, executed by Robert Persse at Lord Guillamore's house in Dublin, and though Lord Guillamore was not actually present at the execution of the deed he was frequently in the room when the parties had met for that purpose; and Robert Persse, after the execution of the deed, delivered the deed which was in his possession to Lord Guillamore, saying, that the younger branches of his family, when they had found he had executed the deed, would annoy him on the subject, and that therefore he wished Lord Guillamore to take care of it, and not to deliver up the deed though he wrote for it, unless he came in person.

It was proved that, in the month of December 1827, Robert Persse had declared that the Roxburgh and Castleboy estates should never be separated, and that for that purpose he had executed a deed to his son Dudley. It was likewise proved, that Robert Persse, upon being asked whether he intended by the deed of 1827 to make any further provision for his younger children, stated, that he did not intend to make any such provision by that deed. It was proved also, that a great quantity of timber on the estate had been cut [121] down, and a great quantity of ancient meadow broken up and set in con-acre.

One of the defendants' witnesses, James Blakeney, deposed, that his father was law agent to the respondent Robert Persse up to 1823 or 1824, and that his father was succeeded (as he believed) in the law agency to Robert Persse by Charles O'Connor; and Robert Persse wrote two letters to Charles O'Connor, dated the 3d of February and 10th of April 1828, in the first of which he states, “That his cook had been served with a paper on the 1st instant, and he supposed that a similar one was served on Dudley;” in the second he states, that “Burton Persse's man is on the lands this day, directing all the meadow lands to be cleared of the stock, and fenced up. Is it possible that he can hold over the lands, and his lease expired at the death of Robert Parsons Persse? What is the Chancellor doing? Surely it is time for him to declare who is to be the owner of the property? By Barton being allowed to hold over the lands and cut the meadows, it will take 500 guineas out of the pocket of the heir-at-law. Let me hear from you if you have any thing pleasant to communicate in my cause.” And it was proved on the part of Robert Persse that he was during the years 1826, 1827, and 1828 in want of money and in embarrassed circumstances.

The cause came on to be heard before the Lord Chancellor of Ireland on the 7th day of February 1837, when his Lordship decreed, as to so much of the appellants' amended bill as related to the subject of waste, that the same be dismissed, with costs;

and that as to the remainder of the said original and amended bills, that the same be dismissed, without costs; and that as to the [122] draft deeds, that the same be deposited with the registrar, with liberty for all parties to inspect the same. And it was ordered, that the defendants, the Earl of Rosse, Sir John Burke, John Martyn, James Lambert, Anthony Richard Blake, and John Prendergast Vereker, are entitled to have their costs against Dudley Persse.

From this decree the appellants appealed.

Mr. Pemberton and Sir William Follett for the Appellants.—The deed of 1823 was more advantageous to the father than the son. The father's age was sixty-two. The consideration for the father's giving up his life estate, which was fixed by the stamp office at £29,250, exceeds the value of the father's life interest.

In 1827 Robert Parsons Persse was supposed to be a lunatic; it was thought advantageous that a commission should be sued out; it was inconvenient to the father to incur the expense of suing out the commission, and the son was unwilling, unless he could derive some advantage from it. If Parsons Persse had made a valid will before his lunacy, all the proceedings would have been useless; and this was not a matter of speculation, as a will was actually set up; so, if the jury had not found that he was in an unsound state, the whole expense would have fallen upon the son. The arrangement of the deed of the 8th December 1827 was a natural family arrangement, that the son should be at the expense of the commission; and if Robert Parsons Persse died in the lifetime of the father, that the Castleboy estate was to be settled in the same way as the Roxburgh estate: the father had repeatedly expressed his wish that the [123] two estates should be re-united. The sum of £250 beyond taxed costs was the expense of the commission. The decree cannot be sustained upon any thing in issue in the pleadings. The defence is, that the deed was executed for securing Dudley Persse's advances; if this was the object of the deed, why did he dispose of the estate by the deed of the 19th of June 1830 without mentioning that security? Then it is objected that the defendant did not consent to the omission of a leasing power, or that the estate should be impeachable for waste.

The attention of the defendant is called by the bill to his having an estate impeachable of waste, and yet he takes no notice of it in his answer; he does not state, as he ought to have done, that he never intended to convey free from impeachment of waste; nor are these objections put in issue by the answer. He admits that he told O'Connor to prepare the deed with expedition, and admits the execution, but says he was not aware of its effect. O'Connor was the solicitor both of the plaintiff and defendant. It is proved that the deed was read over to him, and there is no imputation that he is not a competent person. If there was fraud the Chief Baron must have been a party to it; but the Lord Chancellor of Ireland absolves the O'Gradys from all fraud. The deed substantially accords with the instructions, and it must have been agreed between the parties that the estate should be impeachable of waste and without any leasing power. The Lord Chancellor says, that there is no adequate consideration for the deed; but this is not a case where inadequacy of consideration will operate; it is a case of family arrangement [124]-ment. All the cases upon that subject are collected in *Neale v. Neale* (1 Keen's Reports, 672), *Tweddell v. Tweddell* (1 Turner and Russell, 1).

Mr. Knight Bruce and Mr. Jacob for the Respondents.—Is this such an agreement as a court of equity will carry into effect? 1st. The contract is illegal; it has the character of champerty and maintenance: giving an estate to one for life and another a reversion in fee is equally champerty as if there was a division of the estate. This is not the suit of the father maintained and assisted by the son, but joint suit of father and son for *campi partitio* under a joint agreement between them: *Byrne v. Frere* (2 Molloy, 157), *Wood v. Downes* (18 Ves. 120), *Harrington v. Long* (2 Milne and Keen, 590). 2d. Contrary to the policy of the law. The Chancellor was deceived in the proceedings in lunacy; and Dudley Persse is examined as a witness in the lunacy, divested of all interest, neither the real object nor the real petitioner appearing in the proceedings before the Court. 3d. Want of mutuality. What damages could the father have recovered against the son if the son had refused to bear the expense of the legal proceedings? *Lawrence v. Butler* (1 Sch. and Lef. 20), *Hamilton v. Grant* (3 Dow. 33), *Bozon v. Farlow* (1 Merivale, 459). Hardship, distress, and ignorance are all grounds for refusing to execute this agreement: *Evans v. Cheeshire* (Belt's Supp.

to Vesey, sen. 307), *Wiseman v. Beake* (2 Vernon, 121). It was not a family arrangement: *Pullen v. Ready* (2 Atk. 587), *Stapilton v. Stapilton* (1 Atk. 2), *Cann v. Cann* (1 Pere Williams, 723), *Cory v. Cory* (1 Ves. 20), *Stockley v. [125] Stockley* (1 Ves. and Bea. 23). No provision by this deed for younger children: one son with an estate of £4500 a year, the others scarcely having any provision. Family arrangement must be for the benefit of all the family. There must be no concealment or suppression: *Gordon v. Gordon* (3 Swanston, 473). The draft was sent to O'Grady, who sees the draft will not do, and invents a consideration. The deed voluntary but for O'Grady's alterations; and a court of equity does not execute a voluntary agreement: *Underwood v. Hithcox* (1 Ves. 279). He, again, strikes out of the draft the word leases, for which he had no authority. A court of equity only carries into execution an agreement which is certain, fair, and just, especially where the contract relates to a future interest, Buxton and Lister (3 Atkins, 382). It lies upon him who seeks to enforce a contract in respect of a reversion to prove adequacy of price. It is impossible to put a definite construction upon what suits or proceedings Robert Persse had a right to call upon his son to institute. Who was to be the judge of the necessity or expediency of the suits? If the son was to be the judge it is illusory, and the father could not compel the son to institute any suits. Is the agreement fair? It was executed by surprise; there was no opportunity given to the father of consulting his friends, no solicitor employed on his behalf. Lord Plunkett says the attempt to prove O'Connor the solicitor of Dudley Persse is a miserable failure. This is a suit to enforce, not rescind, an agreement, Stanley and Robinson (1 Russell and Mylne, 527). The solicitor prepared two drafts; neither of the drafts are conformable to the instructions.

[126] (Lord Chancellor.—This is entirely a new case, for which the plaintiff could not be prepared.)

The plaintiff must be prepared to prove that the instructions were conformable to the deed. He had no occasion to say he was taken by surprise, because he had the documents upon which the bill was drawn. The father was taken to Lord Guilmores to have the deed executed; he was only there on this occasion, when the estate was to be made over to his son-in-law, and unusual courtesy was shown to him.

Mr. Pemberton in reply.—The Court never refuses relief when the contract is not executory. Here all that could be done has been performed by the son; the plaintiff is only calling for the legal estate to perfect the settlement; no adequate relief at law on account of the various interests. There must be an action at law by each cestuique, and it is admitted that Robert would be unable to pay the damages. Champerty and maintenance do not apply to this case: this is no adverse suit, nor is there any property to be recovered. Then it is said there is no mutuality: want of mutuality only applies where the party coming for performance is not himself bound, as in the case of an infant; but if after the infant comes of age he files the bill, the objection fails: want of mutuality is not an objection where the agreement on one side has been actually performed. Inadequacy of consideration is not alleged; but in a family arrangement pecuniary consideration not of importance. Evidence must be looked to with reference to the issue joined: defence on the record differs from that made at the bar, and precludes the plaintiff from having any opportunity of explaining. [127] It appears by the original bill that Robert was tenant for life impeachable of waste, yet the answer does not say that he ought to be unimpeachable of waste, but denies the agreement to make any settlement at all; and the instructions and drafts were proved to show that a settlement was intended, and not security. The variance between the instructions and deed is prejudicial to Dudley; there never was any agreement that Robert should be dispunishable of waste, or have a leasing power. Whether he should or not was properly suggested by O'Connor and Miller; and O'Grady had means of communication with both parties; and it must be inferred that he had directions from Robert for making alterations in the draft. The only issue raised has been proved that a settlement, not a security, was intended. The object of the settlement was to re-unite the estates.

Lord Chancellor.—My Lords, I do not feel that I can at present call upon your Lordships to come to a final conclusion upon this cause; it is a matter of very great importance to the family, and involves questions of general importance as affecting the proceedings in courts of equity. But there is one circumstance as to which

the other noble Lords who are present and myself, I believe, entirely concur, namely, that it is impossible for us to affirm the decree. I stated to your Lordships that it involves a question of extremely great importance in proceedings in courts of equity. We find that the issue which is raised upon the pleadings is proved on the part of the plaintiff, and disproved on the part of the defendant. The defendant has thought proper to tender a false defence; he has put his case upon that which is [128] disproved by all the evidence in the cause. There can be no doubt that he must have been aware when he executed the deed in question, and at the time when he put in his answer,—I am sorry to say he could not have forgotten,—that that deed was not merely in respect of the prosecution of the commission of lunacy, but that it was a settlement of the estate, in some way at least, upon his eldest son. He has, however, thought proper to take issue with the plaintiff upon that fact, and the plaintiff, therefore, in preparing for the hearing of this cause, had only to prove his own case and to repel the case made by the defendant, which, I believe, we are all of opinion he has completely succeeded in doing.

It is very true that there are circumstances, which appear upon the evidence which the plaintiff has gone into for the purpose of proving the issue stated in the pleadings and no other, which may be said to call for explanation, but the plaintiff has had no opportunity of entering into that explanation. It was not necessary for him to go into it, because upon that subject there was no issue tendered by the defendant: it is no part of his case upon his answer to state, that, although it is true he intended to make a settlement of his estate upon his son, with certain powers reserved to himself, there was, either by fraud or by negligence, an omission of those provisions which would have been for his benefit. There is no allusion to such a state of facts in the answer put in, in the cause. It was not only, therefore, not necessary, but it would have been superfluous for the plaintiff to have gone into evidence to disprove that which was not affirmed. At the same time, my Lords, there are circumstances, no doubt, which may, if investigated, show that the defendant has a case by which he [129] might be enabled to resist a part of that at least which is asked for by the plaintiff. I confess I have very great difficulty in permitting the defendant, after all which has occurred,—after a statement of a false issue in a contest with his antagonist, to have an opportunity of going into the proof of another case. I think it is extremely dangerous in principle; that it would be very likely to lead to improper means of meeting a claim when made, and also would incur some danger of very great difficulty being felt in coming to a satisfactory conclusion upon any inquiry which might be directed for that purpose. The only doubt, however, which I have, and I believe I may say which my noble and learned friend now present entertains, upon this subject is, whether there ought to be some mode directed by which those circumstances which the plaintiff has had no opportunity upon the record, as the defendant tendered the issues to him, of explaining, should be the subject of further investigation. For that purpose it is necessary that we should take time to look into the proceedings, and in order to that I would propose to your Lordships that the further consideration of the case should be adjourned.

Lord Wynford.—My Lords, I entirely concur with my noble and learned friend, that the issue which has been tendered by the respondent, and which is that which therefore ought to be met by the appellant, has been proved clearly on the part of the appellant, and disproved as far as regards the respondent. But still, my Lords, I cannot but think that there are many circumstances in this case which are not met, probably it may be from the fault of the respondent that they were not properly brought before the Court; but it [130] appears to me that you cannot give a perfectly satisfactory judgment unless you can find out some mode by which these circumstances may be further investigated. I quite agree with my noble and learned friend, that it is an extremely dangerous thing, where a cause has been tried upon one point, to open it afterwards to the parties to inquire into other matters; but I think that the danger may be avoided in this case, if the objections which occur to me shall, on further consideration, appear to be made out by the evidence on the part of the plaintiff. I think it will be very dangerous now to let the defendant go into fresh evidence; but if it appears on the evidence on the part of the defendant that a judgment in favour of the plaintiff ought to have been given, or at least

one less favourable to the defendant, it appears to me that there may in such case be a further investigation. What the mode of that investigation should be I do not know: it occurred to me at one time, and it struck my learned friend at one time, that it might be sent to an issue, but the matter is of such an extended nature that it is impossible the facts on which information is desirable can be satisfactorily ascertained by an issue. I am not familiar enough with the practice of the Court of Chancery to know what other mode there may be by which this matter may be investigated, but I agree with my noble and learned friend that it is highly proper, in a case of so much importance, and where I feel bound to say I cannot quite approve of the conduct of any of the parties to these transactions, that some delay should take place, for the purpose of considering whether any mode can be discovered by which the facts may be more clearly ascertained.

Further consideration adjourned.

[131] Lord Chancellor (7th May).—My Lords, the object of this bill was to carry into effect an arrangement between the plaintiff Dudley Persse and his father, the defendant Robert Persse, respecting a considerable landed estate which belonged to Parsons Persse, a supposed lunatic, to whom Robert Persse was heir-at-law.

By a previous arrangement of 1823 Robert the father, who was tenant for life of the family estates called Roxburgh, with remainder to his son Dudley in tail, had conveyed his life estate to Dudley in consideration of an annuity of £800 for his own life, and payment of debts which he owed, which are stated to have been equal to £17,000, and a charge upon the estate of £6000 for his younger children. The estate is represented to have produced about £4500 per annum, and the age of Robert the father in 1823 is stated to have been about sixty-one or sixty-two. Much has been said as to this transaction, but the propriety of it is not in question in this cause; its validity has never been impeached, and the provisions of it are very material for the purpose of showing the relative situation of the parties in the year 1827.

Before this time, that is in 1826, Dudley the son married Miss O'Grady, and by the settlement upon that marriage this Roxburgh estate was so settled that Dudley took only a life estate, with remainder to his elder son in tail, and provision was made for the wife and the younger children. Such was the state of the family property in 1827, at which time apprehensions were suggested that unfair means might be resorted to by others to deprive the family of the succession to the estates of Parsons Persse, the supposed [132] lunatic, which were called the Castleboy estates. The lunatic was at that time about forty, Robert Persse the father was sixty-five or sixty-six, and Dudley a young man. It is, therefore, obvious that Dudley's expectancy of succeeding as heir was much more valuable than his father's, and if he had so succeeded he would have had the fee.

From expressions proved to have been used by the father it appears that the Roxburgh and the Castleboy estates had formerly been united in his family, and that he was anxious that they should be re-united; but to effect this purpose it might be expedient that Dudley should not have the power of disposing of the Castleboy estate any more than he had of the Roxburgh estate. The course recommended to secure the Castleboy estate was to sue out a commission of lunacy against Parsons Persse, the expense of which, though to be paid out of his estate if the lunacy were established, required an immediate advance of money, which would fall upon the party suing out the commission if the lunacy should not be established. Robert Persse the father had been a bankrupt, and had no command of money; under these circumstances the deed of covenant in question in this cause, dated the 8th of December 1827, was executed, the effect of which was, that Dudley the son was to undertake the prosecution of the commission in the name of his father, the heir-at-law of the supposed lunatic, and the Castleboy estate, if it should descend upon the father upon the death of the lunatic, was to be settled so as to give to the father an estate for life, subject thereto upon the same trusts and purposes as the Roxburgh estate stood settled.

The commission was sued out and proceeded with [133] success. The lunatic died in October 1829, and a will having been set up an ejectment was brought by the person claiming under it, but upon a trial the jury found a verdict against his claim. The title of the heir being thus established, in June 1835 the present bill

was filed to carry into effect the provisions of the deed of the 8th of December 1827; and with reference to the grounds upon which the prayer of that bill was refused by the Court of Chancery in Ireland, and upon which the decree has been supported at the bar of this House, it is of the utmost importance to consider the defence set up by the answer. That defence consisted simply in stating that the deed had been obtained by misrepresentation and fraud; not of advantage taken of the distressed circumstances of the defendant, the father, or of his want of legal assistance in stipulating terms for his own advantage, but by a fraudulent misrepresentation of the purport and object of the deed; the defendant Robert deliberately swearing in both his answers that he never intended to give up his expectancy of succeeding as heir to the lunatic, or in any manner to agree to settle his estate, but that the extent of his intention was to charge the expenses of prosecuting the commission upon the estate; and that he was told and believed that such was the only object and purport of it. That this defence is false in every part is proved beyond the possibility of doubt; the judgment assumes that it is so; the instructions for the deed of December 1827, if known to Robert the father, disprove it; and four witnesses, O'Connor, Nolan, Waller O'Grady, and Richard O'Grady, prove that the deed was read over to and a copy read by Robert the father before he executed it; and Richard Adams proves subsequent [134] recognitions of it by him. Lord Guillamore, the late Chief Baron of Ireland, though not actually present at the execution of the deed, was frequently in the room when the parties were met for the purpose, and was made the depository of the deed by Robert the father. If any such fraud as that sworn to in the answers was contemplated, Lord Guillamore and his two sons must have been parties to it, or, what is scarcely more credible, the real author of it must have chosen to practise it in their presence.

It is unnecessary, however, to observe further upon this defence, as it forms no part of the judgment appealed from, and was not relied upon at the bar by the counsel for the appellant. But in considering the ground upon which the judgment was founded, and those upon which the right of the son to the relief he prays was denied at the bar, it must not be forgotten that the defendant pleaded this defence, and no other, and is therefore not at liberty to set up any other which depends upon matters of fact not put in issue, and which the plaintiff, therefore, has had no opportunity of disproving or explaining. Objections to the relief prayed, which rest upon the nature or provisions of the deed itself, or upon facts common to both parties, are not open to this observation; but, assuming that the father was perfectly acquainted with the contents of the deed before he executed it, to permit him to impeach it upon matters of fact not put in issue by him would be contrary to the established rules of courts of equity, and inconsistent with the most obvious principles of justice.

Some of the grounds relied upon on behalf of the defendant are of a middle character, arising out of facts [135] put in issue, it is true, but for a totally different purpose, such as the instructions and drafts of the deed proved by Mr. O'Connor. This the plaintiff put in issue to disprove the defendant's statement, that he conceived the deed to be only a security for the expenses of the commission; but the circumstances under which those instructions were given and those drafts prepared were not put in issue, the transaction not being impeached upon any statement connected with that transaction. No opportunity, therefore, was afforded to the plaintiff to explain what may now seem to require explanation, or to prove additional facts where the information may appear defective. I should, therefore, have thought that any suspicions, arising from so much of the transaction as was so proved in the cause, ought not to have led to any conclusion influencing the decision of the case; but seeing that many such circumstances have been much relied upon, it may be expedient to examine how far such suspicions appear to be well founded.

It was contended that the son had taken an improper advantage of the distressed situation of the father, occasioned by the withholding his annuity. I do not find any proof of this, but, on the contrary, it appears that there was no complaint made and no ground of complaint upon that subject. The father was, indeed, in circumstances which precluded him from incurring expenses or pecuniary liabilities; but that can only be referred to his own misfortunes or extravagance: and it is to be observed that this part of the defendant's case is inconsistent with another much



relied upon, namely, that the undertaking by the son to prosecute the commission was no burden upon him, and, therefore, no consideration for the deed, because the property of the [136] lunatic was ample to provide for the costs. But if that were so, how could the distressed situation of the father prevent him from himself prosecuting those proceedings, and where was the inability to do so, which is alleged to have been used by the son as a means of depriving the father of that to which he was entitled?

Another objection taken to the transaction was, that the father had no professional advice, Mr. O'Connor being exclusively the solicitor of the son. I think it is proved that Mr. O'Connor acted as solicitor for the father as well as for the son, and that he was the person whom the father was so far in the habit of consulting as to make him the most natural person for him to employ upon the matter of the lunacy. The evidence of James Blakeney, examined by the defendant, and the letters of the 3d of February 1828 and the 10th of April sufficiently prove this. It is true that he also acted as solicitor for the son, and was thereby placed in the difficult and responsible situation of acting for two clients in a matter to be settled between them; but the objection, if any, must be, that Mr. O'Connor betrayed the interest of his client the father in favour of his client the son, and not that the father had not professional assistance.

The ground upon which it was contended that the solicitor betrayed the interests of his client the father rests upon the written instructions and the drafts of the deed of 1827, which he produced for the purpose of proving the falsehood of the defence set up in the answer. The instructions were taken down at the meeting between the father and the son; they certainly are very short, but they embrace the whole of the arrangement as afterwards carried out; they provide [137] that the father should give up his expectancy in the Castleboy estate, except a life interest for himself, and that the son should prosecute the commission. This appears to have been the whole at that time settled. When the solicitor afterwards prepared the instructions for counsel, and when the counsel employed for each of the parties proceeded to prepare the draft of the deed, it naturally occurred to inquire whether the life estate of the father was to be dispunishable of waste, and whether he was to have a leasing power. The absence of provisions for these purposes in the deed is not insisted upon or alluded to as an objection in either of the answers; no explanation, therefore, could be expected on behalf of the plaintiff. That many opportunities occurred of discussing this and all other matters connected with the proposed arrangement, is proved by Mr. O'Connor, and by Mr. Waller O'Grady, in whose father's (Lord Guillamore's) house the father was residing; and that additional details were arranged after the written instructions taken by Mr. O'Connor, is proved by the fact, that by deed the Castleboy estates were to be settled to the same uses as the Roxburgh estate, in which the son had only a life estate, whereas the instructions would have given to him the fee; an alteration which the son would not have consented to if it had not been stipulated for by or on behalf of the father. What passed upon this subject, or relative to the leasing power of the life estate not being dispunishable for waste, is not stated, no explanation being called for by the defence set up; but as the defendant does not complain of the deed because it does not contain such provisions, why is fraud and imposition to be assumed on behalf of a party who with a deed before [138] him, as stated in the bill, does not suggest any such fraud or imposition, and against a party who has thus been deprived of an opportunity of explaining the circumstances which led to the omission of them? Incidentally, however, and by accident, it is proved that the father expressed a desire that the Roxburgh and Castleboy estates should be re-united in his family, which tends to explain the absence of a leasing power for any terms which could be turned to profit by the tenant for life; and that, upon being consulted whether he wished to have a power of making any provision out of the estate for any of his younger children, he answered, that he did not, which explains the absence of a power to cut timber, as it may be assumed that he would have exercised such a power for that purpose. It appears to me, therefore, that there were not sufficient grounds for the suspicion of unfair dealing which have been relied upon, and that regard being had to the matters put in issue by the pleadings such suspicion ought not to have influenced the decision of the cause.

It was, however, open to the parties to rely upon objections appearing upon the face of the instrument, upon which relief was prayed. These objections, though

divided into many heads in the argument, may be reduced to four: first, that the contract was illegal, as partaking of champerty and maintenance; secondly, that it was illegal against public policy, and a fraud upon the great seal in the matter of the lunacy; thirdly, that there was no mutuality in its provisions; fourthly, that the covenant was voluntary, being without any, or at least without any adequate, consideration.

As to the first the answer is obvious; there was no suit to be maintained, and no property in litigation to [139] be divided. Upon the second objection no case was cited, and I have not been able to understand how an arrangement between parties expecting property upon the decease of a lunatic can be a fraud upon the great seal in the matter of the lunacy, or upon the ground void as against public policy. The thing to be looked to in matters of lunacy is the protection of the person and property of the lunatic, and for that purpose the encouragement to parties to interfere, and to bring the facts before the Court. It is obvious that this object would in many cases be impeded, rather than promoted, by holding that all agreements relative to the costs of the proceedings or the ultimate division of the property were void. I have not heard any principle or authority in support of this objection. Agreements as to expectancies have been enforced in equity, which appeared to be open to serious objections, which do not apply to the present case.

In support of the third objection, that there was no mutuality in the contract, some well-known cases were cited; but the question here is, whether, after the risk incurred, and the benefit secured, and the consideration thereby paid, the father can on his part resist the performance of the contract which led to those results? If this objection could prevail in this case, how could decrees for specific performance where the defendant only signed the agreement, or upon part performance, be maintained? In those cases there is no mutuality in the sense in which the word is used in the present argument, because the contract, being within the statute of frauds, could not have been originally enforced against the plaintiff; but he having performed his part is entitled to compel the defendant to perform his.

[140] Fourthly, the supposition that the covenant was merely voluntary is negatived by the plaintiff's own statement of the case, for beyond all question some consideration proceeded from the son. The object of having a commission of lunacy prosecuted, the father's inability to undertake it, from whatever cause proceeding, and the fact of the son's having taken upon himself the prosecution of it, are facts common to both parties, and show that the covenant was not merely voluntary; leaving the question to be considered how far it can be objected to upon the ground of the consideration being inadequate. The situation of the parties and the properties in question appear to me to afford a complete answer to this objection. The son was in possession of the family estate but as tenant for life only; from the relative ages of the father and of the son, and of the supposed lunatic, the probability was much in favour of the son, by the death of his father before the lunatic, succeeding as heir to whatever estate might descend from him; but there was a strong expectation, and, as the event proved, a great probability, that without active measures to counteract the fraudulent projects of others no part of the lunatic's estate would descend to either of them. It may well be supposed to have been an object of the father, who is proved to have been anxious for the re-union of the two estates, that the lunatic's estate should be settled in the same manner as the family estates. The agreement with the son effected all that could be done to secure the lunatic's estate to the family, and, if it should descend to the father, secured its re-union with the family property. By what scale of money consideration are these objects to be estimated? The impossibility of doing so has led to the exemption [141] of family arrangements from rules which affect others. The consideration in this and in other such cases is compounded partly of value and partly of love and affection. The ages of the parties made the father's expectancy of but little value, but if he had been certain of himself succeeding as heir to the lunatic, his own personal use of the estate would probably have been confined to a life interest. This, in ordinary cases, would have been the natural course, and not likely to be departed from, where the father had expressed his anxious wish that the two estates should be held together.

But there were several younger children unprovided for, and it is assumed that the father must have desired the dominion over the estate for the purpose of making some further provision for them. Experience does not prove that the want of the

younger children generally induces fathers to deprive the eldest son of much of the inheritance, but in this case it is proved, that upon being distinctly asked the question he answered that he did not wish to have any power over the estate for that purpose. If this be true (and it is sworn to by two witnesses) the absence from the covenant of any power to make leases and to cut timber is very much explained. There is no allegation or proof that it was part of the agreement that the father should have such powers. The omission of those forms no part of the father's case; but, if the contract be otherwise binding, is the absence of such powers in an arrangement between a father and son such cogent proof of imposition as to invalidate it? The arrangement of 1830 is open to the same objection; and I cannot but consider the parties interested under the settlement as the real de-[142]-fendants in this case. The father appears to have but little, if any, interest in the contest. That arrangement of 1830 took place with sufficient notice of the previous arrangement with the eldest son, and, therefore, cannot prevail against it, if such prior arrangement was in itself binding.

Being of opinion that the objections stated to this arrangement are not available for the purpose of depriving the plaintiff of the benefit of it, I am of opinion that he is entitled to have it completed by a decree, and as the timber has been cut with full knowledge of the plaintiff's title and in defiance of the father's covenant, I think it impossible to deny to the plaintiff the account he prays upon the subject. I think also that the decree below ought to have been made with costs. There can be no costs of the appeal.

Lord Wynford.—My Lords, in wading through these very long pleadings, I certainly should have thought there are many important questions which were submitted to your Lordships' consideration, but it can make no difference in the conclusion to which I shall come, because I am decidedly of opinion, upon a view of the whole case, that the judgment which my noble and learned friend has advised your Lordships to give upon this occasion is the correct judgment.

My Lords, there certainly are many points in this case, which were touched upon by the counsel at the bar, which are not raised by the pleadings. I think your Lordships cannot with propriety take any notice of those, as nothing can be more dangerous in the administration of justice than to allow your decisions to be affected by matters which are not pleaded. If the at-[143]-tention of the opposite party had been called to such points he might have given a denial, or a satisfactory explanation of such matters, which, by the course of pleading, he has been prevented from doing. The Court would, therefore, if it decided on those matters, be deciding on matters which it has been prevented from fully and satisfactorily hearing.

The points which are not adverted to in the pleadings are, first, that the respondent was not told that it was not necessary that he should take out a commission of lunacy, as it was competent to any other person to take it out; secondly, that he was not told that if he succeeded he would be paid out of the estate costs taxed as between attorney and client, that is, the whole of his expenses; thirdly, that the consideration was not sufficient to support the conveyance.

It might be observed, that the only consideration that was at first introduced was that of natural love and affection, and it was not until after it was discovered that the consideration did not prevent a subsequent conveyance from getting rid of it that any other consideration was introduced. But this is an objection that should not be made unless it be specifically pointed out by the pleadings. Now, the sufficiency of consideration depends on many circumstances, which may be proved by evidence, if the attention of the opposite party had been called to them. The deed of 1830, by which this conveyance is attempted to be set aside, is liable to great suspicion; it seems to be only colourable; the price is only eight years' purchase, and that is not to be paid till after the purchaser has got possession.

The fourth objection is, that the conveyance was obtained by maintenance and champerty; the fifth, [144] that the life estate was made unimpeachable of waste, and that no power of leasing was given to the tenant for life.

The two questions, as it has occurred to me, on the determination of which your Lordships' judgment should depend, are: first, was the respondent deceived by being prevailed upon to execute a deed which conveyed Parsons Persse's estate absolutely to the appellant, which deed he was made to believe was only a security upon the estate for the expenses that the appellant was likely to incur by taking out and prosecuting

the commission of lunacy against Parsons Persse? In support of this objection the respondent urges that the deed was prepared by the appellant's attorney, a person whom he had never employed, and that it was executed in Lord Guillamore's house, who was the appellant's father-in-law, in which the respondent, who had never visited Lord Guillamore before, had resided for a fortnight surrounded by his family. It is not true that the respondent had never employed the attorney before; he had employed him many years ago when respondent was a bankrupt, and he had since been employed by the respondent's man of business; and the respondent must have known that, for he must have paid the attorney's bills for the business that was then done. On this occasion the attorney was employed by the appellant, who sent the attorney to the respondent to prevail on him to sue out a commission against Parsons Persse. He persuaded the respondent to visit the appellant, and the appellant succeeded in getting him to go to Dublin, to give instructions for the commission of lunacy and for this deed. As the respondent had never before partaken of the hospitalities of Lord Guillamore, it would have [145] been more delicate in the appellant not to have taken the respondent to his Lordship's house on this occasion. But are these circumstances to disturb a solemn deed? Yet these are all which the respondent can bring forward. On the other hand, there are many witnesses of great respectability who prove that the respondent himself gave instructions for the deed; that it was read over to him at the time of its execution; that he expressed his intention to execute such a deed before it was executed, and declared that he should do this to unite the two estates in the same person; and that after the deed was executed he told another gentleman that he had executed such a deed, and declared that he had done it with the same object as that which he had mentioned to the gentleman to whom he had said that he would make such a disposition. Whatever circumstances of suspicion may hang about it, one can scarcely conceive a stronger case. O'Connor has sworn that he took the instructions for the deed from the respondent's own mouth; those instructions, although departed from in some respects, were to prepare a conveyance of the estate to the appellant for his own use, and were not authorizing him to prepare a security for the expenses to be incurred. O'Connor, the two O'Gradys, and Nolan, that is four witnesses, swear that the deed was distinctly read over to the respondent before it was executed by him. This is confirmed by Adams and Lambert, one of whom swears that the respondent spoke to him, before the deed was executed, of his intention to unite the two estates, and the other swears that some time after the deed was executed the respondent told him that he had executed a deed by which he had provided for the union of these estates.

[146] The second question that, it appears to me, is raised by the pleadings, as I have already stated, is perfectly immaterial with respect to the judgment on the case. Did he execute the deed under the pressure of distress which the appellant had occasioned by the nonpayment of the annuity payable to him by the appellant out of the Roxburgh estate? Considering the amount of that annuity compared with the rental of the estate out of which it was to be paid, and that the respondent had only this annuity to subsist upon, I cannot find any sufficient excuse upon the evidence for the irregularity with which it was paid. But this defence is inconsistent with the case before made by the respondent; he was not likely to be induced by distress to execute a deed which was to provide for the security of money to be expended for a purpose beneficial, although not in an equal degree, to both parties. A man under the pressure of distress may execute deeds to obtain the means of supplying his present wants, but not to provide for any remote advantage. The hope of advantage here was very remote; indeed, as Parsons Persse had by will given his estate from this branch of the family, and as it was so difficult to get him found a lunatic that one jury summoned to try that question had been discharged without finding a verdict, I do not think that there was any great probability that it ever would have been realized. I cannot think that your Lordships can say that this deed was executed under the influence of distress. Whether the execution of that deed were a wise act on the part of the respondent or not, I think it was executed by him with a full knowledge of what he was doing, and for the attainment of the object that he stated to Lambert and Adams he had in his contem-[147]-plation when he executed it; and I cannot conceive that the straitness of his circumstances could have contributed to influence him to make that conveyance. I am, therefore, of opinion that the appeal should be allowed,

the decree of the Court below set aside, and the directions proposed by my noble friend to your Lordships to be given should be given.

It is ordered, that the said decree of the 7th of February 1837 be reversed; and it is declared, that the plaintiffs are entitled to the benefit of the indenture of the 8th of December 1827, mentioned in the said original bill, and of the covenants and agreements therein contained; and that the indenture of the 9th of June 1830, also mentioned in the said original bill, is to be considered as fraudulent and void so far as it affects or interferes therewith.

[148] FROM THE COURT OF EXCHEQUER.

FRANCIS CLEE, JOHN ROBERTS, HENRY POWLES, JOHN GEORGE, FRANCIS DAVIS, ANN PRICE, WILLIAM BLACKLOCK, BENJAMIN PURSLOW, RICHARD WEIR, and JOHN NEWMAN,—*Appellants*; GEORGE HALL, Clerk,—*Respondent*.

SEPTIMUS HOLMES GODSON, JOSEPH COOKE, THOMAS BARNES, and Others,—*Appellants*; GEORGE HALL, Clerk,—*Respondent*.

VINCENT WOOD WHEELER and Others,—*Appellants*; GEORGE HALL, Clerk,—*Respondent*.

[19th June 1838, 1st June 1840.]

[S.C. 7 Cl. and F. 744, *q.v.*]

"Privy tithes" synonymous with "small tithes," though the Ecclesiastical Survey makes a distinction between "privy tithes" and "lesser tithes," that distinction being explained by a subsequent terrier, distinguishing between tithes in general and privy tithes payable to the vicar; and there being evidence that in the district wherein the vicarage is situate privy tithes mean small tithes.

The endowment of a vicarage being established by ancient documents, and money payments having been made for privy tithes to the vicar since 1763 by some of the occupiers of the parish, and small tithes not having been claimed by or paid to the rector;—Held, as against a defence of the occupiers claiming in themselves or their [149] landlords title to the small tithes, that the vicar was entitled to small tithes of all lands in the parish, in respect of which no discharge had been proved; though some portion of the small tithes had been conveyed away by the owners of the rectory, that conveyance being capable of explanation by being referred to the glebe lands belonging to the rectory; and though some payments had been made for houses only, and in some instances payments had been omitted altogether.

On the 31st July 1833 the respondent, as vicar of Tenbury, filed his bill in the Exchequer against the first-named appellants and John Bradley (since deceased), who were occupiers of lands within the town of Berrington and parish of Tenbury, claiming to be entitled to all tithes except tithes of corn and grain within the township of Berrington and parish of Tenbury.

The parish of Tenbury consisted of the hamlet or township of Tenbury, Tenbury Foreign, Berrington, and Sutton otherwise Sutton Sturmeay.

The appellants by their answers denied the vicar's title to the tithes claimed by him, and stated that the rectory of Tenbury was formerly part of the possessions of the abbot and convent of Lyra in Normandy: that upon the suppression of the alien priories in the reign of king Henry the fifth it was granted by the Crown to and became part of the possessions of the priory and convent of Shene in the county of Surrey, and that upon the dissolution of monasteries it became vested in the Crown: that in the thirty-fifth year of the reign of king Henry the eighth the rectory of Tenbury, with the tithes and appurtenances thereto belonging, were, with divers other lands and hereditaments, granted by the Crown to Richard Andrews and Nicholas Temple, and the heirs and assigns of the said Richard Andrews for ever, at the yearly rent of 16s.: that soon after the [150] appropriation of the rectory to the abbot and convent of Lyra a vicar of Tenbury was appointed, and a vicarage created and endowed with the great and small tithes of the hamlet or township of Sutton otherwise

Sutton Sturmeay, or some part thereof, except a certain part of the said last-mentioned township called Sutton Park, but that the said vicarage was not endowed with any of the tithes, either great or small, within the hamlets and townships of Tenbury Town, Tenbury Foreign, and Berrington, but that they remained appropriated to the abbot and convent of Lyra as the rector of the said rectory of Tenbury; and that upon the suppression of the alien priories the said rectory, and the tithes and appurtenances thereto belonging, including all and singular the tithes, great and small, of the said three several townships or hamlets of Tenbury Town, Tenbury Foreign, and Berrington, were granted to and became vested in the said abbot and convent of Shene, and continued to be and were parcel of the possessions of the said last-mentioned monastery until and at the time of the dissolution thereof; and that upon the dissolution of the said monastery of Shene the possessions thereof, including the said rectory of Tenbury and all and singular the tithes of the said townships or hamlets of Tenbury Town, Tenbury Foreign, and Berrington, were granted by the Crown to the said Richard Andrews and Nicholas Temple, and the heirs of Richard Andrews: that Richard Andrews sold the rectory of Tenbury, and the tithes thereof, including all the tithes of Tenbury Town, Tenbury Foreign, and Berrington, unto certain persons, who were the owners of the lands comprised in the last-mentioned townships: that after such sale the owners of the lands in the several townships and their descendants, and purchasers from them, [151] and their tenants, held and occupied their farms and lands freed from the payment of all or any tithes whatsoever.

All the appellants, except Clee, George, and Blacklock, admitted that small annual payments under the name of privy tithes had been made by the occupiers of their farms to the vicar of Tenbury, and those payments had been made by the occupiers of houses as well as lands; but that such payments were in the nature of personal tithes, oblations, or obventions, and not as moduses or compositions for tithes.

On behalf of the respondent the following documentary evidence was produced:—

An extract from pope Nicholas's Taxation, whereby it appeared that the tenth of the church was taxed at two marks, and the tenth of the vicarage at one mark:

The following extract from the Ecclesiastical Survey:—

	£	s.	d.
"Magister R. Shute vicarius perpetuus ejusdem ecclesiæ habet in decimis prædialibus, viz., garbarum et feni et unius molendini vicariæ suæ prædicti com̃ annis pertinentibus . . . . .	10	8	8
"In libro suo computat paschaï privatarum decimarum com̃ annis . . . . .	1	0	0
"In quatuor diebus, oblaç et aliis oblationibus com̃ annis . . . . .	1	10	0
"In decimis ovium venalium com̃ annis . . . . .	1	3	4
"In mortuariis com̃ annis . . . . .	0	3	4
"In minoribus decimis, viz., porcorum, anserum, canapum, lini, ceræ, mellis, et aliorum consimilium com̃ annis . . . . .	1	16	0
"Item in emolumentis et proficuis capellæ de Rochford com̃ annis . . . . .	5	6	8
[152] "Et sic in toto £21 8s. Inde allocatur pro sinagio et procuracione archino ibidem annuatim resoluït 8s. 2d., et sic remañ de claï £20 19s. 10d.; decima inde £2 2s."			

An extract from the Parliamentary Survey, in which the value of the tithes of the vicarage of Tenbury was stated to be worth £27 per annum:

Two terriers from the bishop's court, of the diocese of Hereford; one, after describing the vicarage house and premises, states "that the vicar hath no common or pasture for sheep, but hath some tithe hay in the common fields, but not of all the parish, and the tithe of corn of the parish of Sutton." The other is in the following words:—

"Teamburie, } A true terrier of the vicarage of Teamburie taken by us,  
July 25, 1637. } whose names are underwritten:

"Imprim., one vicarage howse; 2ndly, one barne; 3rdly, one hemplock; 4thly, 2 gardens; 5thly, one portion of tyth from Sutton; 6thly, prive tythes from the rest of the parish.

"signed EDM. CLERK, vicar.  
+ JOHN UNKLES } churchwardens.  
HUMPHREY LANE }  
THOMAS WALDON.  
FRAN. LANE."

The grant of the Crown of the rectory of Tenbury to Andrews and Temple, which only contained the general words of "all tithes" to the rectory belonging.

And receipts for payment of small sums, as for privy tithes, from 1763 down to the present time.

The parol evidence produced on the part of the respondent proved, that annual payments under the name of privy tithes had been made to the vicar by several occupiers of lands in the three townships of [153] Tenbury, Tenbury Foreign, and Berrington; that easter dues were different payments from privy tithes, and were paid at different times of the year; that small tithes in several parishes in the neighbourhood of Tenbury were known under the name of privy tithes; that the small tithes of the three townships had never been paid to the owner of the great tithes of the parish of Tenbury.

On behalf of the appellants the documentary evidence produced was:—

An extract from the Nonae Roll, stating "that the church of Temedbury is taxed at £20, whereof the ninth of sheaves, fleeces, and lambs is worth ten marks; that the land of which the church is endowed is worth by the year 40s.; the hay of the same is worth 6 marks; the tithe of mills is worth 38s.; oblations, obventions, and small tithes with mortuaries, are worth 6 marks; and it hath peculiar jurisdiction, with power of correction, which is worth by the year 7 marks:"

An extract from Inquisitions of Benefices of Alien Priors, from the Tower, wherein it is stated that the proctor of the abbot and convent of Lyra hath the church of Temdebury, which is worth by the year 20 marks:

An extract from the charter (in the Tower), of the third and fourth Henry the fifth, of the foundation and endowment of the monks of Sheen, whereby the possessions belonging to the alien abbey of Lyra in Normandy, together with all lands, tithes, etc. are granted to the prior and monks of Sheen:

The Ecclesiastical Survey:

The grant to Andrews and Temple:

An inquisition post mortem (12th September 1601) of Joyce Lucy (from the Rolls), which found that Sir Thomas Lucy, son of Sir Thomas Lucy and Joyce his [154] wife, daughter and heir of Thomas Acton, was seised in fee as heir to his mother of the rectory of Tenbury:

An inquisition post mortem (15th July 1606) of Sir Thomas Lucy, the son, which found that he was seised at his death of the rectory of Tenbury, and that he left Sir Thomas Lucy, his son and heir:

A licence of the 2d April, nineteenth James the first, for Sir Thomas Lucy and Alice his wife to alien to Richard Milward, Rowland Corbett, and Richard Hayle, and their heirs, three messuages, two cottages, five gardens, five orchards, seventy acres of land, ten acres of meadow, and forty acres of pasture, and all and all manner of tithes in the tenements aforesaid, with the appurtenances in Tenbury:

A fine of easter term, nineteenth James the first, from Sir Thomas Lucy and Alice his wife, of the same premises and to the same persons as are mentioned in the licence:

A conveyance of the 13th of April, nineteenth James the first, whereby Sir Thomas Lucy conveyed to Milward, Corbett, and Hayle, and their heirs, a certain mansion called the parsonage in Tenbury, together with all the glebe lands, and one other messuage, and sixteen acres of arable land, and three other cottages, and two gardens in Tenbury, and all manner of tithes, corn, grain, sheep, wool, lamb, flax, hemp, and all other tithes whatsoever, and about fifty-six acres of other lands in Tenbury (without tithes being mentioned):

A feoffment of 19th May, nineteenth James the first, from Milward, Corbett, and Hayle to Lane of twelve acres of land in Tenbury parish, and also all manner of tithes of corn, grain, and sheep, wool, lambs, flax, hemp, and all other tithes, great and small:

A feoffment of the same date and by the same persons, to John and William Warde, of four acres in [155] Tenbury, with all manner of tithes upon the premises renewing, without specifying particular tithes:

Various other deeds were produced, whereby the lands and tithes mentioned in the two deeds of feoffment were proved to be vested in the master and fellows of Pembroke College, Oxford:

An extract from the Parliamentary Survey (in Lambeth Palace), 1649, which states that in Tenbury there is a vicarage, and to the same, belonging a house and garden worth £3 per annum, and other tithes to the value of £27 per annum:

A fine, of the twenty-eighth of Charles the second, by Richard Lucy and Elizabeth his wife, and William Molyneux and Bridget his wife, to Richard Leigh and Robert Bradshaigh, and the heirs of Richard, of certain lands in Tenbury and other places, and also of the tithes of the parishes of Tenbury and Berrington:

A fine, of the second of Anne, by Viscount Molyneux and Bridget his wife, to Sir William Gerrard, of the rectory of Tenbury with the tithes of sheaves, grain, and hay:

A recovery, of the ninth of Anne, wherein Robert Webber is demandant, and Sir William Molyneux, and Viscount Molyneux and Bridget his wife, and others are vouches of the advowson of Tenbury and the tithes of sheaves, grain, and hay.

The parol evidence on the part of the appellants was, that no tithes in kind or composition in lieu of tithes had ever been rendered to the vicar, but that small payments had been made by some but not all the occupiers of farms and lands in the townships of Tenbury Foreign, Tenbury Town, and Berrington, under the name of privy tithes, except two payments; one, on the 29th September 1784, for 3s. per annum, viz., 1s. 6d. [156] for Eaton's and 1s. 6d. for the tan-house, as a modus for small tithes to the vicar; another, on the 28th July 1796, of 1s., being in full of a modus for privy tithe of Wight's meadow; that the payments had been made for houses as well as lands, and that the payments had been uniform with regard to Berrington farm. Francis Clee, however, had paid a yearly sum of one guinea in lieu of the crops of some ridges and parcels of land containing three quarters of an acre, part of his farm at Berrington, and this payment had varied in amount.

The first-mentioned cause came on to be heard before Mr. Baron Alderson on the 28th day of June 1836, when it was, amongst other things, ordered and decreed, that an account of the titheable matters and things (other than and except corn, grain, and hay) had and taken by the appellants respectively from and upon their said respective farms and lands since Michaelmas 1827, and of the tithes thereof, be taken with the usual directions; and that the costs of the suit, so far as related to the tithes of which an account was directed, should be paid by the defendants to the plaintiff.

From so much of the decree as is herein mentioned the first-mentioned appeal is brought.

Mr. Pemberton and Mr. Maule for the appellants.

Mr. Boteler and Mr. Simpkinson for the Respondent.

Lord Chancellor.—My Lords, in this case it appears to me particularly important to attend to the defences set up in the answers of the appellants. They all claim title in themselves, or in those under whom they hold their land, to the tithes demanded by the [157] vicar, and they all, except Clee, George, and Blacklock, admit payment of small annual sums to the vicar under the name of privy tithes. Against such defences it is certainly necessary for the vicar to show his title to the tithes claimed; but if he succeed in so doing it is not competent for the defendants, upon such defences as they have adopted, to set up moduses or compositions. The defendants have totally failed in showing any title to those tithes in themselves, or in those whose lands they hold. There seems to be some reason for supposing that some of the lands held by Roberts, Powles, George, Davis, and Price were formerly part of the rectory, but they have not proved that the small tithes in question were granted with the lands, or have since been conveyed with them. It is indeed stated in the appellants case, at page 4, that one of the houses in Tenbury Town, comprised in one of the deeds proved in the cause, was traced to the defendant Davis, but I do not find any evidence that any of the lands occupied by any of the defendants had been conveyed with the tithes in question. All the defendants, therefore, have failed in this their principal defence, namely, title in themselves to the tithes in dispute; but it is still open to them to insist that the vicar has failed in proving any title in himself. No endowment being produced, the vicar is at liberty to establish his title by other evidence. That there was a vicarage endowed before the year 1291



appears from Pope Nicholas's Taxation; the tenth of the church was taxed at two marks, and the tenth of the vicarage at one mark. The Ecclesiastical Survey is not very intelligible by itself, but it becomes more so when it is considered that the vicar appears to have all the tithes of a district called Sutton. When, therefore, the Eccle-[158]-siastical Survey speaks in one place of tithes of sheaves and hay, and in another of lesser tithes, to wit, pigs, geese, *et caetera*, it may be referring altogether to Sutton; otherwise it might be inferred that the privy tithes spoken of were something different from the lesser tithes. This establishes the fact that the vicar at that time was entitled to some endowment under the name of privy tithes.

The Parliamentary Survey and the first terrier afford no information, but the second terrier is very important. It states that the vicarage has one portion of tithes from Sutton, and privy tithes from the rest of the parish. The fact that the vicarage was endowed with some description of tithes from the parish generally is, I think, by these documents sufficiently established.

Of the payment of small sums as for privy tithes there is no dispute; the receipts go back as early as 1763, and in 1784 the payment is described as a modus for the small tithes. The same occurs in 1796, but in general the term "privy tithes" is used.

As these small tithes must originally have formed a part of the rectory, and as the question is, whether they were at an early period separated from the rectory as an endowment of the vicarage, it is material to ascertain whether they have been treated as still belonging to the rectory. The earlier documents, such as the grant to Andrews and Temple, in the thirty-fifth of Henry the eighth, prove nothing, as general terms only are used, such as "all tithes to the rectory belonging;" but in subsequent conveyances, such as the fines in the twenty-sixth of Charles the second and the second of Anne, and the recovery in the eleventh of Anne, there is a description of the advowson of the church [159] of Tenbury, and all and all manner of tithes of sheaves, grain, and hay; and there is no evidence that any small tithes from any of those lands were ever claimed by the persons entitled to the rectory.

It is true that conveyances were produced from Millward, Corbett, and Hayle, who claimed under Andrews and Temple particular lands, with all tithes, as well great as small, arising and renewing within the premises, but from the preceding conveyance of the 13th of April in the nineteenth of James, there is good reason for believing that those lands were parcel of the glebe of the rectory, which may well be supposed to have been excepted from the endowment of the vicarage, and these form no part of the lands of the defendants.

These ancient documents, taken by themselves, would constitute strong evidence of the vicarage being endowed with the small tithes generally, by proving that the vicar was entitled to some tithes called privy tithes, and that the small tithes had not, except in some few instances, (not in question in this cause), been conveyed with the rectorial tithes, and the parol testimony strongly confirms these deductions from the documentary evidence; as it proves the payment of those sums called privy tithes, and that they are different from easter offerings, and the small tithes have never been paid to the owners of the great tithes.

As to the meaning of the term "privy tithes" many authorities and instances were produced to show that the term was often used as synonymous with small tithes, proving, I think, satisfactorily that they cannot be understood to mean personal tithes, which is the meaning contended for by the appellant, and there is parol [160] evidence that the term is understood in the district in which these lands are situated to mean small tithes. It is true, that as to some of the defendants there is no evidence of any payment of privy tithes having been made, but the question is, whether there be sufficient secondary evidence of the vicarage having been endowed with the small tithes, because if there be sufficient evidence of such endowment the vicar's right will be established as against all lands, (as to which no particular discharge is proved, although no small tithes have ever been paid for such lands.) The cases of *Kennicott v. Watson* in 2 Eagle and Younge, 690, and *Masters v. Fletcher*, in Younge, 25, established this proposition. Upon the whole, therefore, I think the decree of the Court of Exchequer right, and that it should be affirmed with costs.

Decree affirmed, with costs.

## (SECOND APPEAL.)

On the 28th June 1836 Mr. Baron Alderson made the same decree for the payment of tithes against the appellants in this appeal as he had made against the appellants in the first appeal. From this decree this appeal was brought.

Mr. Kindersley and Mr. Godson for the Appellants.

Mr. Boteler and Mr. Bethell for the Respondent.

Lord Chancellor (4th August).—I think the right course will be, that as to some of the parties, namely, those who have not proved the possession of lands which formed part of [161] the premises comprised in the conveyances,\* on which so much stress has been laid, the decree must be affirmed with costs. With regard to two of the defendants, Cooke and Barnes, of course the bill must be dismissed; and I think that the bill must be dismissed with costs, because there never was a ground for attacking those parties, and they set up a case sufficiently in their answer † to entitle them to go into that defence. Then with regard to the costs of the appeal, I am of opinion that those parties who have succeeded in altering the decree, though it does not appear that they called the attention of the Court below to these distinctions, must be exempted from the order for the payment of the costs of the appeal.

With respect to those who hold glebe lands the decree must be altered, by exempting those lands which they prove to have been conveyed with great and small tithes; they must be exempted from the order which directs only the appellants who have no case to pay the costs of the appeal. Those who succeeded altogether in the withdrawing their lands from the operation of the decree, and the others who succeeded in withdrawing part of their lands from the operation of the decree, ought not, so far as those lands are concerned, to pay the costs of the appeal. The other appellants, who have established no distinction as to their lands, must pay the costs of the appeal; and those appellants who have shown [162] that none of their lands are liable to tithe must have the costs of the suit below.

It is ordered, that the decree of the 28th of June 1836 as to the said Joseph Cooke and Thomas Barnes be reversed, and that the bill as to them be dismissed, with costs: That the said decree as to John Russell, Charles Smith, and John Benbow be in part reversed as herein-after mentioned, and that the bill as to them be in part dismissed, with costs, as herein-after mentioned; that is to say, as to the said John Russell, so far as the said bill and decree relate to four acres, twenty-seven perches of land, mentioned in the answer of the appellants; and as to the said Charles Smith, so far as such bill and decree relate to a close containing one acre and three quarters, mentioned in the same answer; and as to the said John Benbow, so far as such bill and decree relate to a dwelling house and building and eleven acres of land in the same answer mentioned. And it is ordered, as to the three last-named appellants, in respect of other houses and lands in their respective occupation, that the decree be affirmed; and as to the rest of the appellants, other than the said five appellants, it is ordered that the appeal be dismissed, and the said decree affirmed, with costs.

## (THIRD APPEAL.)

On the 28th June 1836 Mr. Baron Alderson made the same decree against the appellants in this appeal as he had made against the appellants in the two former appeals; from this decree the appeal was brought.

Mr. Swanston and Mr. Godson for the appellants.

Mr. Boteler and Mr. Bethell for the respondent.

[163] Lord Chancellor (4th August).—This must follow the fate of Clee and Hall; the appeal must be dismissed with costs.

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\* The particular lands comprised in these conveyances were proved in the cause to be vested in the master and fellows of Pembroke College, Oxford, and to be occupied by defendants Thomas Barnes and John Benbow as their tenants.

† The defendants Thomas Barnes and John Benbow by their answer insisted that the lands occupied by them were purchased by their ancestors, or by persons under whom they derived title, together with the tithes arising thereon.

Appeal dismissed, with costs; and the said decree, so far as therein complained of, affirmed, with costs, to be paid by the appellants to the respondent

[164] FROM THE COURT OF EXCHEQUER.

JOHN COPLAND, *Appellant*; MARGARET TOULMIN, THOMAS BUTTERFIELD SIMPSON, and BRYAN HOLME, *Respondents*. The same Party, *Appellant*; the same Parties, *Respondents* [1st June 1838 and 1st June 1840].

[*Mews'* Dig. x. 464, 531, 614. S.C. 7 Cl. and F. 349; and, in Court below, *sub nom. Toulmin v. Copland*, 3 Y. and C. 625. On point as to partnership accounts, see *Robley v. Brooke*, 1833, 7 Bli. N.S. 90, and Partnership Act, 1890, ss. 24 (1), 44. On point as to appropriation, see *Brown v. Adams*, 1869, L.R. 4 Ch. 764: *In re Hallett's Estate*, 1880, 13 Ch. D. 696: *In re Stenning* (1895), 2 Ch. 433.]

A party complaining of a decree which had directed inquiries for the purpose of obtaining further information, nine years and a half after the decree made, ought to have a strong case to induce a court to set it aside; more especially when the party complaining has exhausted the subject matter of the inquiry, and failed. Where debts due to a former partnership are agreed, upon the formation of a new partnership between a partner of the old and a new partner of the new partnership, to be transferred to the new firm as part of the capital of the new partnership, against the debts due from the old partnership, the monies received by the new partnership must, in the absence of appropriation by the customers or agreement between the parties, be applied in payment of the earlier debts of the old partnership. Declarations and admissions made by plaintiff not stated in the pleadings inadmissible in evidence.

[165] In and prior to the year 1806 Richard Toulmin deceased and Abraham Toulmin, who is now also deceased, carried on the business of navy agents in co-partnership together in Surrey Street in the Strand. In the year 1806 that partnership was dissolved. On the 1st September 1806 Abraham Toulmin took the appellant John Copland as a partner into the business, and from that time until the death of Abraham Toulmin they carried on the business of navy agents in copartnership together under the style and firm of "Toulmin and Copland," upon the terms that Abraham Toulmin should bring into the new partnership of Toulmin and Copland £40,000 of good debts, due to the old partnership of Richard and Abraham Toulmin, for the purpose of setting against and providing for debts to that amount due from the old partnership; and that John Copland should bring £4000 into the partnership, and that Abraham Toulmin should have two thirds and John Copland the remaining third of the profits of the business, and on the 4th January 1819 Abraham Toulmin died, having by his will appointed the respondents Margaret Toulmin his widow, Thomas Butterfield Simpson, and Bryan Holme his executrix and executors, who proved his will.

On the 16th of January 1819 the respondents filed their bill of complaint in the Exchequer against the appellant, thereby claiming two thirds of the profits of the partnership of Toulmin and Copland, and praying the usual partnership accounts, and for an injunction and receiver.

The appellant by his answer stated that the terms of the partnership agreed upon between him and Abraham Toulmin were, that Abraham Toulmin should bring [166] into the partnership good debts due to the preceding partnership to the amount of £40,000 to set against debts due from such partnership, and that the appellant should bring in £4000, and that Abraham Toulmin should be entitled to two thirds, and the appellant to one third of the profits; but that if Abraham Toulmin failed in bringing in £40,000 good debts, that then the profits of the business should

be divided in moieties; and that Abraham Toulmin having failed in bringing into the partnership the £40,000 good debts, the partnership, from the time of its commencement to the death of Abraham Toulmin, was carried on upon equal division of the profits; and he insisted that he was entitled to a moiety of the profits of the partnership.

Before the appellant put in his answer to the said bill, and on the 29th day of January 1819, he made an affidavit, filed in the cause, in support of a motion made by him in the cause, wherein he stated to the same effect as in his answer; viz., that the profits were to be divided in thirds if the £40,000 was brought into the partnership; and it goes on to state that, Toulmin having failed to bring in the £40,000, he and Toulmin afterwards agreed to divide the profits in moieties.

On the 12th June 1828 the cause came on to be heard before the Chief Baron, when, after witnesses had been examined on both sides, and extracts from the partnership books proved for the purpose of proving how the profits were divided, the Court referred it to the master to take the partnership accounts, and to inquire whether Abraham Toulmin, the testator, brought into the partnership of Toulmin and Copland £40,000 of good debts which were owing to the partnership of Abraham Toulmin and Richard Toulmin, according to [167] the true intent and meaning of a certain agreement stated in the said affidavit of the appellant, sworn in the cause on the 29th day of January 1819, upon the footing of which their partnership commenced; and also to inquire whether the said agreement was at any time after the commencement of such partnership varied and altered, and under what circumstances and in what respects; and if he should find that there was such agreement, and that it was not afterwards altered, then that the accounts should be taken on the footing of one third of the profits to the appellant, and the remaining two thirds to the respondents; but if he should find that there was a subsequent agreement, or the £40,000 good debts were not brought into the partnership, then that the accounts should be taken on the footing of the subsequent agreement, or, in the latter alternative, on the footing of their having been partners in equal moieties.

On the 26th May 1830 the master made a separate report, finding that Abraham Toulmin did not bring £40,000 good debts into the partnership; and upon exceptions taken to that report the Court, on the 21st December 1830, over-ruled the exceptions, and confirmed the report; but the House of Lords, on the 30th May 1834, reversed the order of the Court of Exchequer, thereby establishing that Abraham Toulmin had brought into the partnership £40,000 good debts; and thereupon the master made his separate report, on the 2d of July 1835, whereby he found, that the said Abraham Toulmin did bring into the said partnership of Toulmin and Copland the said sum of £40,000 of good debts, which were owing to the said late concern which was carried on in partnership with the said Abraham and Richard Toulmin. And the said master [168] also found, that the said agreement was varied and altered after the commencement of the said partnership, and that it was agreed between them, the said Abraham Toulmin and the appellant, that they should carry on and be interested in the said partnership in equal shares and proportions, and should receive and pay the profits and loss in equal moieties.

The respondents took exceptions to the said last-mentioned report; first, on the ground that he ought not to have found that the said agreement was afterwards varied or altered; and, second, that he ought to have found under what circumstances and in what respects the said agreement was varied and altered.

On the 27th day of February 1836 the Court allowed the said exceptions, and referred it back to the master to review his report, who, by his report dated the 3d November 1836, reviewed his report, and found that the agreement was not varied.

The master, by another separate report dated the 15th day of February 1836, after stating the evidence brought before him, found, that in taking the accounts between the said Abraham Toulmin deceased and the appellant, as directed by the said decree, all sums received by the firm of Toulmin and Copland from their customers and clients who had been debtors of the former firm of Richard and Abraham Toulmin, and to whom advances had been made by the said firm of Toulmin and Copland in the ordinary and necessary course of the business and practice of navy agents, should, in the first place, be applied towards the discharge of such advances and interest respectively, and that the surplus only should be applied towards the

discharge of debts due from such customers and clients [169] respectively to the said firm of Richard Toulmin and Abraham Toulmin; but in consequence of such finding being objected to he had forborne to take the accounts of the partnership.

From the last report the respondent took, amongst others, the following exception: "For that in case the said master ought not, in and by his said report, to have found as submitted or insisted on by the said plaintiffs in their said first exception, then the said master, regard being had to the evidence laid before him, instead of his said finding, ought to have found, in and by his said report, that in taking the accounts between the said Abraham Toulmin deceased and the said defendant, as directed by the said decree, all sums received by the said firm of Toulmin and Copland from or on account of their customers and clients who had been debtors to the said firm of Richard and Abraham Toulmin, and whose debts had been transferred to their respective accounts in the said books of Toulmin and Copland, should, in the first place, be applied towards the discharge of the said debts owing to Richard and Abraham Toulmin, and of the interest thereon respectively, and that the surplus only, if any, should be applied towards the discharge of the advances and interest in the said report mentioned; and that the said firm of Toulmin and Copland, as between them and the said Abraham Toulmin, should be charged with the sums so firstly applied, and with interest thereon, from the times when the same were respectively received to the 4th day of January 1819, at the rate of £5 per cent. per annum, with annual rests."

[170] This exception came on to be heard before the Chief Baron on the 17th of December 1836.

From the original decree of the 12th June 1828 the appellants appealed.

Extracts from the partnership books were produced in evidence, but in the general business no division had been made of profit and loss, and the same uniform mode of keeping the accounts had been adopted, except in particular items, which showed that certain losses and expenses were borne between the parties in moieties; such as in the purchase and sale of stock, and in the purchase of wines; and the purchase of wine was included under an account of "house expenses." Declarations were proved to have been made by Abraham Toulmin, that, in all cases of advances made by the firm of Toulmin and Copland to clients of the late firm, such advances should be deducted from the first remittances or receipts, on account of the clients of the old firm.

It was likewise proved by the book-keeper of the partnership books, that in December 1814 the appellant had directed him to balance the partnership books, and carry one moiety of the profits to his account, and the other to the account of Abraham Toulmin; which Abraham Toulmin must have heard, and expressed no dissent to such direction. It was on the other hand proved, on the part of the respondent, that the appellant had stated to Robert Reynolds that he, the appellant, had only brought into the concern the sum of £4000, and that he was to receive one third of the profits.

The Chief Baron, by an order dated the 17th day of December 1836, allowed the exceptions, except where [171] it appeared on the face of the accounts in the books of the said firm of Toulmin and Copland, in the said master's said report mentioned and referred to, that deductions had been made from particular receipts, and the balances only carried to the credit of the account; and it was thereby referred back to the said master to review such separate report, and vary and amend the same accordingly.

From the order dated the 27th day of February 1836, the master's report dated the 3d of November 1836, and the said order dated the 17th day of December 1836, the appellant appealed, asserting that the two reports dated the 2d day of July 1835 and the 15th day of February 1836 ought to be confirmed.

Mr. K. Bruce and Mr. G. Richards for the appellants.

Mr. Simpson and Mr. Jacob for the respondents.

Lord Chancellor (1st June).—This case came before your Lordships upon two appeals: the first appeal was from certain orders of the Court of Exchequer made in a subsequent stage of the cause; the second appeal was an appeal complaining of the original decree. That order had been made in the month of June 1828. If

your Lordships should be of opinion that the original decree was wrong, it will necessarily follow that any subsequent proceedings in the cause will fail with that.

I shall proceed in the first instance to consider the second appeal, and, secondly, the points that relate to the early stage of the cause. The decree of the 12th of June 1828 merely contains a reference to the master to [172] enquire whether one of the partners of the firm, Abraham Toulmin, brought into the partnership of Toulmin and Copland £40,000 of good debts due from a certain partnership, according to the true intent and meaning of an agreement stated in a certain affidavit of the appellant, and whether such agreement was at any time varied.

Under that decree the master made a report, of the 26th of May 1830, in which he negated the fact inquired into, namely, as to whether there had been this sum of £40,000 brought into the concern. That report, and the accuracy of that finding, were questioned by exceptions taken, which were heard in December 1830, and overruled. The result therefore of the decision in the Court of Exchequer upon that subject was to negative the proposition, that a sum of £40,000 of good debts had been brought into the concern of Toulmin and Copland. The order, however, of December 1830 became the subject of appeal to this House, and by an order of this House, of the 30th of May 1834, the decision of the Court of Exchequer was reversed, and the exceptions taken to the report were allowed. It, therefore, then became established, by an authority which can no longer be questioned anywhere, that Abraham Toulmin had brought into the concern £40,000 of good debts, and that he had, therefore, to that extent performed the contract which he had entered into with his partner Mr. Copland.

The parties went on, and in the month of July 1835 there was a report on the second part of the inquiry, by which the master found that the agreement had been varied. That also became matter of question before the Court of Exchequer, and by an order of the 27th of [173] February 1836 those exceptions to the master's report were allowed. The Court of Exchequer in that instance, therefore, established the fact that the original agreement had not been varied by any subsequent agreement between the parties.

Various other proceedings followed in the cause, till at last in the year 1837, (I am now confining my observations to the appeal against the original decree,) nine years and a half after the original decree was made, namely, the decree directing inquiries as to the fact, the appellant thought it expedient to appeal against the original decree, which is the appeal I am now considering, which was heard at your Lordships' bar. Now, my Lords, that decree contained merely inquiries. It may be undoubtedly true that a decree ought not to contain a mere inquiry, and that there was either no ground for the inquiry or that some other mode of inquiry ought to be adopted. If that were so it would require a very strong case, after all the objects of the inquiry have been exhausted, and when the decree adjudicates no right, establishes no fact, but merely is an act of the court, by which the court desires that further information may be obtained,—it would require a strong case to induce your Lordships to reverse a decree merely for the purpose of ascertaining a fact, in order to enable the Court with more certainty to adjudicate between the parties.

It appears that the answer which the defendant put in to Mr. Toulmin's bill stated the contract to have been, that if Toulmin brought in £40,000 of good debts, then that the partnership between them should be in thirds, Toulmin being in that case to have two [174] thirds, and he, Copland, in that case to have one third; and we have now the fact, by the ultimate judgment of this House, that that £40,000 was brought in, and that Copland therefore had performed his part of the contract. We have, therefore, according to the answer now, a statement in that answer denying the fact of the £40,000 having been brought in; but that fact being established the case stated by the answer is, that in the event now proved to have existed the parties were to divide the profits in thirds, the present contest, however, being, on the part of Mr. Copland, that the ultimate agreement between the parties was to divide in moieties.

The affidavit referred to in the decree is an affidavit by which it is stated, that on the failure of Toulmin bringing in the £40,000 a new agreement was made. It states the original agreement, namely, that the profits were to be divided in thirds if the £40,000 was brought in, in the same way as the answer, but the affidavit goes

on to say, that Toulmin having failed to bring in the £40,000 the parties afterwards agreed to divide the profits in moieties. Now, inasmuch as it was established, by the ultimate judgment of this House, that the £40,000 had been brought in according to the intent and meaning of the contract, the event never occurred upon which the parties would have entered into a new contract; and the affidavit stating that it was upon the failure of that payment,—that being an event which never took place,—it is impossible that such new contract can have been entered into between the parties.

My Lords, it was said that this affidavit was to be [175] taken altogether, that is to say, if it is used for the purpose of showing what the original contract was, namely, that there was a division into thirds in case the £40,000 was brought in. Being to be taken together, therefore, you are bound to adopt that part of it which states the new contract. It is certain that it must be taken together, but it does not follow that, because it must be taken together, therefore every part of it is to be conclusive upon the fact of which it is evidence; the Court therefore required further information, and sent it to the master, first to exhaust the first inquiry as to the £40,000, and then directed the master to inquire whether there had been any subsequent contract entered into between the parties; that refers to the other appeal. As I have stated, the party now appealing having exhausted both subject matters, and the inquiry having failed him in both, he then complains of the Court having inquired into those facts at all.

I think that that extreme case does not occur here, in which your Lordships would be disposed to disturb a decree merely directing inquiries, after the lapse of time which has taken place, and after the result of the inquiries was contradictory to the case set up by the party. Even if it were not for the length of time, and if your lordships were called upon to express an opinion upon the original decree immediately after it had been pronounced, I should have said that it was a case of that kind, in which it was the duty of the court to inquire into the facts. The defendant having set up a defence, both parties were entitled to call upon the Court; to ascertain by inquiry the nature of that defence so set up; and that defence depending on certain facts, [176] it was not possible without inquiry to come to any satisfactory conclusion upon the facts so stated. It was matter, therefore, of course, for the Court to adopt one or other mode of ascertaining the facts which were not at that moment before it, in such a way as to enable it to dispose of the case: it might have directed an issue, and that is one of the arguments; the Court was, no doubt, quite competent to direct an inquiry. But the Court directed an inquiry, and no complaint was made of the inquiry so directed until after the subject matter was exhausted, and the party now complaining had failed to establish the facts in his favour. My Lords, I think this House will not listen to complaints brought, under the circumstances of this case, against a decree merely directing an inquiry. After all that had taken place, I think the inquiry itself perfectly proper, and upon both grounds, therefore, I think the appeal against the original decree has no foundation to rest upon, and must be, therefore, dismissed, with costs.

The first appeal in point of date, that is to say, that first presented, complains of two orders. It complains of an order of the 27th of February 1836, by which exceptions were allowed to the report of the 2d of July 1835; now, the effect of allowing those exceptions was to decide that there had been no alteration in the agreement after the commencement of the partnership. But the second appeal also complained of another order of the 17th of December 1836, which allowed the second exception taken to the report of the 15th of February 1836, by which the master had reported that all sums received by Toulmin and Copland from their customers ought to be applied in repaying the advance [177] of the firm, and the surplus only applied in payment of the debts due to the former firm. The effect, therefore, of the order of the court was to establish the converse of that proposition as the rule to be followed in taking the accounts. As to the order of the 27th of February 1836, it is to be observed, that Mr. Copland's affidavit rested altogether upon the allegation of a new agreement having been made, upon the assumption that the £40,000 good debts had not been brought into the concern by Abraham Toulmin, but this house having decided that such assumption was unfounded, the very ground upon which the supposed existence of such new agreement was rested failed, and, after a careful examina-

tion of the evidence, I think that there is no proof of any such new agreement. I lay aside all evidence of declarations and admissions imputed to Abraham Toulmin, which are not stated in the pleadings, and which there was not, therefore, any opportunity of explaining or disproving; and in the absence of all direct evidence upon the subject, either verbal or in writing, it can only be ascertained by reference to the evidence furnished by the books themselves. The books do not contain any division of profit and loss. And here I may observe, that a new contract is supposed to have taken place at some subsequent period; now there is a total absence of any trace in the books of any altered mode of keeping the accounts: if the parties had originally been connected together according to a certain agreement as to the division of profits, and if at a subsequent period they had agreed to adopt another mode of dividing the profits, it could hardly have occurred that in the accounts there should have been throughout [178] the whole of that time a complete absence of all evidence of such an altered contract having taken place between the parties. The books, however, are uniform, following the same system from the commencement to the end, and there is no alteration whatever in the mode of keeping the accounts. The books do not contain any division of profit and loss as to the general business between the parties, and so far they afford no evidence of any new contract; but in respect of particular items they do show that certain expenses and losses were charged equally to the partners. Those relate to certain losses upon the purchase and sale of stock in the public funds, and to certain wines purchased by the firm, which, it appears, were divided equally between the partners. But to this it is answered, that these purchases and sales of stock were not on the partnership account, but that they were speculations of the two partners as individuals, and that the losses were therefore properly charged in moieties to each of the two; and such appears to me to be probably the true solution, for if they were in fact partnership transactions, why were they kept separate from the other transactions of the firm, and why were the results carried to the account of each partner, when no such course was followed as to any other of the partnership transactions? It may also be observed, if the partners were to bear the result of all the transactions in moieties, why were the losses upon their stock transactions carried separately to the account of each partner? But if they were to bear their losses in moieties, and the result of the general business of the partnership in thirds, there was an obvious propriety in separating the results of these adventures from the transactions in their general business.

[179] As to the wines which were divided between the parties the answer given was, that they were so divided to meet the expenditure in entertaining the customers of the firm, and there seems some probability for this supposition. The reference in the account to "house expenses" leads to this conclusion; but in order to make this item available proof of a new agreement for a division of the profits in moieties, it would have been necessary to have shown that the same mode of division applied to all similar cases, which does not appear upon the face of the accounts. The evidence, therefore, of a new agreement to divide the profits equally in my opinion totally fails, and the order of the 27th of February 1836 appears to me to be correct, and in my opinion the exceptions to the report of the 2d of July 1835 were properly allowed.

As to the order of the 17th of December 1836, it establishes a rule for taking the accounts consistent with the ordinary course of business, and which the law assumes to be the course to be pursued, unless there be proof of a contrary course agreed upon between the parties. Certain debts due from the customers of the house to the general firm of Richard and Abraham Toulmin were, by agreement between Abraham Toulmin upon the formation of the partnership between them, transferred into the books of the new firm as Toulmin's capital, and the transactions with such customers continued as before; monies were received on their account, and advances were made to them or payments made on their account. Without a distinct appropriation by the customers paying the money,—at least that is the general [180] course of business, (in some particular instances there seems to have been an appropriation,)—but without a distinct appropriation by the customers paying the money, or an agreement between the parties prescribing a different course of proceeding, the monies so received would be applicable to the earlier debt. What, then, is the proof that there was any such agreement



between the parties prescribing a different course? And here, again, I must lay aside all declarations imputed to Abraham Toulmin which are not stated in the pleadings. In the accounts of the customers the old and new debts constitute but one account, and the balance struck is the result of the two. But it is said, that in certain proceedings between Abraham Toulmin and the estate of his late partner, who had become lunatic, he had represented that the monies so subsequently received were to be first applied in repaying the subsequent advances. But it will be found that, by the objection in the exception in favour of Abraham Toulmin, he endeavoured to support this proposition upon the ground of the custom of trade as applicable to that particular business, and not of any special contract for that purpose; but the decision of the case by Lord Eldon (Devaynes and Noble, 1 Merivale, 598) negatived any such contract or any such custom, by deciding that, as between those two branches of the firm, no doubt Abraham Toulmin being the nominal party as between himself and the estate of his late partner, there was sufficient to show that Copland was a party to the proceedings then carried on. Lord Eldon decided, upon the evidence in that case, that the monies re-[181]-ceived were to be applied in payment of the earlier debts; he, therefore, negatives the two grounds set up for a contrary proposition, namely, that, either by the custom of trade or by contract, it was to be applied in paying advances for the subsequent partnership. I think, therefore, that there is no proof of any special contract or any particular custom of trade to support the proposition contended for by the appellant, and the general rule of law is against it. So far, therefore, I think the order of the 17th of December 1836 correct. That order, however, allows the second exception, with an exception which I think very proper, but which is not here in question; it allowed that part of the second exception which asserted "that the firm of Toulmin and Copland, as between them and Abraham Toulmin, should be charged with the sums firstly applied, and with interest thereon, from the times when the same were respectively received to the 4th day of January 1819, at the rate of five per cent. per annum, with annual rests."

The master, by the report to which the exceptions were taken, after stating his opinion as to the manner in which he conceived that the monies received ought to be applied, stated that he had forbore to take the account till this point was decided. Now the part of the second exception to which I have referred does not relate to the question of the manner of applying the monies received, as raised by the report, but to the manner of taking the account, which the master stated he had forbore to take, consequent, indeed, perhaps upon the decision of the first point, but which is not directly embraced by it, although the master has stated he had forbore to take it. It is impossible, therefore, to say that the master, if he [182] was right in making a separate report at all as to the mode of showing the receipts, ought to have reported in the terms of the latter part of the second exception to which I have alluded. I by no means wish to be understood as expressing any opinion against the proposition so raised, but before the account is taken, and without more information as to the fact, I think that it would not be safe for this House *a priori* to lay down that or any other proposition beyond what is necessary to decide the question raised by the report, and I have before said that it is not regular by an exception to raise a proposition foreign to the subject matter of the report excepted to. I think, therefore, that there should be a variation in the order of the 17th of December 1836, so as to make it allow the second exception, except that concluding part of it to which I have alluded, not for the purpose of expressing any opinion against the proposition so raised, but because I think it was not regular to express an opinion in that state of the cause upon an exception to such a report.

I have had a doubt whether this alteration in the order ought to protect the appellant against the payment of the costs of the appeal. The objection to the order was not put forward as a ground of the appeal in the printed case, but it was insisted on at the bar, and I think it of some importance. Upon the whole, therefore, I think that the appellant should pay the costs of the second appeal, and of so much of the first appeal as complains of the order of the 27th of February 1836, and that each party should pay their own costs with reference to the remaining part of the first appeal.

[183] Ordered, that the appeal against the original decree below be dismissed, with costs; and the appeal against the orders of the 27th of February and 17th De-

cember 1836 be dismissed, so far as the appeal complains of the order of the 27th February 1836, with costs, and in part varied as to the order of the 17th December 1836.

[184] FROM THE COURT OF CHANCERY, IRELAND.

The Reverend THOMAS SMYTH, Clerk, and THOMAS JAMES SMYTH, a Minor, by the said THOMAS SMYTH his Father and next Friend,—*Appellants*; JOHN HYACINTH NANGLE, WILLIAM NANGLE, RICHARD MORE O'FERRALL, and GERALD DEASE, Esquires,—*Respondents* [1st and 2d June 1840]. [See Hussey.]

[Mews' Dig. viii. 819; S.C. 7 Cl. and F. 405; 4 Jur. 476; and, in Court below, 1 Ir. Eq. R. 119; and, at law, 1 Jebb and S. 199. See *Sherlock v. Kennedy*, 1863, 15 Ir. Ch. R. 160; and *Swinburne v. Milburn*, 1884, 9 A.C. 847.]

Upon a bill filed to obtain the benefit of a perpetual renewal of a lease alleged to be contained in a lease granted in 1672, the lease itself being destroyed, the plaintiffs refer to the recitals in a subsequent lease as containing evidence of the covenant contained in the original lease, and pray that the covenant contained in the original lease may be decreed to have been a covenant for perpetual renewal, but make no other case by that bill, the covenant so recited in the subsequent lease not being a covenant for perpetual renewal:—Held, that two issues directed by the chancellor of Ireland, 1st, whether at the time of the execution of the original lease it was agreed that the lessor should grant to the lessee a lease for lives renewable for ever of the premises mentioned in the lease; 2d, whether, independent of the memorandum or endorsement made upon the lease, there was contained in the lease any clause, covenant, or agreement relating to the lease, were issues not consistent with the case made by the bill. The decree was reversed, and the original bill dismissed, with costs.

[185] Henry Pakenham, formerly of Tullenally in the county of Westmeath, esquire, deceased, having been, in and previous to the year 1672, seised in fee simple of the lands of Mayne and Fiermore, by indenture of lease, dated the 24th of May 1672, demised unto Bartholomew Cooper, his heirs and assigns, that part of the lands of Mayne, containing 148 acres of profitable land of the late Irish plantation measure, and part of Fiermore, containing twenty-five acres two roods and five perches and one third part of a perch, like measure, situate in the barony of Fore and county of Westmeath, for the lives of the said Bartholomew Cooper and Appellina Cooper his wife, and Bartholomew Cooper his son, at the yearly rent of £30 for the first seven years of the said term, and £33 16s. 8d. for so many years as should after ensue during the said lives.

There was the following agreement contained in or endorsed upon the said lease:—"And it is hereby agreed between the parties aforesaid, that upon renewing or inserting of any life or lives there shall be paid by the said Bartholomew Cooper the father, his heirs or assigns, unto the said Henry Pakenham, his heirs or assigns, the full sum of £16 16s. 4d., current and lawful money of England."

Some time before the year 1713 Bartholomew Cooper entered into possession of the lands demised by the lease, and shortly afterwards, by endorsement on the original lease, conveyed his interest therein to Garrett Nangle of Mayne, gentleman, the ancestor of the respondent John Hyacinth Nangle.

In or about the year 1674 Appellina Cooper, one of the lives in the lease, died, and in 1695 Bartholomew [186] Cooper the elder, the lessee, and one other of the lives in the lease died.

Henry Pakenham settled the lands of Fiermore, part of the lands comprised in the lease of 24th May 1672, on his son Sir Thomas Pakenham, and the lands of Mayne, the residue of said lands comprised therein, on his son the Rev. Robert Pakenham.

Robert Pakenham, by deeds of lease and release bearing date respectively the

4th and 5th days of February 1706, in consideration of the sum of £1760 granted unto Thomas Smyth the first, his heirs and assigns, the lands of Mayne.

Thomas Smyth the first, by his last will dated the 20th of February 1712, devised unto trustees therein named the lands of Mayne, to the use of his second son Thomas Smyth (called Thomas Smyth the second) for life, with remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the said Thomas Smyth severally, successively, and in remainder, according to priority of birth, and their respective heirs male of their bodies, and for default of such issue to the use of his eldest son William Smyth for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of the said William Smyth severally and successively, and of the several and respective heirs male of their bodies respectively issuing, with divers remainders over. The testator died in the same year, without having altered or revoked his will.

Garrett Nangle, on the 1st day of July 1713, exhibited his bill of complaint in the Court of Chancery in Ireland against Thomas Smyth the second and others, and [187] thereby, after setting forth the seisin in fee of the said Henry Pakenham of and in the said lands of Mayne and Fiermore, expressly stated and put in issue, that he the said Henry Pakenham did, about the 1st day of May 1672, come to an agreement with the said Bartholomew Cooper, to make him a lease for lives, renewable for ever, of said lands and premises, and, after stating the particulars of said lease as before set forth, that the said Henry Pakenham did, on the 24th of May 1672, in pursuance and performance of the said agreement, demise the said lands to the said Bartholomew Cooper for the three lives therein named, as by the said indenture of lease, then in the custody of the said Garrett Nangle, and by his said bill stated to be ready to be produced to the Court, might appear; and the said Garrett Nangle thereby charged that it was concluded and agreed by and between the said Henry Pakenham and the said Bartholomew Cooper, senior, before and at the time of making the said lease for lives, that the same should be renewable for ever by the said Bartholomew Cooper, his heirs and assigns, on the payment of £16 16s. 4d., and charged that such agreement the more plainly appeared by its being mentioned and expressed in the said deed of lease, "that upon the renewing or inserting of any life or lives there should be paid by the said Bartholomew Cooper, his heirs or assigns, the full sum of £16 16s. 4d. unto the said Henry Pakenham, his heirs or assigns."

By his said bill the said Garrett Nangle also stated that the said Henry Pakenham had settled or conveyed the said lands of Fiermore to his son Sir Thomas Pakenham, and the lands of Mayne to his second son Robert Pakenham clerk, who conveyed same to [188] Thomas Smyth the first, and charged that the said Thomas Smyth the second had refused to renew the said lease, alleging that he was not obliged by the said covenant or agreement in the said lease to renew the same, in regard that the said agreement was not more fully or skilfully worded; and the said Garrett Nangle by his said bill further charged, that if the said agreement for renewing was not as fully or skilfully expressed or worded as it ought to be, the same was occasioned by the mistake and ignorance of the person that drew the lease, and his being unacquainted with the term or manner of drawing leases for lives renewable, which was a conveyance then rarely used in Ireland.

And the said Garrett Nangle submitted, that he was relievable by the equity of the said Court of Chancery, in regard that by the manner of wording the covenant or agreement mentioned in said deed of lease, he could not bring an action at law to compel the said Thomas Smyth to renew said lease, though (as alleged by the said bill) it plainly appeared by the said lease, that it was the intention and meaning of the parties thereto that the same should be a lease for lives renewable.

And the bill prayed that the said Thomas Smyth and the other defendants might set forth their knowledge, hearsay, and belief of all and singular the premises, and that he might be relieved therein, according to equity and conscience.

Thomas Smyth the second by his answer admitted the seisin in fee of the said Henry Pakenham of and in the lands of Mayne and Fiermore, and that he did, about the time therein mentioned, by indenture of lease demise that part of the said lands of Mayne unto Bartholomew Cooper for three lives; and that in the said [189] lease there was a clause contained in the words and to the purpose following:—"And it is hereby agreed between the parties aforesaid, that upon the renewing or inserting

of any life or lives there shall be paid by the said Bartholomew Cooper the father, his heirs or assigns, unto the said Henry Pakenham, his heirs or assigns, the full sum of £16 16s. 4d. current and lawful money of England."

And he swore that he did not know or believe, nor had he ever heard, save by said bill and by some late discourse with the said Garrett Nangle and those who acted on his behalf some short time before filing the said bill, that the said Henry Pakenham and the said Bartholomew Cooper senior at any time had come to any other agreement, whereby the said Henry Pakenham did make or agree to make to the said Bartholomew Cooper senior a lease for lives renewable for ever of the said lands and premises, or any part thereof, or that the said lease was made in pursuance or performance of any such agreement, or that it was concluded or agreed, before or at the time of making the said lease for lives, that the same should be renewable for ever by the said Bartholomew Cooper senior, his heirs and assigns.

And that he did not know or believe, nor did he ever hear that the said Thomas Smyth the first did, when he purchased the said lands of Maine, know or believe or ever hear that the lease thereof was renewable for ever, or was so agreed or designed to be made by the said Henry Pakenham, or that he purchased the same cheaper on that account; and, on the contrary, he the said Thomas Smyth the second expressly swore that the said Robert Pakenham before said purchase made use of it as an argument with the said Thomas [190] Smyth the first to induce him to give what he did for said lands, that there was a lease for three lives only, and that said lands would be worth a great deal more at the expiration of said term.

And he insisted and was advised that he was not obliged by the said covenant or agreement in the said lease to renew to the said Garrett Nangle.

And he stated that if the said clause or agreement was not fully or skilfully worded, it was not occasioned by the mistake or ignorance of the person that drew the same, or by his being unacquainted with the form and manner of drawing a lease for lives renewable for ever, it having been drawn by the said Sir Thomas Pakenham, who was her majesty's prime serjeant-at-law, and, therefore, if it had been designed to be a lease for lives renewable for ever it would have been otherwise drawn.

And he stated that there was no other clause, except what was afore-mentioned by him in the said lease, to the purport or effect that the said Bartholomew Cooper senior, his heirs and assigns, might renew any life or lives, paying the sum of £16 16s. 4d. on the renewal, or any other to that purpose; and that he had never heard nor did he believe that the said clause before mentioned was inserted in the said lease in pursuance or performance of any agreement that the said lease should be renewable for ever.

The plaintiff proved, by Robert Pakenham, the sale by him of Mayne to Thomas Smyth the first, as being subject to a lease for lives renewable, and that the general reputation in the county was that the lease was renewable; and by the evidence of Ann Pakenham, the widow of Henry Pakenham, "that the said lease was made by her [191] husband to the said Bartholomew Cooper with an intention to be renewable for ever, and that she having had some discourse with her husband in relation to the said lease, he told her that the said lease was renewable for ever." And the plaintiff also proved, by the evidence of Anne Beatty (the daughter of the said Henry Pakenham), that all the body of the said lease was the proper handwriting of Andrew Williams, who was not a person skilled in drawing leases, but was a parish clerk; that she heard her father say "the lease was for lives renewable;" and heard him say, several years after the death of the said Appellina Cooper, (one of the lives in the original lease,) that he wondered the plaintiff in that suit did not renew his lease by putting in a new life, instead of the said Appellina Cooper. The plaintiff also proved, by the evidence of Edward Pakenham, that the said Andrew Williams was a parish clerk, and no way skilled in drawing leases, and that it was the intent of the said Henry Pakenham and Bartholomew Cooper that the said lease should be for lives renewable for ever.

The cause was heard in the Court of Chancery in Ireland on the 22d, 26th, 27th, and 28th days of November 1716, the lease of the 24th May 1764 having been proved and read upon the hearing of the cause.

On the 28th day of November 1716 it was decreed by the then Lord Chancellor of Ireland, that the said Thomas Smyth should perfect unto the said plaintiff, Garrett

Nangle, a lease or leases of the said lands of Mayne, demised by the said Henry Pakenham to Bartholomew Cooper for the lives of Thomas Nangle [192] and Patrick Cashell in the room of Bartholomew Cooper the elder and Appellina Cooper, the plaintiff paying a proportion of the rent and of the fines payable by the said lease in respect of the said lands of Mayne, regard being had to the said lands of Fiermore, without costs on either side; "and his lordship was thereby pleased to declare, that he did not establish the said lease was a lease for lives renewable or not."

In pursuance of the decree Thomas Smyth the second, by indenture of the 8th of April 1719, and in consideration of £28 15s. 5d., after reciting said lease of the 24th day of May 1672, and that the same contained a clause or agreement to the purport and effect before mentioned, namely, "that upon the renewing or inserting of any life or lives, there should be paid by the said Bartholomew Cooper the father, his heirs or assigns, the full sum of £16 16s. 4d.," and after reciting the said decree, the said Thomas Smyth, in obedience to the said decree, did grant unto the said Garrett Nangle, his heirs and assigns, the said lands of Mayne, containing 148 acres of profitable land and 23 acres 13 perches of unprofitable land, for the life of Bartholomew Cooper and the lives of Thomas Nangle and Patrick Cashell, at the yearly rent of £28 10s. 3½d.

A memorial of the indenture of the 8th of April 1719 was registered in Ireland, and described as "a memorial of an indenture of renewal, bearing date and perfected the 8th of April 1719, made between the Rev. Thomas Smyth of the city of Dublin, clerk, of the one part, and Garrett Nangle of Mayne in the county of Westmeath, esq., of the other part, annexed to a lease for lives renewable for ever, dated the four [193] and twentieth day of May one thousand six hundred and seventy-two." Signed by Garrett Nangle, but not by Thomas Smyth the second.

The said Bartholomew Cooper the younger, the last remaining life in said lease of the 24th of May 1672, having died, Thomas Smyth the second, by indenture bearing date the 5th day of May 1752, after reciting said lease of the 24th of May 1672, and that same contained an agreement in the precise words before set forth, and after reciting said decree and said indenture of the 8th of April 1719, so executed in pursuance thereof, in pursuance of the covenant of renewal in the said original lease contained, granted unto Hyacinth Nangle (the grandson and heir of Garrett Nangle), his heirs and assigns, the said lands at Mayne, for the lives of the said Thomas Nangle, Patrick Cashell, and his royal highness George Prince of Wales, and the survivors and survivor of them; and in this last-mentioned indenture the following agreement is contained:—

"It is hereby agreed between the parties aforesaid, that upon the renewing or inserting of any life or lives there shall be paid by the said Hyacinth Nangle, his heirs or assigns, unto the said Thomas Smyth, his heirs or assigns, the full sum of £14 17s. 8½d. current and lawful money of England," being the sum apportioned for the renewal fine by the said decree in 1716.

Thomas Nangle, one of the lives named in said indenture of the 8th of April 1719, having died, Thomas Smyth the second, by indenture dated the 2d day of March 1754, after reciting to the effect mentioned in the lease of 1752 and the indenture of 5th of May 1752, in [194] pursuance of the covenant for renewal in the said original lease contained, and in consideration of £14 7s 8½d., did release unto the said Hyacinth Nangle, his heirs and assigns, the said lands of Mayne for the lives of Patrick Cashell, George Prince of Wales, and Prince Edward his brother, and the survivors and survivor of them, with a similar clause as to renewal as is contained in the lease of 1752.

Some time after the execution of the indenture of the 2d of March 1754 the house of Hyacinth Nangle, at Streamstown in the county of Westmeath, was set fire to and burnt, and Hyacinth Nangle was murdered, and all the title deeds therein, including the original lease of the 24th of May 1672 and the renewals thereof, were burnt or destroyed.

Hyacinth Nangle left an only child, Christopher Nangle, then a minor, him surviving.

William Smyth, the eldest son and heir-at-law of Thomas Smyth the first, and to whom Thomas Smyth the first had devised certain estates in his said will mentioned for life, to take effect in possession immediately on the decease of Thomas Smyth

the first, with remainder to his first and other sons successively in tail male, died in the lifetime of his next brother Thomas Smyth the second, leaving an eldest son Thomas Smyth (called Thomas Smyth the third), who, as the first tenant in tail of the said estates which had been so devised directly to his father the said William Smyth for life, became entitled thereto in possession on the death of his said father William Smyth, and thereupon, having duly barred the estate tail and all remainders over under said will, acquired the fee in the said estates so devised to his said father for life by the will of said Thomas [195] Smyth the first, and was also entitled to an estate tail in remainder in the lands so as aforesaid devised to the said Thomas Smyth the second for life, expectant on the death of the said Thomas Smyth the second without issue male.

The said Thomas Smyth the third being entitled to such estates in possession, and to the said lands of Mayne and other estates in reversion expectant upon the death of Thomas Smyth the second, upon and previous to his marriage with Miss Martha Hutchinson, made and duly executed an indenture of release and settlement bearing date the 10th day of March 1764, whereby he conveyed the several lands therein mentioned to trustees therein named upon trust, to the use of himself for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to a jointure for the said Martha Hutchinson and to the powers and remedies for recovery thereof, to the use of the first and other sons of the said Thomas Smyth the third by the said Martha Hutchinson in tail male, with divers remainders over.

This last-mentioned settlement contains a proviso, that in case the said Thomas Smyth the third should outlive the said Thomas Smyth the second, and thereupon, and by suffering a recovery thereof, the lands then possessed by the said Thomas Smyth the second should become vested in the said Thomas Smyth the third in fee, it should be lawful for the said Thomas Smyth the third to revoke the limitations thereby declared concerning the lands therein comprised, and to limit and settle the lands then in the possession of the said Thomas Smyth the second upon the same trusts [196] and for the same estates as the several lands therein comprised then stood limited.

In the latter end of the year 1764, and shortly after the execution of said settlement, Thomas Smyth the second died without issue, whereupon Thomas Smyth the third became seised of an estate tail male in possession in the lands of Mayne and the other lands devised to the said Thomas Smyth the second for life by the will of the said Thomas Smyth the first; and the said Thomas Smyth the third, in or as of Hilary term 1765, levied a fine and suffered a common recovery of all said last-mentioned lands, and acquired an estate in fee simple therein.

In pursuance of the proviso contained in said settlement of the 10th of March 1764, for revoking the limitations thereof as regarded the lands therein comprised, and settling said last-mentioned lands in lieu thereof, Thomas Smyth the third made and duly executed an indenture of release and settlement, bearing date the 8th day of March 1766, and did thereby revoke and make void the several trusts declared in the said indenture of the 10th of March 1764 concerning the lands and premises therein comprised, and did thereby grant and release unto trustees therein named the lands of Mayne and the several other lands therein mentioned upon trust, to the use of the said Thomas Smyth the third for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to a jointure for the said Martha Hutchinson and to the powers and remedies for recovery thereof, to the use of the first and other sons of Thomas Smyth the third by the said Martha Hutchinson, in tail [197] male and in strict settlement, with divers remainders over.

In or about the year 1768, Prince Edward having died, Thomas Smyth the third, by indenture bearing date the 2d day of April 1768, after reciting to the effect mentioned in the lease of 1754, and after reciting the said indenture of the 2d of March 1754, in pursuance of the covenant of renewal in the said original lease contained, and in consideration of £14 7s. 8½d., did release unto Christopher Nangle, the only child and heir-at-law of Hyacinth Nangle deceased, a minor, the lands of Mayne for the lives of the said Patrick Cashell, his said royal highness George Prince of Wales, then George the third, and of his royal highness William Henry Duke of Gloucester, and the survivors and survivor of them, with a similar clause for renewal as is contained in the two former leases.

Thomas Smyth the third executed a memorial of said last-mentioned indenture of the 2d of April 1768, which was registered in the public registry office for registering deeds in the city of Dublin, on the 22d of April 1768.

Thomas Smyth the third, Patrick Cashell having died in or about the year 1768, by indenture of lease dated the 25th day of December 1768, after reciting the said original indenture of lease of the 24th of May 1672, and that it was by the said indenture of lease agreed, that upon renewing or inserting of any life or lives there should be paid by the said Bartholomew Cooper the father, his heirs or assigns, unto the said Henry Pakenham, his heirs or assigns, the full sum of £16 16s. 4d. sterling; and after reciting the said decree and said indenture of the 8th day of April 1719, the 5th day of [198] May 1752, the 2d day of March 1754, 2d day of April 1768, and that Patrick Cashell was dead, and that the life of Christopher Nangle was nominated in his place, the said Thomas Smyth the third, in pursuance of the covenant for renewal in said original lease contained, and in consideration of £14 7s. 8½d., did release unto the said Christopher Nangle the said lands of Mayne for the lives of King George the third, his royal highness William Henry Duke of Gloucester, and of the said Christopher Nangle, and the survivors and survivor of them.

And in the said last-mentioned indenture is contained the following clause:—  
“And it is thereby agreed between the parties aforesaid, that upon the renewing or inserting of any life or lives there shall be paid by the said Christopher Nangle, his heirs or assigns, unto the said Thomas Smyth, his heirs and assigns, the full sum of £14 7s. 8½d. current and lawful money of England.”

On the 29th July 1774 Thomas Smyth the third filed his original bill for the purpose of having the boundaries ascertained between the said lands of Mayne and certain lands at Coole, alleging that Garrett Nangle and Hyacinth Nangle were severally and successively in possession of lands of Coole adjoining the lands of Mayne, as tenants to the said Thomas Smyth the second and Thomas Smyth the third, under determinable leases for twenty-one years, and that during the continuance of such leases they had defaced the ancient meerings between the said lands of Mayne and Coole, and had annexed part of the lands of Coole to the said lands of Mayne.

On the 6th day of August 1779 the bill was amended, [199] and it was therein stated that the lands of Mayne were held under a lease for three lives, with a covenant for a perpetual renewal. The suit was not prosecuted to a decree, an amicable adjustment having been made.

Some time in the year 1782 or 1783 Thomas Smyth the third died, leaving Thomas Hutchinson Smyth his eldest son, who, having suffered a common recovery of the lands in Mayne, in contemplation of a marriage afterwards had with Miss Abigail Hamilton, by an indenture of release and settlement, bearing date the 27th day of February 1796, granted and released unto trustees therein named the said lands of Mayne and other estates therein comprised, upon trust, to the use of himself the said Thomas Hutchinson Smyth for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to a jointure thereby provided for the said Abigail Hamilton and to the powers and remedies for securing the same, and in default of such appointment as therein mentioned, to the use of the first and other sons of the said Thomas Hutchinson Smyth by the said Abigail Hamilton, his intended wife, and the heirs male of such first and other sons in tail male, and in default of such issue to the use of the said Thomas Hutchinson Smyth in fee.

William Henry Duke of Gloucester having died some time prior to the year 1806, Thomas Hutchinson Smyth, by deed dated the 16th day of January 1806, and purporting to be made between the said Thomas Hutchinson Smyth of the one part and the said Christopher Nangle, the lessee in the annexed indenture, of the other part, after reciting that William Henry [200] Duke of Gloucester, one of the *cestuique vies* in the annexed indenture, was dead, and in order to fill up the three lives pursuant to the covenant for perpetual renewal in said annexed indenture mentioned, the said Christopher Nangle had nominated his eldest son John Nangle, and in consideration of a fine of £14 7s. 8½d., the said indenture witnessed, that, in pursuance of the said covenant for perpetual renewal, and in order to fill up the said three lives agreeable thereto, the said Thomas Hutchinson Smyth added and inserted to the time or term of said grant or demise the life of the said John Nangle then nominated, and released unto Christopher Nangle, his heirs and assigns, the lands of Mayne, for

the lives of King George the third, of Christopher Nangle, and John Hyacinth Nangle, and the survivors and survivor of them.

On the death of George the third Thomas Hutchinson Smyth, by indenture bearing date the 12th day of August 1820, and made between the said Thomas Hutchinson Smyth of the one part, and the said Christopher Nangle, who is therein again described as the lessee in the annexed indenture named, of the other part, after reciting that George the third was dead, and in order to fill up the three lives, pursuant to the covenant for perpetual renewal in the said annexed indenture mentioned, and in consideration of a fine of £14 7s. 8½d. did add the life of William Nangle, and did release unto Christopher Nangle, his heirs and assigns, the lands of Mayne, for the lives of Christopher Nangle, John Hyacinth Nangle, and William Nangle, and the survivors and survivor of them.

In the month of October 1830 Thomas Hutchinson Smyth died, leaving Thomas Smyth the fourth his [201] eldest son, who, having suffered a recovery of the lands in Mayne, and in contemplation of his marriage with Miss Mary Anne Gibbons, which was afterwards solemnized, made and duly executed an indenture of release and settlement, dated the 2d day of August 1832, whereby he granted and released unto trustees therein named the said lands of Mayne and the several other lands therein comprised, upon trust, to the use of himself for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to a jointure for the said Mary Anne Gibbons, in case she should survive the appellant Thomas Smyth the fourth, and to the powers and remedies for recovery thereof, and to a trust term for better securing the same and raising portions for younger children, to the use of such of the sons of the appellant Thomas Smyth the fourth by the said Mary Anne Gibbons as the said appellant Thomas Smyth the fourth should appoint; and in default of such appointment, to the use of the first and other sons of the said marriage, and the heirs male of such first and other sons, in tail male.

On the 12th day of June 1836 Christopher Nangle, the last surviving *cestuique vie* named in the before-mentioned indenture of renewal of the 25th day of December 1768, died, having previously made his will, bearing date the 2d day of July 1828, whereby he devised all his estates therein, including his interest in the said lands of Mayne, to the respondents Gerald Dease and Richard More O'Ferrall, their heirs and assigns, in trust, to the use of his eldest son, the respondent John Hyacinth Nangle, for life, with remainder to his first and other sons in tail male, [202] with remainder to testator's second son William Nangle for life, remainder to his first and other sons in tail male.

On the 8th day of July 1836 John Hyacinth Nangle applied to Thomas Smyth the fourth to execute a new lease of the lands of Mayne for a life to be nominated by him in place of Christopher Nangle deceased; but Thomas Smyth the fourth, conceiving that John Hyacinth Nangle had possessed himself of more lands than were comprised in the original lease of the 24th day of May 1672, refused to grant a renewal of the leases until it was ascertained what lands John Hyacinth Nangle was entitled to beyond those comprised in the original lease.

On the 28th day of November 1836 the respondents John Hyacinth Nangle, William Nangle, Richard More O'Ferrall, and Gerald Dease filed their original bill against the said Thomas Smyth the fourth, and which was amended in June 1836, setting forth the original indenture of lease of the 24th of May 1672, and that therein was contained a covenant on the part of the said Henry Pakenham with the said Bartholomew Cooper for the perpetual renewal thereof on payment of half a year's rent, as by the said original lease which had been burnt or destroyed, if it could be produced, would appear, and as appeared by a recital thereof in the indenture of the 25th day of December 1768, thereafter set forth.

The respondents by said bill then proceeded to deduce the title of the lessor and lessee to the said lands of Mayne, and in so doing particularly stated and set forth the several indentures of the 8th day of April 1719, 5th of May 1752, and 2d of March 1754, and in so [203] doing averred that the same had been burned or destroyed, and particularly referred to the recitals of the said several indentures in the said indenture of the 25th day of December 1768 as conclusive evidence of the contents thereof.



The respondents, by their said bill, after stating the said indenture of the 2d day of April 1768, and particularly setting forth the said indenture of the 25th day of December 1768, stated that the said last-mentioned indenture, viz., the indenture of the 25th of December 1768, contained full recitals of the several indentures therein-before set forth and stated to have been burned or destroyed, and submitted that the appellant Thomas Smyth the fourth was bound and estopped by the recitals contained in the said last-mentioned indenture of the 25th of December 1768.

And after the several other statements in said bill contained, the respondents prayed that the covenant for renewal might be decreed to have been a covenant for perpetual renewal.

The appellant Thomas Smyth the fourth by his answer admitted that the lease of the 24th May 1672 had been executed by the said Henry Pakenham to the said Bartholomew Cooper, and that there was contained in said lease or endorsed there-upon a clause or memorandum in the words or to the purport following, that is to say:—"and it is hereby agreed between the parties aforesaid, that upon the renewing or inserting of any life or lives there shall be paid by the said Bartholomew Cooper the father, his heirs or assigns, unto the said Henry Pakenham, his heirs or assigns, the full sum of £16 16s. 4d. current and lawful money [204] of England;" but appellant denied that there was contained in or endorsed upon said lease any other or further covenant in anywise relating to the renewal of said lease than the covenant or memorandum aforesaid.

And after deducing his title to the fee and inheritance of said lands of Mayne as herein-before stated, he submitted that he was not bound by the aforesaid agreement or memorandum, and the true construction thereof, to execute any renewal to the respondents, and that he was not bound by the renewals, inasmuch as the same were made by persons having only estates for life.

After the appellant had filed his answer insisting that the said indenture of the 24th of May 1672 did not contain any covenant or agreement in anywise relating to the renewal thereof, except the clause or memorandum aforesaid, and that the said clause or memorandum was not a covenant for perpetual renewal, the respondents, on the 23d day of June 1837, amended their said bill upon the file, by introducing the following words at the commencement of the prayer; viz., "that the covenant for renewal contained in the said original lease may be decreed to have been a covenant for perpetual renewal." And by such amendment the respondents made the appellant Thomas James Smyth, a minor, and Francis Smyth, James Gibbons junior, and the Rev. Robert Pakenham parties defendants, and prayed an injunction to restrain the appellants from proceeding at law.

On the 1st day of July 1837 the appellant Thomas Smyth the fourth filed his answer to such amendments.

[205] In Easter term 1837, the appellant Thomas Smyth the fourth brought his ejectment in the Queen's Bench for the recovery of the possession of the lands of Mayne.

This ejectment was tried at the Mullingar summer assizes in the year 1837 before Mr. Baron Foster, who in charging the jury stated, that the question whether the defendant Nangle had now a valid subsisting title to the possession of the lands sought to be recovered, must depend upon whether the leases of 1806 and 1820, or either of them, were good and subsisting leases on the days in the declaration mentioned, which depended on the fact whether there was or was not a covenant for perpetual renewal in the lease of 1672; and in case there was such a covenant in the said lease, it then became a question for the Court, and not for the jury, and there-upon directed the jury to consider the leases of 1806 and 1820 as good and subsisting leases.

The plaintiff excepted to this charge, insisting that the judge should have told the jury that there was not any covenant for perpetual renewal contained in the lease of 1672, or in the renewals of 1768, or in any other renewal; and that the renewals of 1806 and 1820 were not good and valid leases, first, as having been made by a tenant for life under the settlement of 1796, and, secondly, as not having been made in pursuance of the leasing power contained in that settlement.

On the 23d day of January 1838 the defendant Francis Smyth filed his answer to the said original amended and supplemental bills.

On the 3d day of February 1838 the defendants [206] James Gibbons and the

Rev. Robert Pakenham filed their joint and several answer to said original amended and supplemental bills, and upon the same day the appellants Thomas Smyth the fourth and Thomas James Smyth, a minor, filed their joint answer to said supplemental bill, and the appellant Thomas James Smyth also answered said original and amended bills, by which said answer the appellant Thomas Smyth the fourth submitted, that as there was not any covenant for perpetual renewal in said lease of 24th May 1672, no subsequent events could construe it to have been such, and that the jury had found for the defendant in such ejectment cause upon the misdirection of the baron who tried the same.

On the 2d day of March 1838 the plaintiffs filed their replication in said cause, and evidence was gone into on the part of the respondents and appellants; and publication having passed in the cause, the same was set down to be heard upon pleadings and proofs as to the appellants, and upon bill and answer as to the other defendants.

On the 22d day of May 1838 an order was made in this cause, on consent, that the parties should be at liberty to read as an original document the copy of the will of Thomas Smyth the first; and the cause came on to be heard before the Lord Chancellor of Ireland on Friday the 25th day of May 1838; but the bill of exceptions taken to the charge of the learned baron who tried the ejectment cause being in course of argument before the Court of Queen's Bench in Ireland, the hearing of this cause was from time to time adjourned until the argument in said law cause should be closed, and the judgment of the Court of Queen's Bench [207] upon the construction of the said clause or memorandum, being the point raised by the bill of exceptions, should be pronounced.

On the 13th day of June 1838 the Court of Queen's Bench, after argument, gave judgment on the said bill of exceptions, in which the Court gave it as their opinion, that there could be no reasonable doubt that the terms of the renewal covenant contained in the lease of 1672 were such as they were recited to have been by the renewal lease of 1768, and in conformity with the renewal covenant contained in that lease; and the Court were of opinion that the terms of that covenant did not amount to or warrant the construction of such a covenant being a covenant for perpetual renewal; and the Court stated that the jury should have been directed that the terms of the covenant, as the same were recited in the lease of 1768, did not amount to a covenant for perpetual renewal, and that, although the Court could not but feel a disposition to sustain a construction to which the acts of parties appeared for a length of time to have given countenance, the Court did not see sufficient grounds to adopt it; and the verdict of the jury having been founded upon a direction leading to a misconception of the construction of that covenant, the Court thought that the exceptions so taken by appellant Thomas Smyth the fourth should be allowed, and a *venire de novo* awarded. Bell, on the demises of *Thomas Smyth and others, v. John Hyacinth Nangle* (1 Jebb and Symes Reports, 199).

The cause came on to be heard before the Lord Chancellor of Ireland on the 3d day of November [208] 1838, and to be further heard on the 5th, 6th, 7th, and 8th days of November 1838, and on the 22d day of December 1838 it was decreed by the Lord High Chancellor of Ireland, that the respondents bill should be retained for six months, with liberty for the respondent John Hyacinth Nangle to commence a feigned action at law against appellants, to which the appellants should appear gratis and plead the general issue, and to admit all matters of form, so that a trial might be had between the said parties to try the following issues:—first, whether at or before the time of the execution of the lease dated the 24th day of May 1672, in the pleadings mentioned, it was agreed between Henry Pakenham, the lessor in that lease, and Bartholomew Cooper, the lessee therein, that the said Henry Pakenham should grant to the said Bartholomew Cooper, his heirs and assigns, a lease for lives renewable for ever of the lands and premises in the said lease mentioned; and secondly, whether, independent of the memorandum or endorsement made upon said lease, whereby it was agreed by and between the parties thereto that for the renewing or inserting of any life or lives there should be paid by the said lessee, his heirs or assigns, the sum of £16 16s. 4d., there was contained in the said lease of the 24th day of May 1672 any clause, covenant, or agreement relating to the renewal of said lease to the lessee, his heirs and assigns; the parties to the said action to be respec-

tively at liberty to give in evidence on the trial of such issues all the evidence used by the said parties on the hearing of this cause; the said issues to be tried by a special jury of the county of Westmeath; and the judge before whom such trial should be had should certify to the said court the verdicts to be [209] had on the said issues respectively; and his Lordship was pleased to reserve all further directions until the return of said judge's certificate.

From this decree the present appeal is brought.

Sir William Follett and Mr. Jacob for the appellants:—These issues cannot be supported; there is no agreement between the parties distinct from the lease. The plaintiffs do not make out a case upon their bill for a perpetual renewal.

The case put upon the record is, that the covenant contained in the several leases, is a covenant for a perpetual renewal, and that case has failed. The proceedings in the Court of Chancery in 1713 show that there was no covenant for perpetual renewal. Two allegations have been resorted to which are not on the record; first, a parol agreement for a perpetual renewal, second, that there might be some other covenant than that contained in the original lease.

The lease executed supersedes any parol agreement, unless evidence of reputation can be admitted to contradict a written instrument; the only endorsement on the original lease was an assignment of Bartholomew Cooper's interest in the lease to Garrett Nangle.

The different renewals which were made by the Smyth family were made in ignorance of their rights; and the acts of the parties cannot convert what is not a covenant for perpetual renewal into a covenant for perpetual renewal, *Iggulden v. May* (9 Ves. 325; 7 East, 237). Lord Alvanley would not [210] allow a deed to be construed by the acts of the parties, *Baynham v. Guy's Hospital* (3 Ves. 295). The Lord Chancellor said he could not come to any satisfactory conclusion, and therefore directed these issues. Supposing the jury were to find that there was another agreement, could the Chancellor act upon it? There can be no living witnesses to examine. If there is documentary evidence the Court itself ought to decide upon it; no parol evidence can be received independent of the statute of frauds; a solemn written agreement cannot be added to by a parol agreement. Most of the leases granted by tenants for life, therefore, no evidence against us, and the Lord Chancellor adopts as a fact in one of the issues what is pure hypothesis, that there is a memorandum or endorsement on the original lease.

Mr. Pemberton and Mr. Wakefield for the respondents:—From 1713 to the present time there never has been a doubt of the right of the Nangle family to a renewal; each side has treated it as a perpetual interest, and it is not a violent presumption that there was some collateral agreement for a perpetual renewal.

There is no objection to a parol agreement in Ireland; there was at that time no statute of frauds. In 1754 the lease was destroyed, and the lessee was not able to produce the original lease; but it is remarkable that the lessor produces no counterpart.

(Lord Chancellor:—There is no evidence that they have the lease.)

They do not account for not producing it.

[211] (Lord Chancellor:—If you had asked them for it they might have accounted for it.)

In the proceedings in Chancery in 1713 the Court, by decreeing that two lives should be added, determines that there is some engagement for a perpetual renewal, otherwise there would be a great injustice in adding two lives. In 1752 the same party, who was litigating the point, acquiesces in the claim, and grants a renewed lease; all the leases have been taken as if there was a covenant for perpetual renewal, and though there have been disputes as to boundaries, no dispute has ever arisen in respect of a renewal of the leases. From the numerous renewals which have taken place the Court would presume a covenant for perpetual renewal. *Attorney General v. Bishop of Ely* (4 Russell, 102), *Ball v. Lord Devonshire* (Lynes App. on Gen. 61). Where the question of right in a suit is a mere legal question dependent upon written evidence, the House of Lords held that it was right to send it to law to be tried upon a proper issue. *Collins v. Saurey* (4 Brown's P. C. 692), *Burkett v. Randall* (3 Merivale, 466).

(Lord Chancellor:—I have looked over the original and amended bill, and I do not find any such case made by your bill as you are arguing.)

We have put the case sufficiently in issue. The plaintiffs by their supplemental bill state, that the defendants pretend that the case of 1672 does not contain any covenant for perpetual renewal.

(Lord Chancellor:—But they do not charge that the pretence was untrue.)

The Court might give us leave to file a supplemental bill.

[212] (Lord Chancellor:—It could not be done by supplemental bill; but your bill must be dismissed, without prejudice to your filing another bill.)

Sir William Follett in reply:—A supplemental bill would bring forward a case totally inconsistent with the case made in 1713. Mr. Foster, the judge, thought the covenant was a covenant for a perpetual renewal, and the bill is framed upon that view of the subject. The original lease was produced in 1713, and in the answers to the bill filed in 1713 the covenant contained in the original lease is set out, and it is denied that there was any agreement for a perpetual renewal. This is not a case of presumption, like the bishop of Ely's case. To presume that the lease contained such a covenant would be inconsistent with the deed; further litigation would answer no additional purpose; no additional evidence can be produced. There are many instances in church lands of families holding leases for centuries, and yet from that holding no presumption of a right to a perpetual renewal arises; it is the practice always to recite the renewal covenants in a new lease. Nothing can be wilder than the first issue, to leave to a jury to say there was an independent agreement; the whole evidence is before the Court. Nothing further can be elicited; the result must be the same, and only additional expense incurred.

Lord Chancellor (2d June):—This suit was instituted to obtain the benefit of a perpetual renewal of a lease which had been agreed for, as alleged, in 1672; and since the case was argued yesterday I have taken ad-[213]-vantage of the interval to look through the pleadings, and I think our judgment must be regulated by the pleadings, and the pleadings alone, because it would be very dangerous to listen to the arguments urged at the bar, that a different rule of pleading is to be followed regarding matters of equity, whether the cause comes from Ireland or from England. The rules of pleading for this purpose are essential to the due administration of justice, in order to give to each party the opportunity of knowing the case which he has to meet. Now, when this case comes to be investigated, there is no such objection, and when I threw out that the House might be disposed to dismiss the bill without prejudice to the party filing another bill, it was certainly on the supposition that the form of the bill might have been more advantageously framed if it had assumed a different shape; but when I come to consider what appears on the proceedings of 1713, I am quite satisfied that the gentleman who drew this bill, having those proceedings before him, could not have drawn the bill in a way which would have led to a more beneficial result to his client than the course he has adopted.

Now, the order of the Lord Chancellor of Ireland directed certain issues to be tried, and the question is, whether these issues are at all consistent with the case made by the bill, one of the issues being to inquire, whether there was an agreement independently of the lease at or before the period of the lease of 1672; and the other, whether that lease contained any other provisions besides that memorandum, which, it appears, the plaintiff states to have been either included in or attached to that lease.

When we look to the bill itself it does not open the [214] door to any one or other of these inquiries; it confines the plaintiff's case strictly to what the plaintiff alleges to have been contained in that lease of 1672. The bill states that lease, and then states that it contained a covenant for perpetual renewal, and refers to a subsequent lease of the 25th of December 1768 as evidence of the alleged contents of that first lease. Now, if the bill had stopped there, if there was nothing further, no further allegation on the subject, it might have been open to the observation of Mr. Wakefield, that it was an allegation that the original lease contained a covenant for renewal, and referred to the renewed lease of 1768 as evidence of its containing such a covenant. But the subsequent part of the bill entirely excludes such a supposition, for, in mentioning the renewal, it is always mentioned to be "in pursuance of said

covenant." In page 27 it states "your suppliants do not possess any copies or copy thereof, or any of them, or any evidence of the contents thereof, save the recitals thereof contained in the said indenture of the 25th day of December 1768 herein-after mentioned, but which recitals your suppliants submit is conclusive evidence of the contents thereof for the reasons herein-after set forth." Then in a subsequent page it states, that the last-mentioned indenture of renewal contains full recitals of the several indentures herein-before set forth or mentioned, and herein-before stated to have been burned or destroyed," which includes the lease of 1672; and having been executed by Thomas Smyth, your suppliants submit that Thomas Smyth is bound and estopped by the recitals contained in the last-mentioned indenture of renewal. Then the bill prays, "that the [215] covenant for renewal contained in the said original lease may be decreed to have been a covenant for perpetual renewal."

Now, it is impossible to read that bill and put any other construction on it than this,—that which appears in the renewed lease of 1768 is a copy of that which is contained in the lease of 1672. We have not got the deed of 1672; it was burned or destroyed; but we state that we know what it contains, because that deed of 1768 contains all the recitals and statements in that deed; and then having got that covenant from the deed of 1768 the bill prays that the covenant contained in the original lease, alleged to be identical with that which is stated in the renewed lease of 1768, may be declared to be a covenant for perpetual renewal. The whole case of the plaintiff is put on the construction of that covenant, which is stated by the plaintiff to be identified and ascertained by the renewed lease of 1768. When that case fails it is not attempted at the bar to be argued that that covenant is a covenant for perpetual renewal, or that it gives the plaintiff any title to the relief which he claims by this bill. Now, what have the issues tendered by this bill to do with the construction of the covenant? They have nothing to do with the construction of the covenant; they find out a case for the plaintiff totally *dehors* the bill.

Then it occurred to me, certainly, that if the bill had assumed a different shape, and if the bill had stated that the deed was lost, (but through the dealings between the parties an inference ought to be drawn that that deed contained a covenant for perpetual renewal,) [216] and they had brought forward evidence for the affirmative of that proposition,—that a large and reasonable inquiry might have been open to the plaintiff, which might have justified the inquiries directed by those issues. But then, when we look at the earlier history of this transaction, and look at what passed in the year 1713, when the original lease existed, when the parties had it to produce, when they were as much interested in making the most of that lease as at the present moment, it is quite clear there is no room for any presumption that the deed itself, then in possession of the parties, contained any other covenant than that which is contained in the renewed lease of 1768. The complaint being not of any covenant that is contained in it, but the bill prays for relief on the ground of some mistake or error in the person employed to prepare the lease, and asks for relief on the ground of that supposed error. Why, there was no error in the covenant for renewal, which is all the plaintiff asks for. He states that which appears in the renewed lease of 1768, and asks for relief on the ground of that not being properly adapted to the purpose the parties had in view. That shows that no further investigation, nor any other form of suit, could possibly enable the plaintiff to have that which he asks; and the person who prepared this subsequent bill had good reason for not opening a door for further inquiry, knowing that the proceedings of 1713 would show that there was no other ground on which the plaintiffs case could by possibility succeed.

No doubt, after possession has been held for so long a time, and parties have supposed they have a title which [217] they have not, courts of justice are anxious to take care that no conclusion of wrong may be done consistently with the original right of the parties; and where the dealing presupposes that there are grounds of title which are not capable of being proved, they would give the party every opportunity of proving the history of that title. Such, however, is not the title now set up by the plaintiff, and I think it would be improperly encouraging litigation to allow the plaintiff to file a bill which he will not be able to sustain. If he has any other ground of equity, or a case generally which enables him to make a new title to new relief, under those circumstances the dismissal of this bill will not prejudice him.

I think it much fairer, considering the circumstances of the transaction, not to hold out any hope to the plaintiff of proceeding in a case which, according to the rules of practice, he would be precluded from proceeding with by the dismissal of this bill. I therefore propose to your Lordships, that this decree should be reversed, and the original bill dismissed, with costs.

Lord Brougham.—I entirely agree with what my noble and learned friend has stated, in the opinion he has given as the result of this case, in every particular. It has been said, that certain inattention or negligence, or slovenliness, as was stated in one part of the observations, has been found to prevail in other parts of the United Kingdom in the drawing of pleadings, and that on that account your Lordships ought to apply a different rule to cases coming from that part of the kingdom than to cases coming from nearer home. My [218] Lords, I should say, if it were so (which I very much doubt),—if it were so, that would be an exceedingly dangerous course for your Lordships to take, for it would be the means of perpetuating that negligence, or at least slovenliness, which it is suggested there exists; I do not believe it exists, but if it does exist, your Lordships, by having one rule of pleading for Ireland and another for Westminster Hall, would undoubtedly perpetuate that neglect.

But I see no evidence whatever of this in the present case; I see nothing whatever of that defect in the present pleadings; the defect is not in the draughtsman but in the party, not in the bill but in the case. The bill appears to me to meet the facts of the case, and no doubt it is unfortunate to the party that it must be so framed; but the case being defective in that essential particular, which has been pointed out by my noble and learned friend, the bill is defective in that particular, as the case—as the facts upon which the draughtsman had to proceed were defective, and, therefore, cannot be now remedied.

A doubt appeared to exist at one moment, both in my noble and learned friend's mind and my own, whether we ought not to dismiss this bill, without prejudice, so as to enable the party to file another; but I think the real answer to that is, that, looking at the proceedings of 1713, that the lease was in existence, and was before the draughtsman who prepared that bill, which was disposed of by Lord Middleton, there is no evidence here, from the frame of that bill, of what the contents of the lease then before the draughtsman were. I do not say whether that bill would be evidence [219] between the same parties in the present suit, supposing an action was sent to be tried at law; I do not argue that at all; but, in the discretion which the Court has to exercise as to whether it will encourage another suit or not, it is very material to consider whether there is any possibility, when you look at the bill, of the lease being now produced containing the clause it is alleged to have contained, namely, the covenant for perpetual renewal. Is it possible to conceive that there should be a lease in existence with that covenant, when you see the way in which that bill is framed with the lease lying before the draughtsman at the time? So far from saying there is a covenant for perpetual renewal in that bill, he says there were various covenants in the bill; that it was agreed between the parties at and before the time of executing that lease,—it was understood and agreed between them that there should be a perpetual renewal, as more plainly appears by this clause, namely, the sixteen guinea clause. Now, if there had been a covenant for perpetual renewal, it would not have more plainly appeared by the sixteen guinea clause, but it would have most plainly appeared by that covenant of renewal itself. It is clear that there was no such covenant, or he would not have had recourse to that form of stating his case, or to that kind of evidence by which he was to support it. Then he states the reason why that sixteen guinea clause was so framed, and was not a covenant for perpetual renewal, namely, the unskilfulness of the conveyancer who prepared the lease. It is clear, in my opinion, that your Lordships have the strongest reason to suppose,—the strongest reason that can be imagined,—that in the [220] lease itself, if it had not been unfortunately destroyed, there would have been found no covenant for a perpetual renewal, excepting that clause respecting the sixteen guineas.

I entirely agree with my noble and learned friend that this decree ought to be reversed, and the original bill dismissed, with costs, below.

It is ordered, that the said order complained of in the said appeal be reversed, and that the respondents' bill be dismissed out of the Court below, with costs.

[221]

FROM THE COURT OF CHANCERY, IRELAND.

MASON GERARD EARL OF ALDBOROUGH,—*Appellant*; HENRY NORWOOD TRYE, THOMAS HENNEY, and WILLIAM CHARLES KING, Executors of JOHN HARVEY OLLNEY, deceased,—*Respondents* [2d, 4th, and 15th June 1840].

[*Mews' Dig.* vii. 271, 276, 431; xi. 716; xii. 1062. S.C. 7 Cl. and F. 436. On point as to "fair value," approved in *Talbot v. Staniforth*, 1861, 1 J. and H. 503; *Fry v. Lane*, 1888, 40 Ch.D. 320. On point as to position of grantor of voluntary deed, discussed and approved in *Judd v. Green*, 1876, 33 L.T. N.S. 597; and *Nant-y-glo and Blaina Ironworks Co. Lim. v. Taylor*, 1876, 35 L.T. N.S. 125. See also *Siree v. Kirwan*, 1843, 9 Cl. and F. 738.]

Lord Aldborough, being tenant in tail male of certain estates expectant upon the determination of his father's life estate, charged his estates with the payment of £12,000 and £20,000 in case he shall survive his father, as the consideration to Colonel Ollney for his advancement to Lord Aldborough of £6000 and £10,000, and gives an annuity to his agent for his services, which is afterwards assigned by the agent to Colonel Ollney for a valuable consideration. Upon a bill brought by Colonel Ollney to enforce, and a cross bill by Lord Aldborough to set aside, these transactions:—Held, (though at the hearing of the cause evidence was given on the part of Lord Aldborough, that, according to the tables, an inadequate price was given for the post-obit securities, but no evidence of value was given by Colonel Ollney,) that the Court below, in directing the master to inquire what was the fair market price for the sums secured to be paid, having regard to the ages of Lord Aldborough and his father, the circumstances of the property, and the estate and interest of Lord Aldborough therein, and the other [222] circumstances in the pleadings mentioned, was a proper inquiry; and that the market value, not the value of the tables, was the proper criterion of value; and it was held that Colonel Ollney had a right to be repaid, with interest, the sum he had paid for the purchase of the annuity, though the annuity was voluntary, and not supported by a pecuniary consideration.

In and prior to the year 1825 Benjamin O'Neale Earl of Aldborough was tenant for life of certain estates in Ireland of the annual value of £8000, with remainder to the appellant Mason Gerard Earl of Aldborough in tail male.

In 1825 Benjamin O'Neale Earl of Aldborough was upwards of seventy-nine years of age; the appellant was baptized on the 22d July 1784, and was in December 1825 under the age of forty-two years.

The appellant, Lord Aldborough, from the year 1817 until the year 1826 had been confined within the rules of the King's Bench prison for debt, and had been from 1817 until the death of his father in very embarrassed circumstances.

In the years 1810 and 1812 he alienated an annuity of £500 granted to him by his father, the only income he had for the support of himself and his family, which in 1825 consisted of two sons and two daughters; and in and prior to the year 1825 judgments had been obtained against him to the amount of £160,000.

Under these circumstances in the month of December 1825 it was agreed between William Read King, as the solicitor of John Harvey Ollney, and Lucius Hook Robinson, as the agent of the appellant, with whom the application for a loan had originated, that £6000 should be advanced to the appellant by John Harvey Ollney, in [223] consideration of his being paid £12,000 three months after the death of the appellant's father, and of its being secured on the estates in Ireland.

An indenture, dated the 21st December 1825, was accordingly made and executed between the appellant, Lord Aldborough, of the one part, and John Harvey Ollney of the other part, whereby, in consideration of the sum of £6000 to the appellant paid by the said J. H. Ollney, the appellant covenanted that, in case he should survive his father, he would, in three months after his death, pay unto J. H. Ollney the sum of

£12,000; and he thereby demised his estates in Ireland, of which he was seised or entitled at law or in equity, in possession, reversion, or remainder, unto the said J. H. Ollney, his executors, administrators, and assigns, from the day next before the day of the date of the said indenture, for the term of ninety-nine years, in trust, during so much of the said term as the said Benjamin O'Neale then Earl of Aldborough should live, for the said Benjamin O'Neale then Earl of Aldborough, and his assigns, and after his decease in trust for the person or persons for the time being entitled to the said hereditaments in remainder expectant on the determination of the said term, in case the said appellant, then Viscount Amiens, should depart this life in the lifetime of the said Benjamin O'Neale then Earl of Aldborough; or if the said appellant, then Viscount Amiens, should survive the said Benjamin O'Neale late Earl of Aldborough, then until default should be made in payment of the said sum of £12,000, or any part thereof, at the day or time appointed for payment thereof, in and by the covenant therein-before for that purpose contained; and upon further trust, that in case [224] the said appellant, then Viscount Amiens, should be living at the decease of the said Benjamin O'Neale late Earl of Aldborough, and default should be made in payment of the said sum of £12,000, or any part thereof, then that the said J. H. Ollney, his executors, administrators, or assigns, should at any time thereafter, by sale or mortgage of the said term, raise the said sum of £12,000, with interest for the same from the time the same became payable, together with the costs of the execution of the trusts.

And in the said indenture was contained a covenant by the appellant with the aforesaid J. H. Ollney, that he would, at Hilary Term then next, levy one or more fine or fines unto the said J. H. Ollney of the said hereditaments, and also, in case he the said appellant should survive the said Benjamin O'Neale late Earl of Aldborough, would suffer one or more common recovery or recoveries of the same hereditaments; and it was thereby agreed and declared, that the said fine or fines and recovery and recoveries should operate and enure to the use of the said J. H. Ollney, his executors, administrators, and assigns, for the residue which should then be to come of the said term of ninety-nine years, but upon and for the trusts thereby declared concerning the same, and after the expiration or sooner determination of the said term, to the use of the said appellant, then Viscount Amiens, his heirs and assigns for ever.

Shortly after the execution of the said indenture fines were duly levied, in the Court of Common Pleas in Ireland, of the hereditaments comprised in the said indenture, in pursuance of the covenant.

The sum of £12,000, secured by the said indenture, was, in case of the appellant surviving his father, further [225] secured by the bond of the appellant, with warrants of attorney for entering up judgments both in England and Ireland against him; but by the said indenture it was agreed that the judgments should not be entered of record until the death of Benjamin O'Neale Earl of Aldborough.

William Read King on the 22d of December 1825 paid to the appellant the sum of £6000 in the following manner; £2500 in Bank of England notes, and £3500 in promissory notes of J. H. Ollney, William Read King having previously cashed one of the notes. On the 24th January 1826 the notes were paid, but no discount was paid to the appellant. In the month of July 1826 the appellant went to reside in France. In the month of July 1827 it was agreed between William Read King, as the solicitor of J. H. Ollney, and Lucius Hook Robinson, as the agent of the appellant, upon the proposal of L. H. Robinson, that John Harvey Ollney, in consideration of his being paid £20,000 after the death of the appellant's father, and being secured on the estates in Ireland, should advance £10,000 to the appellant, who was then resident in France. An indenture was accordingly executed, dated the 27th July 1827, between the appellant and J. H. Ollney, whereby it was agreed that the powers given over the estates to the said J. H. Ollney by the indenture of the 21st December 1825 might be exercised for securing the sum of £20,000 within three months after the decease of Benjamin O'Neale Earl of Aldborough, with interest from the time when the same should become payable, as well as the payment of the £12,000 with interest.

The sum of £20,000 was further secured by the bond [226] of the appellant, with warrants of attorney for entering up judgment against him.

On the 28th July 1827 the sum of £10,000 was paid by William Read King to the appellant in the following manner:—£6000 in Bank of England notes, and £4000 in



eight bills of exchange of £500 each, payable at six months after date, and £100 for discount. The bills, when they became due, were paid to the appellant.

On the 28th December 1825 W. R. King, who prepared the deeds, received from Lucius Hook Robinson, for his expenses attending the loan of £6000, and for preparing, engrossing, and executing the indenture and bonds for the same, the sum of £285 in part payment of £300, which L. H. Robinson had previously agreed to pay him for such expenses, and on the 28th of July 1827 a sum of £500 for similar expenses in respect of the loan of £10,000, which L. H. Robinson had previously agreed to pay him. In neither case was any bill of costs made out by William Read King.

By indenture of the 28th July 1827, executed between the appellant of one part and L. H. Robinson of the other part, in consideration of the services performed by L. H. Robinson for the appellant, and for a nominal consideration, the appellant granted to L. H. Robinson an annuity of £200, issuable out of and charged upon the same estates, to hold the said annuity unto the said L. H. Robinson, his executors, administrators, and assigns, for the term of 99 years, to commence and be computed from the death of Benjamin O'Neale late Earl of Aldborough, if the appellant should be then living, and fully to be complete and ended if the said L. H. Robinson should so long live; and to be paid quarterly, the first payment to be made at the expiration of three calendar months [227] after the decease of the said Benjamin O'Neale late Earl of Aldborough, if the appellant should survive him; and in case of the death of the said L. H. Robinson on any other day of the year than one of the said quarterly days of payment, then also a proportionate part of the said annuity for the time which at the death of the said L. H. Robinson should have elapsed since either the day of the decease of the said Benjamin O'Neale late Earl of Aldborough, in case the said appellant should have survived him, or the then last quarterly day of payment, as the case might be; and by the said indenture the said appellant demised unto the said L. H. Robinson, his executors, administrators, and assigns, the hereditaments in Ireland for the term of 100 years, without impeachment of waste, upon certain trusts for securing the said annuity thereby granted.

By indentures of lease and release, bearing date respectively the 2d and 3d days of July 1828, the release being made between the said Benjamin O'Neale Earl of Aldborough of the first part, the appellant of the second part, Charles Doyne of the third part, William Jackson of the fourth part, James Montgomery Blair of the fifth part, Robert Saunders and the reverend John Charles Lloyd of the sixth part, and the said Charles Doyne and Thomas Rickards Watkins of the seventh part, and by certain common recoveries suffered in the Court of Common Pleas in Ireland, the hereditaments and premises comprised in the several indentures before mentioned were discharged from the estate tail of the appellant, and were settled to the use that the said James Montgomery Blair, his executors and administrators, might, during the joint lives of the said Benjamin O'Neale Earl of Aldborough and the [228] appellant, receive, upon certain trusts, a yearly rent-charge of £700 to be issuing out of the said hereditaments; and subject thereto, to the use of the said Charles Doyne and Thomas Rickards Watkins, their executors, administrators, and assigns, for a term of years for securing the same; and subject thereto, to the use that after the decease of the said Benjamin O'Neale Earl of Aldborough the said Robert Saunders and John Charles Lloyd, their executors, administrators, and assigns, should receive upon certain trusts a rent-charge of £700, to be issuing out of the said hereditaments; and subject thereto, to such uses as the said Benjamin O'Neale late Earl of Aldborough and the said appellant should jointly appoint; and in default of such appointment, to the use of the said Benjamin O'Neale Earl of Aldborough and his assigns for his life, without impeachment of waste; and after his decease, to the use of the appellant, his heirs and assigns for ever.

In and about the month of March 1833 L. H. Robinson applied, on behalf of the appellant, to William Read King, as the solicitor of J. H. Olney, for a further loan of £5000.

By indentures of lease and release bearing date respectively the 1st and 2d days of March 1833, the release being made between the appellant of the first part, the said J. H. Olney of the second part, and Margaret Powell and the respondent William Charles King of the third part, in consideration of the sum of £5000, the appellant covenanted with the said J. H. Olney, his executors, administrators, and assigns,

that he the appellant, his heirs, executors, or administrators, would, on the 2d day of August then next ensuing, pay unto the said J. H. Ollney, his executors, administrators, [229] or assigns, the sum of £5000 of lawful money of Great Britain, together with interest after the rate of 6 per cent. per annum, to be computed from the day of the date of the said indenture, without any deduction whatsoever; and by the said indentures, for the considerations aforesaid, the appellant conveyed unto the said Margaret Powell and William Charles King, and their heirs, all the hereditaments comprised in the indentures before mentioned, to the use of the said Margaret Powell and William Charles King, their heirs and assigns for ever, subject nevertheless to the life estate of the said Benjamin O'Neale Earl of Aldborough, and to the said indentures of the 21st day of December 1825 and the 27th day of July 1827 respectively, and to the annuity of £700, limited to the said Robert Saunders and John Charles Lloyd as aforesaid by the said indenture of the 3d day of July 1828, nevertheless upon the trusts following; that is to say, in case the said two several sums of £12,000 and £20,000, secured by the said herein-before stated indentures of the 21st day of December 1825 and the 27th day of July 1827 respectively, should either never become payable, or should, together with all interest thereon respectively, have been fully paid and satisfied to the said J. H. Ollney, his executors, administrators, or assigns, at the expiration of six calendar months next after the decease of the said Benjamin O'Neale Earl of Aldborough, and in case the said sum of £5000 and all interest thereon should have been fully paid and satisfied within six calendar months next after the decease of the said Benjamin O'Neale Earl of Aldborough, then in trust for the appellant, his heirs and assigns for ever; but in [230] case such several sums of £12,000 and £20,000, or any part thereof or any interest thereon, should not have been paid within six calendar months next after the decease of the said Benjamin O'Neale Earl of Aldborough, then upon trust to sell and dispose of the said hereditaments or any of them, or any part thereof, and out of the monies to arise from such sale or sales, and out of the rents and profits which should arise from the said hereditaments from and after the death of the said Benjamin O'Neale Earl of Aldborough, in the first place pay and satisfy all the costs, charges, and expenses attending or in anywise relating to the said sale or sales, and in the next place pay and satisfy unto the said J. H. Ollney, his executors, administrators, and assigns, all principal monies and interest which should be due in respect of the indentures of the 21st of December 1825 and 27th of July 1827, and of the present indenture; and should pay the ultimate surplus, which should remain after answering all the purposes aforesaid, unto the appellant, his heirs or assigns, for his or their own absolute use and benefit.

On the 2d of March 1833, £4700, part of the said sum of £5000, was paid to the appellant in Bank of England notes, and £300, the residue, was retained for the expenses of William Read King in effecting the loan.

By an indenture bearing date the 4th day of March 1833, and made between the said L. H. Robinson of the one part and the said J. H. Ollney of the other part, in consideration of the sum of £750 paid to the said L. H. Robinson, the said L. H. Robinson assigned to the said J. H. Ollney, his executors, administrators, [231] and assigns, the said annuity of £200 granted by the said indenture of the 28th July 1827, and the lands thereby demised.

Benjamin O'Neale Earl of Aldborough died on the 9th July 1833, and was succeeded in the earldom by the appellant.

On the 28th day of November 1833 J. H. Ollney filed his bill in the Court of Chancery in Ireland against the appellant and others, stating the several deeds before mentioned, and praying that an account might be taken of what was due to the said J. H. Ollney for principal and interest in respect of the said three several sums of £12,000, £20,000, and £5000, and in respect of the said annuity of £200 so assigned to the said J. H. Ollney as aforesaid, and of all incumbrances affecting the said lands and premises or any of them prior to the demands of the said J. H. Ollney; and that, in default of payment of the sums which should be found due on such account, the appellant might be debarred and foreclosed from all equity of redemption in the said hereditaments respectively charged with the said principal sums and interest; and that the same might be sold; and that out of the proceeds of such sale or sales the sum which should be found due to the said J. H. Ollney upon taking such account, and such other charges as the Court should consider to be

properly payable thereout, might be paid and satisfied; and that the residue of such proceeds, or a competent part thereof, might be properly secured for the purpose of answering the accruing payments of the said annuity; and that in the meantime a receiver might be appointed of the said lands and hereditaments, and might be directed to apply the rents towards satisfaction of the sums due or to become due to the said J. H. Ollney.

The appellant, by his answer to the bill, stated, amongst other things, that in the respective years 1810, 1812, 1814, and 1816 he charged his estates in Ireland with annuities amounting to £1324 or thereabouts, payable during the lives of himself and of other persons in the event of his surviving his father, and with divers principal sums of money amounting to upwards of £40,000, payable in the like event; and he alleged, that at the time when the said J. H. Ollney paid him the said sums of £6000 and £10,000 he was in great pecuniary distress, and was thereby induced to submit to unreasonable terms; and that the said L. H. Robinson was employed by the said J. H. Ollney, and not by the appellant, in negotiating the said transactions; and that the said indenture of the 21st of December 1825 was prepared by Mr. William Read King, the solicitor of the said J. H. Ollney, and was executed by the said appellant in prison, and without employing or consulting any solicitor; and that the said indenture was not in conformity to the agreement between the parties, for that the appellant had agreed to pay the said sum of £12,000 within twelve, and not within three, months after the death of his father if he survived him; and that the appellant, on the execution of the said indenture, paid to the said L. H. Robinson £600 as a bonus with the knowledge of the said J. H. Ollney; and that the said indenture of the 27th day of July 1827 was also prepared by the said W. R. King, and was executed by the appellant while abroad, and without consulting any solicitor; and that on the execution of the said last-mentioned indenture the appellant paid to the said [233] L. H. Robinson £1000 as a bonus, and also paid to the said W. R. King £500 for his charges, exclusive of stamps and other costs out of pocket, and travelling expenses; and that the said indenture of the 28th day of July 1827 was prepared by the said W. R. King with the privity of the said J. H. Ollney; and that by another deed the appellant appointed the said L. H. Robinson receiver of the rents of the said hereditaments after the death of the appellant's said father; and that in the year 1825 the appellant's father was upwards of eighty-three years of age, and was in a very infirm state of health, and that the appellant was then only forty-five years of age, and a very healthy person; and the appellant by his answer insisted that on payment of the said sums of £6000 and £10,000, with interest from the times of the said advances, the said indentures of the 21st of December 1825 and the 27th July 1827 ought to be set aside, and that this indenture of the 28th July 1827 ought to be set aside, without payment by the appellant of any sum whatsoever. And the appellant alleged, that out of the said sum of £5000 he paid to the said W. R. King £300 or thereabouts for the expenses of the said loan; however, he admitted that the said J. H. Ollney was entitled to the said sum of £5000 secured by the said indentures of the 1st and 2d March 1833, with interest thereon from the time of the advance thereof; and the said appellant submitted, that at the time of the said several transactions with the said J. H. Ollney the appellant was in the situation of an expectant heir, dealing with his expectancies, and that advantage had been taken by the said J. H. Ollney and his agent of the situation of appellant, and of his necessities and embarrassments; and that appellant [234] was entitled in equity to be relieved from the said bargain.

On or about the 19th February 1835 the appellant filed a cross bill in the said Court of Chancery in Ireland against the said J. H. Ollney, Margaret Powell, and W. C. King; and by such cross bill stated the original bill of the said John Harvey Ollney, and stated and charged the matters contained in his answer to the original bill, and charged that L. H. Robinson was the agent of J. H. Ollney.

And that the appellant executed the said indenture of the 28th day of July 1827 without receiving any consideration for the same, and that same was in fact only colorably granted to the said L. H. Robinson, he being in fact a mere trustee for the said J. H. Ollney, and it not being meant or intended that he should derive or receive any benefit or advantage from the same; and that no money consideration was in fact paid by the said J. H. Ollney to the said L. H. Robinson for the assignment of the said annuity; and that if any such was paid it was only colorably done,

and that such consideration had been repaid to the said J. H. Ollney, or been allowed to him by the said L. H. Robinson in some collusive manner, for the purpose of enabling the said J. H. Ollney to insist that he was a purchaser of the said annuity from the said L. H. Robinson.

And appellant by his said cross bill charged that appellant, some time in the year 1828, joined with his father in suffering recoveries of all the said estates tail, which were re-settled to the use of appellant's said father for life, with an absolute vested remainder in fee to appellant, expectant on the decease of appellant's said father, who was then at the point of death; which [235] having come to the knowledge of the said J. H. Ollney or his agents, he, in order, if possible, to give validity to the said loans, proposed to lend appellant the sum of £5000 upon the terms of appellant securing the said principal sum and interest from the time of the said advances by a conveyance of all his said estate to trustees as therein-after mentioned; and appellant having agreed thereto, and being much in want of money, and pressing for the said advance, the said J. H. Ollney, or his agents, represented to appellant that it would be convenient for him to have all his demands included in one deed, and that appellant could not be in any way prejudiced by doing so; whereupon appellant, who had no professional man concerned for him on the said negotiation, and finding that the said J. H. Ollney would not lend the said £5000 unless he submitted to the said request, consented that the deed about to be executed should also include the said two sums of £12,000 and £20,000 in addition to the said sum of £5000; and appellant, then being under the pressure of absolute want, did thereupon execute the said indenture of the 2d of March 1833; and that the said deed was prepared by the said W. R. King, who, with the knowledge and consent of the said J. H. Ollney, retained or was paid the sum of £300 for preparing the same out of the said sum of £5000; and that appellant executed the said deed without ever having read over the same or any copy thereof, and in the kingdom of France, where appellant then resided, and from whence he could not depart, he being at the time indebted to several inhabitants of that country.

And the said appellant by his said cross bill prayed that the said indentures of the 21st day of December [236] 1825, the 27th day of July 1827, the 28th day of July 1827, and the said bonds dated the 21st day of December 1825 and the 27th day of July 1827 might be set aside as fraudulent and void, and be delivered up to be cancelled upon payment by appellant of the principal sum actually and *bona fide* paid to appellant on the execution of the said deeds, after deducting throughout all such sums as appellant by fraud or imposition was compelled to repay or allow the said L. H. Robinson and W. R. King at the desire and by the contrivance of the said J. H. Ollney; which principal sums, with the interest thereon from the time they were respectively advanced, appellant undertook to pay when fully ascertained; and that the said deed of annuity of the 28th of July 1827 might be set aside and delivered up to be cancelled, and that an account might be taken of the sum due for principal and interest on foot of the sums actually and *bona fide* received by appellant for his own use at the times of the said respective alleged advances, and also on account of the sum of £5000 so advanced to appellant on the 2d day of March 1833, with interest for the advance; and that the several deeds and securities so obtained by the said J. H. Ollney, if not altogether set aside, might be deemed to be securities only for the sum or sums of money which, upon the taking of the said account, should appear to be due on foot of the said respective advances made to appellant by the said J. H. Ollney; and that upon payment of such sums as should be found due on taking the said account, which appellant undertook to make, the said lands and hereditaments might be re-conveyed to appellant.

J. H. Ollney by his answer denied that L. H. Robinson was his agent, or that he had any knowledge of the [237] bonuses, or the sums paid or retained by William Read King for costs; and he further stated that he paid the sum of £750 to L. H. Robinson as the consideration for the assignment of the annuity of £200, and that no part thereof had ever been returned to him.

On the 16th January 1836 J. H. Ollney died, and the suits were revived against the respondents and his executors.

The said suits being at issue, witnesses were examined on both sides in each suit.

The respondents in the suits instituted against the appellant proved the execution of the several deeds and the payment of the consideration for them in the manner before mentioned, and that Lucius H. Robinson was the agent of the appellant. W. R. King proved the due execution by the appellant of the deeds and the consideration for the several deeds as before mentioned.

The appellant proved that the chief clerk to the Pelican Life Insurance Office, who had been accustomed to the calculating the value of contingent reversionary interests for twenty years, calculated that the sum of £8576 4s. 5d. was a fair and proper sum, in the month of December 1825, in respect of the sum of £6000 then paid, to be secured and payable and paid within three months after the death of a gentleman of seventy-nine years in the event of his being survived by a gentleman then forty-two years of age; and that the sum of £13,838 15s. 8d. was a fair and proper sum, in the month of July 1827, in respect of the sum of £10,000 then paid, to be secured and payable and paid three months after the death of a gentleman then aged forty-four years; and he calculated the same by the Carlisle table of mortality, and reckoning the interest of money at five per cent; but no [238] evidence was given on the part of the respondents to show what was the value of the *post-obit* bonds at the time they were purchased.

On the 7th of February 1837 the causes came on to be heard before the Lord Chancellor of Ireland, when he decreed that it should be referred to the master to inquire, and report whether, under all the circumstances, the sum of £6000 paid by the said J. H. Ollney to the now Earl of Aldborough on the 21st day of December 1825 was a fair market price for the sum of £12,000, secured to be paid to the said J. H. Ollney by Mason Gerard Earl of Aldborough at the time and in the manner in the pleadings mentioned, taking into consideration the relative ages at the time of the said Earl of Aldborough and his father, Benjamin O'Neale Stratford then Earl of Aldborough, and the circumstances of the property whereon the said sum of £12,000 was intended to be secured, and the estate and interest of the said defendant, the Earl of Aldborough, therein, and the other circumstances in the pleadings mentioned relative to the said transaction; and his Lordship further ordered, that it should be referred to the said master also to inquire, and report whether, under all the circumstances, the sum of £10,000, paid by the said J. H. Ollney to the said Earl of Aldborough on the 27th day of July 1827, was a fair market price for the sum of £20,000, secured to be paid to the said J. H. Ollney by the said Mason Gerard now Earl of Aldborough at the time and in the manner in the pleadings mentioned, taking into consideration the relative ages at the time of the said Earl of Aldborough and his father, Benjamin O'Neale Stratford then Earl of Aldborough, and the circumstances of the property whereon the sum of [239] £20,000 was intended to be secured, and the estate and interest of the said defendant, the Earl of Aldborough, therein, and the other circumstances in the pleadings mentioned relative to the said transaction; and his Lordship further ordered, that the defendant, the Rev. John Christopher Lloyd, should have his costs against the plaintiffs, H. N. Tyre, Thomas Henney, and William Charles King; and his Lordship reserved the question, whether the said plaintiffs should have the same over against Lord Aldborough, and all further directions, until the return of the master's report, whereon such further order should be made as should be fit.

The respondents under this decree gave in evidence before the master, that the price given by J. H. Ollney to the appellant was the fair market value of the *post-obit* bonds. The appellant gave no evidence before the master as to their value, except what he had given upon the hearing of the cause.

On the 20th March 1838 the master made his report, and found, that under all the circumstances the sum of £6000, paid by the said J. H. Ollney to the said appellant on the 21st of December 1825, was a fair market price for the sum of £12,000 secured to be paid to the said J. H. Ollney by the said appellant at the time and in the manner in the pleadings mentioned; and that the sum of £10,000, paid by the said J. H. Ollney to the appellant on the 27th day of July 1827, was a fair market price for the sum of £20,000 secured to be paid to him by the said J. H. Ollney at the time and in the manner in the pleadings mentioned.

The said appellant caused objections to be taken to the draft of the said master's

report, which the master [240] overruled, and the said appellant did not file any exceptions to the said report.

The said causes came on for hearing before the Lord Chancellor of Ireland on report and merits, and for further directions, on the 26th and 27th days of April 1838, when it was decreed that the said report should stand confirmed; and that the said two sums of £12,000 and £20,000, secured by the deeds dated respectively the 21st day of December 1825 and the 27th day of July 1827, and interest thereon respectively at the rate of £5 per cent. per annum from the 10th day of October 1833 until paid, were charges on the lands and premises in the pleadings mentioned: and it was further decreed that the said respondents were entitled thereto: and it was further decreed, that the said respondents were also entitled to the sum of £5000, secured by the deed bearing date the 2d day of March 1833, in the pleadings also mentioned, with interest thereon at the rate of £6 per cent. per annum, to be computed from the said 2d day of March 1833 until paid, and that the same was well charged on the said lands and premises: and it was further decreed, that the said respondents were not entitled to the annuity of £200 a year in the pleadings mentioned, granted by the said deed of annuity bearing date the 28th day of July 1827, and assigned to the said J. H. Ollney, deceased, by deed bearing date the 4th day of March 1833; but that the said deeds were only to stand as security for the sum of £750, being the consideration money paid by the said J. H. Ollney to L. H. Robinson for the purchase of the said annuity, with interest thereon from the said 4th day of March 1833, at the rate of £5 per cent. [241] per annum, until paid; and that the said sum of £750 and interest were well charged on the said lands and premises in the pleadings mentioned, and in the same priority as the said annuity: and it was further decreed, that the respondents bill in the original cause should stand dismissed without costs, so far as the same sought to establish the same annuity of £200 per annum: and it was further ordered that it should be and it was thereby referred to the master in the cause, to take an account of what was due to the plaintiffs in the first cause for principal and interest in respect of the aforesaid sums of £12,000, £20,000, £5000, and £750, and also to take an account of all incumbrances prior to the said plaintiffs demands affecting the estate of the appellant in the pleadings mentioned: And it was further decreed, that the defendant, the Rev. John Christopher Lloyd, should be struck out of the bill in the first cause, and that the plaintiffs in the first cause should have, as part of their costs in the said first cause, the costs which, by the decretal order of the 7th day of February 1837, they were directed to pay to the said Rev. John Christopher Lloyd: and it was further decreed, that the said respondents should have the costs as plaintiffs in the said first cause, and as defendants in the said second cause, including the costs of the reference under the said decretal order of the 7th day of February 1837, as against the appellant and the lands and premises in the pleadings mentioned: and the consideration of all further directions was reserved.

From the decree of the 27th day of April 1838 Mason Gerard Earl of Aldborough appealed.

[242] *Mr. Pemberton and Mr. Knight Bruce for the Appellant.*—The appellant was in great pecuniary difficulties, and confined in the King's Bench, when he was obliged to raise £6000 upon *post-obit* bonds. The £6000 was paid, £2000 in cash and £4000 in promissory notes, upon which no discount was allowed; £300 was paid to Mr. King, but no bill of costs was made out. Lord Aldborough procured his discharge from prison by this advance. In respect of the loan of £10,000, £500 was paid to Mr. Read King, the solicitor, for effecting the loan. The onus lay upon the purchaser to show that a proper value was given for the expectancies, *Davis v. Duke of Marlborough* (2 Swanston, 139), but no evidence was given by him as to the value. The cause was ripe for decision, and the Court ought to have made a decree at the hearing, and not have directed any inquiries. Our evidence shows an enormous disproportion between the sum given and what ought to have been given for the expectancies. In *Gowland v. De Faria* (17 Vesey, 20) a decree was made upon the calculated value, and not on the marketable value, of a reversion, and that judgment was approved of in *Lord Portmore v. Taylor* (4 Simons, 210). The principle laid down in *Headen v. Rosher* (1 M'Clel. and You. 89) by Sir William Alexander, that the calculated value is not the proper criterion of value, is improper.

The form of inquiries directing the other circumstances in the pleadings mentioned to be inquired into is wrong. What does it mean? The annuity granted by the appellant, having no consideration to support it, cannot stand; the Court below has not sustained it, L. H. Robinson could not have enforced it, and the assignee [243] ought not to stand in a better situation than the original grantee.

*The Attorney General and Mr. Jacob for the Respondents.*—The market value is the only proper criterion of value; market value in no instance reaches the value of the tables. Sir Anthony Hart, in *Scott v. Dunbar* (Moll. 458), disapproved of *Gowland v. De Faria*. In *Headen v. Rosher* Sir William Alexander refused to set aside a sale, though the value was inconsistent with the tables. In *Potts v. Curtis* (1 Young, 543) the market value prevailed over the value estimated by the tables; so *Wardle v. Carter* (7 Simons, 490); and in *Headen v. Rosher* the Court refused to set aside a sale of a reversionary interest, though inconsistent with the values calculated by the tables. It is said the onus lies upon the purchaser of proving the value; he proved the whole consideration paid, and the evidence brought forward on the part of the appellant might prove there was no inadequacy; sale by auction admits the principle of market value, *Shelley v. Nash* (3 Madd. 232), except where the auction is colourable, *Fox v. Wright* (6 Madd. 111). All the circumstances must be taken into consideration: that the appellant was tenant in tail in remainder; that there were incumbrances upon the estate; that, not having the legal estate or the deeds, the purchaser could not know the amount of the charges; if the appellant had refused to suffer a recovery, the estate could not have been liable; no circumstances were inquired into before the master, except what was the value to be got in the market. With regard to the [244] annuity, there seems no reason why it should have been set aside; it was good against the grantor; but at any rate it was good in the hands of a purchaser for a valuable consideration, *George v. Milbanke* (9 Vesey, 190).

*Mr. Pemberton in reply.*—This was a bill by a purchaser to enforce his demand; it was incumbent upon him to prove the value, *Kendall v. Beckett* (2 Russell and Mylne, 88), *Bawtree v. Watson* (3 Mylne and Keen, 339). The protection which the Court affords to expectant heirs is very different from a naked reversion. The appellant was in very distressed circumstances; £1300 life annuities and £40,000 charged upon the estate. The consideration is not proved as stated; promissory notes and bills of exchange are very different from hard cash; many contingencies are not the subject of valuation, *Baker v. Bent* (2 Russell and Mylne, 224), *Drought v. Eustace* (1 Molloy, 328). It may be said we had no right to take a chance of the inquiry; we had a right so to do; a purchaser has nothing to do but file his bill, go into no evidence, and then have an inquiry in the master's office.

Lord Chancellor.—I must have copies of the bill; there are no copies in the printed cases.

Lord Chancellor (15th June).—In this case I was desirous, before I stated any opinion I had formed on the argument, to have an opportunity of looking into the pleadings, particularly with respect to the annuity of £800 a year.

[245] The cause came on on a bill and cross bill, the object of the cross bill being to set aside certain *post-obit* securities given by the present Lord Aldborough during the lifetime of his father. When the cause came on before the Lord Chancellor of Ireland, a reference was made to the master to inquire "Whether, under all the circumstances, the sum of £6000 paid by Ollney to the now Earl of Aldborough was a fair market price for the sum of £12,000 secured to Ollney at the time and in the manner in the pleadings mentioned, taking into consideration the relative ages at the time of the said Earl of Aldborough and his father Benjamin O'Neale Stratford then Earl of Aldborough, and the circumstances of the property whereon the said sum of £12,000 was intended to be secured, and the estate and interest of the defendant the Earl of Aldborough therein, and the other circumstances in the pleadings mentioned relative to the said transaction."

Upon this reference, made on the 7th day of February 1837, the master made his report, by which he found that, under all the circumstances, the sum of £6000 paid by Ollney on the 21st of December 1825 was a fair market price for the sum of £12,000 secured to be paid to Ollney at the time and in the manner in the pleadings mentioned. There was a similar finding with respect to the sum of £10,000.

To this report no exceptions were taken. It was at one time supposed, that there was some informality in the manner in which the report was confirmed; that supposition was removed, and there appears now to be no irregularity in the mode in which that report was dealt with upon the decree for further directions. [246] The case, therefore, stands upon the report not complained of, establishing the fact that with regard to those two sums, the sum paid was, under all the circumstances of the case, a fair price for the sum received by Lord Aldborough in his then situation of expectant heir.

Two grounds of objection have been taken to the course adopted by the Court of Chancery in Ireland. The first is, that that finding did not justify the decree upon further directions, by which that security was enforced against the estates charged with it; the other is, that, however that might be, yet that upon the original decree, inasmuch as it was not then proved that that was a fair price, it was the duty of the Court to have granted the relief prayed by the cross bill.

The second ground I propose to dispose of and to state my opinion upon first,—and I think this House will not be disposed to give much weight to that objection. The party takes the inquiry, and does not complain of the decree directing the inquiry until after the result of that inquiry is ascertained to be against him. Although, undoubtedly, it is competent to him to complain of the original decree, it is not a complaint to which this House will be very ready to listen. If he can show that there was any error in that decree, he is not precluded from stating his complaint; but in a matter which is purely matter of discretion, where the Court thinks it has not sufficient information to enable it to administer justice between the parties, and either directs an issue or directs an inquiry for the purpose of better ascertaining the facts,—when your Lordships find, upon that inquiry and that investigation, that the facts [247] lead to a conclusion against the plaintiff, this House will not be much disposed to set aside the whole proceeding, because the Court exercised the discretion of directing that inquiry in order to ascertain those facts.

I conceive it to be quite competent to the Court, and that the Court exercised a very sound discretion in directing that inquiry. It appears to be established by several cases that where a party deals with an expectant heir, the onus is upon him to show that he gave a fair price for that which he purchased. It does not from that proposition follow that he is bound to establish it in a different way from that in which it is competent to any other suitor to establish any fact or facts upon which his cause rests; and if, when the cause comes to a hearing, the Court finds that it requires further inquiry to ascertain the facts necessary for the due decision of the case, that is a matter so entirely in the discretion of the Court, that a complaint resting upon that ground is not one to which this house would very readily yield.

Now, in this case, I think I shall in a few words satisfy your Lordships that there was no evidence to enable the Court satisfactorily to dispose of the question between the parties; the Court, therefore, directed an inquiry, and the result of that inquiry is what I have stated. That, however, leaves entirely open the question whether the result of the inquiry found by the master entitled the party claiming the benefit of the security to the benefit of a decree to enforce it, or whether it would merely have entitled the party seeking to have that transaction set aside, to have a decree for that purpose.

[248] In order to support the proposition set up on the part of Lord Aldborough, who complains of these securities, and seeks to have them set aside, it was argued that in the case of *Gowland v. De Faria* this proposition had been established. There are two propositions: one which was established, and the other supposed to be established in that case; the one said to be established was, that in a transaction with an expectant heir it was necessary for the party seeking the benefit of that transaction to show that he gave a fair price; but that proposition has been the subject of much observation, undoubtedly, since that decision took place, and it has been considered as interfering a good deal with that proper discretion which persons who are capable, according to the law of this country, of disposing of their own property, ought to be at liberty to exercise. At the same time it does establish a rule which has the effect of protecting persons who are, generally speaking, very much in need of protection. Of the policy of that rule it is not my purpose to say any thing; that rule has been established in the case of *Gowland v. De Faria*, and has been recognized since.



But another proposition has been supposed to be established by the case of *Gowland v. De Faria*, which is, that in transactions of this sort the Court has only to look at the value of the reversionary interest calculated according to the tables; that is to say, how much of the value of the property is to be deducted on account of its being a postponed interest, postponed by the chance of the duration of another life, and that that is capable of being reduced by calculation to what is considered a fair induction with reference to the duration of the life on which it is dependent.

[249] I do not find any such proposition established by Sir William Grant in that case. Sir William Alexander, in the case before him of *Headen v. Rosher*, in 1st McClelland and Young, 89, and Lord Lyndhurst again, in the case of *Potts v. Curtis* in 1st Young, 543, entertained the same opinion; and upon looking at the language of Sir William Grant it does appear to me that that rule is not at all to be extracted from it. In that case there was no evidence but that of the actuaries, and the evidence of the actuaries proved that the sum given was not the marketable value of the reversion. Sir William Grant, in observing upon the case, states the evidence before him, namely, that of the actuaries, and says there is no other evidence in the case, and he then proceeds upon that evidence, there being no other. Now, the only observation I will make upon that case is, that one may suppose it would have been a more wholesome course to have adopted, seeing that the evidence was only the evidence of the actuaries, and the Court being of opinion that that was not evidence which ought to be conclusive in a case of that description between the parties; I say it would seem to have been better to have adopted some course for the purpose of ascertaining more correctly the value, in the sense in which that term is to be used in inquiries of that kind. Sir William Grant, however, did not adopt that course, and he decided it upon the only evidence he had, that only evidence being to the effect that an inadequate consideration had been given. It is, therefore, not an expression of opinion by Sir William Grant, that that is a rule that ought to be adopted; it is only a dealing with that case, with reference to its own particular circumstances.

[250] That has been disapproved of by subsequent decisions of the highest authority. It was disapproved of by Sir William Alexander, in a judgment the reasons of which are very conclusive to show the soundness of the conclusion at which he arrived. It was also objected to and disapproved of by Lord Lyndhurst, in the case to which I have referred; and if your Lordships consider what the effect of that rule would be,—how inapplicable it is to the great mass of cases,—how little calculated it is to lead to a right conclusion, and how much it must interfere with the right of disposing of property, I am sure this House will not hesitate in preferring the rule which has been established in subsequent cases to that which has been supposed to be established in the case of *Gowland v. De Faria*.

It is sufficient to say, that the establishment of that rule would make it impossible for an expectant heir to dispose of his interest at all; that, I apprehend, is quite a sufficient objection. It is a rule also, which, as a general rule, being calculated on the result of a great mass of cases, must apply with great injustice in a great variety of individual cases. The lives are supposed to be of average value; but the life in question may be an extraordinarily good or an extraordinarily bad life,—one which is likely to last beyond the usual time, or the contrary; how then can it be right to establish a rule not applicable to the particular case, but applying to a mass of cases collected together, and to make that rule govern an individual case to which it may not at all apply?

I will not go further into my reasons for not adhering to that supposed rule. The matter having been very fully and very ably discussed by Sir William Alexander and [251] by Lord Lyndhurst, it appears unnecessary further to discuss it here than to say, that I entirely concur in the reasons of those two very learned judges, and I do not think that the rule supposed to be extracted from *Gowland v. De Faria* is a rule which ought to be laid down.

Then, if that be so, in what position does the present case stand? Taking the report as establishing the fact, it is a bill to set aside these transactions, it being established as a fact that the transactions are fair and proper transactions, regard being had to all the circumstances of the case. I will only observe, that the cases of *Shelly v. Nash*, in 3d Maddox, 232, and the case of *Baker v. Bent*, in 1st Russell and Mylne, 224, although they are not expressly to the same point, yet they establish

this proposition; namely, that the market price is the thing to be looked at; for if the market price is not the thing to be looked at, how is it established that a sale by auction is within the rule? A sale by auction is a means of ascertaining the market price; it is a means of ascertaining, as nearly as it can be ascertained, that that sum which it will fetch in the market is the sum which the thing is worth, and therefore negatives the imputation of fraud.

The case, therefore, stands upon the fact being established, that the sum given was the fair market price. Now, taking that as a fact which is established, and which therefore constitutes a proposition fixed between the parties, that the party buying gave the fair market price under all the circumstances,—that that is the proposition your Lordships have to decide, and which the Court of Chancery in Ireland had to decide,—[252] it is impossible that the case on the part of the appellant can be maintained for a moment, unless the doctrine be established which is supposed to be extracted from *Gowland v. De Faria*. This transaction now cannot be any further questioned. It appears to me to be established that the fair market price was given for these bonds under all the circumstances of the case, regard being had to all the facts which are referred to in the pleadings; all of which were material in order to fix the price that was fair and proper for Mr. Ollney to give to Lord Aldborough under the circumstances. I apprehend, therefore, that, as soon as it is established that the doctrine supposed to be extracted from *Gowland v. De Faria* is not the doctrine of a court of equity, and as soon as it appears that the parties are precluded from disputing the finding of the master, the question is in substance disposed of, as far as relates to these two sums of £6000 and £12,000.

One other part of the case only remains, and that is a point upon which I was desirous of investigating the pleadings, which unfortunately, upon that which is the only part of the case involving any difficulty, are not printed in the papers. There was an annuity given, and a deed, not of the same date, but alleged to have been part of the same transaction, but on the day after the grant of one of these securities;—it is an annuity given to Mr. Robinson, and at a subsequent period, that is to say, in the year 1833 (the grant of the annuity being in 1828) Mr. Ollney, the grantee of the other securities, is alleged to have purchased from Mr. Robinson this annuity for £750. The case made by the bill is, that it was a mere fiction, in order to give an [253] appearance of validity to the transaction which did not in fact belong to it; that Mr. Robinson was only a trustee or agent for Mr. Ollney; that it was intended as an additional benefit to Mr. Ollney. The bill stated that Mr. Robinson was in substance the agent and attorney for Mr. Ollney, not for Lord Aldborough, and that his name was used for the purpose of securing this benefit to Mr. Ollney; that the £750 either was not paid at all or merely colourably paid.

That case has entirely failed. It is established that Mr. Robinson was the attorney for Lord Aldborough, and it is established that the annuity was granted for Mr. Robinson's benefit in the first instance, and that Mr. Ollney paid £750 to Mr. Robinson. Now the bill does not impeach the transaction as a transaction in which an attorney has secured improperly a benefit to himself from his client; it does not attack it upon that ground at all. The grounds upon which it is impeached, and upon which it is sought to take the benefit of that purchase from Mr. Ollney, have entirely failed. I may assume that this is not affected at all with fraud, but that it was a voluntary annuity, because that is admitted by the other party; that is to say, voluntary, so far that there was no money consideration paid for it. Whether it was earned by any services, we do not know; but we know that it was not the subject of a money transaction nor of purchase between Mr. Robinson and Lord Aldborough. That was a transaction in 1828. Five years afterwards, in 1833, (nothing in the meantime being done for the purpose of questioning the security, it being a security under the hand of Lord Aldborough,) Mr. Ollney purchased it, and paid £750 [254] for it; and the decree does confer this benefit on Lord Aldborough, that it sets aside the transaction, but it requires him to repay the £750 and interest which had been paid by Mr. Ollney; and as against him the decree is to operate by setting aside the annuity which he had purchased.

Now, when we consider that the bill does not attack the annuity upon any other ground than want of consideration, except that imputed combination between Mr. Robinson and Mr. Ollney, which is not established in fact, but which is disproved, I

think that Lord Aldborough has got as much benefit from the court of equity in Ireland as he could reasonably expect, because he has the benefit of that transaction being set aside. He has not got the benefit of that transaction being set aside without repaying the money actually paid by Mr. Olney for the purchase; and I apprehend that if the bill had impeached the transaction in a different and more correct mode than this, he never could have had ground, upon the facts as they stand here, to have got any decree to set aside that transaction without repaying the party who had actually paid for it. If a man puts into the hands of another the means of obtaining money from a third person, he never can be enabled to obtain a decree to get rid of that transaction arising out of the security which he has entrusted to another, and of which he (the party complaining) was himself the author.

That has been established in cases of voluntary deeds. In the case of *George v. Milbanke*, in 9th Vesey, 196, Lord Eldon established this: that even as against creditors, where the party had been the author of a [255] voluntary deed, and that voluntary deed had been used by the holder of it for the purpose of either raising money upon it or of sale, that even a creditor in the case of bankruptcy could not get it back without repaying the money that had been paid for it; but here the application is made by the author of this, which is a voluntary deed, to deprive the party of the benefit he is to derive under it. Now, a voluntary deed is not impeachable upon those grounds upon which we know that many transactions between man and man are set aside. Here the author of a voluntary security comes into a court of equity, and asks the court to set aside the transaction against the party who has purchased the benefit conferred by it without paying him that which he has paid himself. I think that the equity which the Court of Chancery in Ireland had administered in that respect is perfectly correct, and that the way in which the appellant has put his case is not sustainable against the decree against which he has complained.

Under all these circumstances, therefore, it appears to me that the Court of Chancery was quite justified in the decree which it has made, and that the appellant has failed in making out his case. I would propose, therefore, to affirm the decree below with costs.

Lord Brougham.—I entirely agree with the view which my noble and learned friend has taken in both parts of this case, the latter part being the only part about which any doubt could exist. I also agree with him that Lord Aldborough has had quite as much benefit as he could have expected in the Court below. With respect to what has been said about the case of *Gowland v. De Faria*, and the doctrine supposed to be laid [256] down in that case, two questions might arise: the first is, whether the doctrine really exists in that case which has been supposed there to exist. Upon that point I have some doubt; but if that doctrine is justly imputed to the case of *Gowland v. De Faria*, I entirely agree with my noble and learned friend in the view which he takes, and which was taken by Lord Lyndhurst in the case of *Potts v. Curtis*, that that doctrine, if it exists at all in that case, is now to be considered as over-ruled. It certainly never could have been the intention of the rule, with respect to expectant heirs dealing with a purchaser, that they should not have the power of dealing at all with their reversion. The rule laid down by the courts has certainly made that dealing very difficult; it has discouraged that dealing, for the purpose of protecting an expectant heir; it has made that discouragement very great indeed. But unless it is intended to say that the practical object of the rule was what undoubtedly in effect it would be were the doctrine supposed to exist in *Gowland v. De Faria* still maintained,—unless it is meant to say that they shall practically never dispose of their reversion at all, it appears to me clearly impossible to maintain that supposed doctrine.

I think in many cases such a rule would be any thing rather than a protection to an expectant heir. Upon the whole, therefore, I entirely agree with the view taken by my noble and learned friend; the matter never, indeed, admitted of any considerable doubt; it was only with respect to the point I first mentioned, and which was last dealt with by my noble and learned friend, that the case stood over for consideration.

[257] Ordered, That the said petition and appeal be dismissed this House, and

that the decrees therein complained of be affirmed; and it is further ordered, that the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal.

[258]

## FROM THE COURT OF EXCHEQUER.

HER MOST FAITHFUL MAJESTY DONNA MARIA THE SECOND, Queen of Portugal and the Algarves,—*Appellant*; Sir RICHARD CARR GLYN, Baronet, THOMAS HALLIFAX, RICHARD PLUMPTRE GLYN, CHARLES MILLS, and GEORGE CARR GLYN,—*Respondents* [27th February 1837 and 2d July 1840].

[*Mews' Dig. v. 699, 876, 880; xi. 46. S.C. 7 Cl. and F. 466; and, in Court below, sub nom. Glyn v. Soares, 1 Y. and C. 644, 5 L.J. Ex. Eq. 49. Followed in Manchester Fire Insurance Co. v. Wykes, 1875, 33 L.T. N.S. 145.*]

Manoel Joaquim Soares, being indorsee of certain bills of exchange, brings an action against Messrs. Glyn and Co. on the bills, as the acceptors thereof. Messrs. Glyn and Co. file a bill of discovery in aid of their defence to the action, and get an injunction in the meantime against M. J. Soares, the plaintiff at law, and the Queen of Portugal, stating that the plaintiff at law is the mere agent of the Queen of Portugal; that he has no interest therein; that neither of them gave any consideration for the same; that the Queen of Portugal, by bringing the action in her agent's instead of her own name, and by attempting to appropriate to her own use the produce of the bills, commits a fraud upon the defendants. Upon a demurrer filed by the Queen of Portugal to the bill,—demurrer allowed, the Queen of Portugal not being a party to the record at law, reversing the judgment of the Court of Exchequer; the Lord Chancellor, Lord Lyndhurst, and Lord Brougham concurring, Lord Wynford dissentiente.

[259] On the 14th of November 1835 the respondents filed their bill of complaint against Manoel Joaquim Soares and the appellant, stating that they carried on in copartnership together the business of bankers in London, under the firm of Sir Richard Carr Glyn, Mills, Hallifax, and Company: that in the beginning of the month of December 1829, and thenceforward down to and in the first six months of the year 1833, and for some time afterwards, Don Miguel was *de facto* King of Portugal, and by himself and his agents exercised the government of the country: that in the early part of the year 1833 Don Miguel had occasion to raise a loan for the exigencies of the government, and that such loan was to be raised upon the security of certain scrip or bonds issued under the authority of Don Miguel and his government; and that the said government was to engage to pay to the holders of such bonds or scrip the sums therein mentioned within a period therein mentioned, and to pay interest thereon half-yearly at the rate therein mentioned; and that in March 1833 Messrs. Outrequin and Jauge, bankers in Paris, entered into an agreement with Don Miguel and his government for negotiating and raising such loan in Paris, and for remitting the same when raised to the treasurer of the royal treasury of Portugal, appointed by Don Miguel and his government, to be applied by such treasurer for the use of Don Miguel and his government: that the bonds were duly received by Messrs. Outrequin and Jauge as the agents of Don Miguel and his government, and Messrs. Outrequin and Jauge, between the 1st of March and the 30th of June 1833, subscribed and advanced, and procured to be subscribed and advanced by various other persons in [260] Paris and elsewhere, considerable sums of money upon the security of the bonds, and remitted a great part of the amount so raised and subscribed to the treasurer of the royal treasury of Portugal appointed by Don Miguel and his government in bills of exchange, among which were six bills of exchange accepted by the respondents: that for some time previous to the 1st of January 1833, and down to the 7th of August 1833, Donna Maria Da Gloria, who now

bears the title of Queen of Portugal, claimed to be Queen of Portugal, and her father Don Pedro Duke of Braganza, in her name and on her behalf, occupied Oporto in Portugal with the adjacent districts, and loans were raised in her name, and fleets and armies were maintained in her name: that Donna Maria the second alleged that Don Miguel was an usurper, and could not by any acts or contracts bind the nation or crown of Portugal, or the revenues thereof: that she repudiated the loan, and declared the same as well as the bonds null and void: that the object of the loan was to furnish Don Miguel and his government with the means of more effectually resisting the military operations of Donna Maria, and of supporting and maintaining his government: that the bills so remitted on account of the loan were remitted to Joaquim Fernandez Couto, and were received by him as the treasurer of the royal treasury of Portugal duly appointed by Don Miguel: that Baron D'Est, residing at Paris, drew upon the respondents, the bankers, six bills of exchange, for the sums of £650, £450, £550, £750, £450, and £550, payable to the order of Messrs. Outrequin and Jauge: that Baron D'Est, according to the custom of merchants, made each of the said bills in two parts; and by the [261] second of such parts required the respondents, the bankers, to pay the amount thereof to Messrs. Outrequin and Jauge, the first not being paid: that the said Baron D'Est, on or shortly after the 4th of June 1833, delivered the said several parts of the four first-mentioned bills to the said Messrs. Outrequin and Jauge, and on or shortly after the 7th of June 1833 he delivered the said several parts of the two lastly-mentioned bills of that date to the said Messrs. Outrequin and Jauge: that the said six bills were intended to be remitted as parts of the said loan: that the said Messrs. Outrequin and Jauge forwarded the first parts to Gower and Co., their agents in London, to present the same for acceptance, and to hold the same when accepted for the holders or endorsees of the second parts: that the first parts of the said bills were presented in due course by Gower and Co., and were accepted by the respondents: that the respondents were not subscribers to the said loan, but accepted the said bills in the course of their business as bankers on the account and by the directions of Edward Richardson, who kept an account with them as bankers; and that they had not any interest in the said bills, save as such acceptors on behalf of Edward Richardson: that in filing the bill they merely act as the agents of Edward Richardson, who has the sole management of the defence to the action and of this suit: that Messrs. Outrequin and Jauge duly endorsed each of the second parts of the said bills as follows:—"Pay to the order of the treasurer general of the royal treasury of Portugal value in account of the negotiation of the royal loan of Portugal:" that Messrs. Outrequin and Jauge transmitted the said bills so endorsed to the office of the [262] royal treasury of Portugal at Lisbon, where the same were duly received by Joaquim Fernandez Couto, the treasurer of the royal treasury of Portugal appointed by Don Miguel: that Joaquim Fernandez Couto never executed the office of treasurer except under the authority of Don Miguel, and that he had no power to apply, dispose of, or negotiate any of the said bills so remitted to him except under the directions of the said Don Miguel, or of the ministers who acted as the agents of Don Miguel: that no consideration was given for the said bills by the government of Portugal except some of the bonds issued by Outrequin and Jauge: that in consequence of the misfortunes which had attended the armies and fleet of Don Miguel, and the approach of a hostile army near to Lisbon, the Duke of Cadaval, who commanded in Lisbon for Don Miguel and his government, abandoned that city in the night between the 23d and 24th of July; and on the 24th of July the said Donna Maria was proclaimed Queen of Portugal by the title of Donna Maria the second.

That in July 1833 Don Pedro and his adherents, acting on behalf of Donna Maria, took possession of Lisbon, and assumed the functions of government on behalf of Donna Maria; which government was founded on the destruction of the government of Don Miguel: that Don Pedro and his adherents seized and took possession of the second parts of the said bills of exchange and other bills on behalf of Donna Maria, and caused them to be endorsed to Manoel Joaquim Soares; and such endorsement of each of the second parts of the said bills purported to be signed by Joaquim Fernandez Couto; and such endorsements were dated the 7th of August 1833, which was after Joaquim Fer-[263]-nandez Couto had ceased to be treasurer of the said royal treasury of Portugal on behalf of Don Miguel: that Joaquim Fernandez Couto had no authority to endorse the same for any purpose except for the purpose of their

being applied for the service of the said Don Miguel and his government: that on or about the 7th of August 1833 the agents of Donna Maria remitted the said second parts of the said six several bills of exchange to Manoel Joaquim Soares, with directions to and in order that he might receive the same on behalf and for the use of the said Donna Maria and her government, and might remit the proceeds thereof to her or her government.

That in the year 1834 Don Miguel was obliged to quit Portugal, and Donna Maria remained in possession of the throne of Portugal: that the loan so raised and the bonds or scrip so issued as aforesaid were not recognized or repaid, or agreed to be recognized or repaid, by or on behalf of Donna Maria or her government; but, on the contrary thereof, Donna Maria and those who act in her name pretend that the said bonds and scrip of the said government are void, and not binding on the kingdom of Portugal, and they have repudiated the same, and declared the same to be null and void: that neither the said Donna Maria nor her government has given any valuable consideration for the said bills of exchange: that the possession of the second parts of the said six bills was obtained by Donna Maria, and the persons acting on her behalf, by fraud, accident, or violence; and they did not nor did any of them thereby acquire any beneficial interest in or any title to any of the said bills of exchange: that as soon as the said Messrs. Outrequin and [264] Jauge were informed that the said bills of exchange had fallen into the hands of the government of the said Donna Maria, and the functionaries who were acting under her authority, they gave instructions to Gower and Co. not to deliver up the first parts of the said bills of exchange, and not to pay them to the said Donna Maria or her government, or to any person claiming title from them.

That, besides the said six bills, the said Baron D'Este drew upon respondents another bill in two parts, dated the 2d of June 1833, for the sum of £600, and endorsed the same to the order of Messrs. Outrequin and Jauge, who remitted the first part of the said bill to Gower and Co., who procured the same to be accepted by the respondents; and Messrs. Outrequin and Jauge endorsed the second part of the last-mentioned bill, in the same manner as the second parts of the said six bills were endorsed to the treasurer of the royal treasury of Portugal, value in account of the negotiation of the royal loan of Portugal, and remitted the same to the royal treasurer of Portugal at Lisbon on account of the said loan; and the second part of the last-mentioned bill came into the hands of Donna Maria or her agents, when they took possession of Lisbon, by the same means and under the same circumstances by and under which the first-mentioned six bills came into her or their hands; and they caused the same to be endorsed by Joaquim Fernandez Couto to Manoel Joaquim Soares, who obtained possession of the first part, and presented the same for payment to the respondents; and to such application the respondents gave the following answer, which appears on the protest:—"This bill being by the endorsement of Messrs. Outrequin [265] and Jauge made payable, not to an individual, but to a public officer, whose name does not appear, and circumstances having transpired which give the acceptors reason to doubt whether the person who has taken upon himself to endorse it is the person entitled by Messrs. Outrequin and Jauge, the acceptors, though ready and willing to pay the amount, require before doing so satisfactory evidence of the right of Couto to endorse this bill as the treasurer general of Portugal, mentioned in Messrs. Outrequin and Jauge's endorsement:" that thereupon Manoel Joaquim Soares instituted proceedings in the Tribunal of Commerce at Paris on the said last-mentioned bill against the said Baron D'Este and the said Messrs. Outrequin and Jauge, and also against divers other persons on others of the said bills which had been so remitted by Messrs. Outrequin and Jauge as aforesaid: that the claim of Manoel Joaquim Soares was resisted in the said suit, on the ground that he had no title to the said bill; and on the 23d of January 1834 the said Tribunal of Commerce gave judgment against Manoel Joaquim Soares, and condemned him in costs, on the ground that he was not the real and *bona fide* holder of the bills in question, and that Soares had not given any consideration for the bills, and that they were not his property.

That on the 19th day of June Donna Maria caused an action to be commenced in the name of Manoel Joaquim Soares against the respondents on the bills of exchange, in the Court of King's Bench, to recover what is due in respect of the said

six bills of exchange, pretending that he was a holder of the bills for valuable [266] consideration; whereas the respondents insisted that he was a mere agent of Donna Maria or her government, and had no interest in the bills of exchange.

The bill charged that the action was brought solely for the benefit of the Queen of Portugal, and was in truth her action: that she had in her possession divers documents by which it would appear that the respondents were not liable upon the bills of exchange to her or to Manoel Joaquim Soares, and that he had no interest therein: that Manoel Joaquim Soares was compelled to endorse the same by duress: that the Queen did not intend to recognize the loan or pay the holders of the bonds or scrip, but that she and Manoel Joaquim Soares acted fraudulently in concert, in attempting to appropriate to their own use or the government of Donna Maria the proceeds of the bills of exchange.

And the bill prayed a discovery of the matters mentioned in the bill, and for a commission or commissions to examine witnesses at Lisbon, Paris, and elsewhere abroad; and that in the meantime the appellant and Manoel Joaquim Soares might be restrained from proceeding in the action commenced or in any other action upon the bills of exchange.

To this bill the Queen of Portugal put in a demurrer on the grounds, first, that the respondents had improperly joined the Queen of Portugal as a defendant in the suit, who was not a party to the action at law brought by Manoel Joaquim Soares in the bill mentioned; and secondly, that the matters mentioned in the bill, if admitted or proved to be true, would not constitute a valid defence to the said action at law.

[267] The demurrer came on to be argued before the Chief Baron on the 15th day of December 1835, and, by an order dated the 19th day of January 1836, was by the Chief Baron overruled.

From this order this appeal is brought.

Mr. Pemberton and Mr. Roupell for the Appellant.—If this judgment is maintained it operates as a perpetual injunction, and the acceptor will continue to hold the money; this is not a bill for relief or interpleader. In no case, except against underwriters, can a bill be filed against any but parties to the record, and in those cases the bills generally pray for the delivery of the policies, and the plaintiff (the broker) must aver for whom the insurance is made. There is no jurisdiction against a foreign sovereign, unless he comes here and sues; *King of Spain v. Hullett* (7 Bligh, 359). Again, the discovery is not available in the action; *bishop of London v. Fytche* (1 Bro. C. C. 96) is said to be an exception; but the register's book proves that the patron was the only defendant. In *Fenton v. Hughes* (7 Vesey, 287) the bill charged interest in a defendant to a bill of discovery, and Lord Eldon allowed the demurrer. In all cases a party not upon the record may be called as a witness for the party seeking the discovery. A sovereign is not amenable unless he files a bill; if he be amenable, the King of England must be equally so to foreign courts. How can a bill be filed against the sovereign power of America, which is "the people of the United States"?

[268] The following cases were cited:—*Le Texier v. The Margravine of Anspach* (15 Vesey, 164), *Dummer v. The Corporation of Chippenham* (14 Vesey, 245), *Vandam v. Monro* (2 Anstruther, 502), *Mayor of London v. Levi* (8 Vesey, 403), *Tooth v. Dean and Chapter of Canterbury* (3 Simons, 63), *Plummer v. May* (1 Vesey, sen. 426).

Mr. Knight Bruce and Mr. James Russell for the Respondents.—The equity is that no consideration was paid for the drawing and accepting the bills. Declarations by a party interested in the action are evidence against the plaintiff, *King v. Inhabitants of Hardwick* (11 East, 578), *Bell v. Ansley* (16 East, 141), *Smith v. Lyon* (3 Campbell, 465), *Alves v. Banbury* (4 Campbell, 28). A foreign sovereign has no privilege. A plaintiff has a right to file a bill of discovery against any party whose declarations would be evidence for the defendant in the action (Lord Redesdale's last edition on Pleadings, pages 53, 111, 148, 161, 185, 188, 283), *Wych v. Meal* (3 Pere Williams, 310). The Queen of Portugal could not be examined as a witness, because she is in fact an interested party, though not a party to the record; *Fenn v. Granger* (3 Campbell, 177), *King v. Inhabitants of Woburn* (10 East, 395). The Queen of Portugal has documents in her possession; *Day v. Drake* (3 Simons, 64), *Angerstein v. Wentworth* (1 Fowler, 227).

Mr. Pemberton in reply.—It is said that in all cases in which an action is brought any one person interested [269] in the subject of the action, and whose declaration

would be evidence in the action, may be made a defendant to a bill of discovery ; if that be so, then all persons interested may be made defendants. The passage from Lord Redesdale does not apply to cases of discovery (Lord Redesdale's last edition on Pleading, page 185). *Plummer v. May* [1 Ves. 426] is referred to as an authority, but that was a bill for relief. Day and Drake [3 Sim. 64] was compromised upon the threat of an appeal. The object of a bill of discovery is to examine your opponent, whom you cannot examine at law ; it must, therefore, be confined to those who cannot be examined at law. The bill is not a bill for relief, offering to bring the money into court.

Lord Chancellor (2d July).—This case comes before this House upon a demurrer by one of the defendants to a bill of discovery, which was filed by Messrs. Glyn and Company, who were the acceptors of certain bills of exchange. The holders of those bills having brought an action on the bills, a bill of discovery was filed, which undoubtedly the defendants at law had a right to file as against those who were pursuing them at law. So far no objection can be taken to the proceeding ; but in addition to those who were pursuing the plaintiffs at law, the defendants at law made another party defendant in the suit in that bill of discovery, namely, the Queen of Portugal. How the Queen of Portugal became a party to the cause below, and what immediate process was served upon her, is not now under consideration ; she was, by virtue of certain orders which have not [270] been the subject of appeal, made a party by the subsequent service, and it became necessary, therefore, for those who had to protect the interests of that foreign potentate to take such proceedings as became necessary in consequence of the orders of the Court of Exchequer. The Queen of Portugal demurs to that bill of discovery ; that demurrer was heard before the Lord Chief Baron of the Exchequer, and overruled. From that order overruling the demurrer an appeal was brought to this House.

Unfortunately a considerable length of time has elapsed since this case was argued, and I only refer to that to guard against any supposition that the delay has arisen from any doubt which I at least, individually, entertained of the proper judgment to be pronounced. It becomes a question now what the order ought to be upon that appeal.

The plaintiffs in equity, the acceptors of the bills of exchange, state, and very truly state, (and there is no reason to suppose that they have any benefit in the subject matter,) that they are merely acting as bankers. But looking at the case as it affects the commercial interests of the country, one cannot fail to observe that they are acceptors of certain bills of exchange, and that the plaintiff at law is the holder of those bills of exchange ; and if that which has been done by the Court of Exchequer in overruling this demurrer was to be considered the law of the land, one does not see how any holder of bills of exchange can ever hereafter compel the acceptor to pay, because, if the acceptor could make any foreign potentate a party defendant, the plaintiff at law will not be at liberty to proceed until that foreign potentate puts in an answer in the Court of Exchequer or the Court of Chancery. It is plain that in such a state of [271] things the holder of the bill of exchange will encounter difficulties which it is not very advisable to permit.

The bill states that the party suing the holder of the bill of exchange, the plaintiff at law, is the mere agent for the Queen of Portugal ; upon a demurrer that of course must be taken as an allegation founded in truth. It therefore raises the question which has been decided in the Court of Exchequer, and the proposition there laid down appears to me very fairly to state the point which your Lordships have now to decide. It was laid down by the Lord Chief Baron, that, in his opinion, where a party interested is charged in a bill of discovery and called upon to disclose, he is bound to do so, and that a court of equity will compel him to do so, although he is not a party to the record at law : those are the terms in which the proposition is laid down. Now, I have the misfortune to differ from the proposition so laid down, and I think your Lordships will be of opinion, on reference to the authorities, that the rule of courts of equity is precisely the reverse.

The decision in the Court of Exchequer which we are now considering, has given rise to several cases in Chancery, which have made it my duty to consider the subject ; and although it is one as to which, during an experience of more than thirty-five years in the Court of Chancery, I have not entertained any doubt, or ever heard any sug-



gested, I have thought it my duty to examine all the cases upon the subject, and propose as shortly as possible to submit to your Lordships the result of that examination.

The question is, whether a bill of discovery can be supported against persons interested in the subject matter of the action at law, but not parties to the [272] record. Bills of discovery in aid of the defence to an action are permitted for the purpose of obtaining from the antagonist at law the discovery of matter which, being admitted by him, may aid the defence, and not for the purpose of procuring evidence. It is now nearly forty years since Lord Eldon, in *Fenton v. Hughes*, reported in 7th Vesey 287, allowed the demurrer of the defendant Bate to a bill of discovery which, according to the statement of the bill by the Vice Chancellor in *Irving v. Thompson*, in 9th Simons 23, alleged that he, Bate, was interested in the success of the action, and was to be entitled to all or some part of the money to be recovered thereby, and that he would be liable to pay all or some part of the costs in case Hughes, the plaintiff in the action, should not recover. Lord Eldon observed, that Bate would not be a witness for the plaintiff at law on account of his interest, but that the defendant might examine him; and that the superior advantage of discovery by answer, particularly as to the production of papers, was not sufficient to make an exception to the rule that a bill of discovery will not lie against a mere witness.

In 1803, in the case of *The Mayor of London v. Levy*, in 8th Vesey 403, and in 1808 in *Le Texier v. The Margravine of Anspach*, in 15th Vesey 164, Lord Eldon laid down the rule in the same way. In 1813 Sir Thomas Plumer acted upon this rule in *Powell v. Yeats*, as stated by the Vice Chancellor in *Irving v. Thompson*, as he did in the same year in *Whitworth v. Davis*, in 1st Vesey and Beames 550. Lord Lyndhurst, in *Tooth v. The Archbishop of Canterbury*, in 3 Simons 63, and in *Few and Guppy*, in *Hare on Discovery*, 124, recognized and acted upon the case of *Fenton v. [273] Hughes*. In 1835, in the case of *Glyn v. Soares*, in 3 Mylne and Keen, 450, at the Rolls, I considered the rule as clearly settled; and in 1839 the Vice Chancellor, in *Irving v. Thompson*, reviewed all the cases and acted upon the rule; and in the present year, in the case of *Kerr v. Rew*, I thought myself bound by the pendency of this case to look into all the authorities, and found no ground for doubting the rule as I had always understood it; and therefore allowed a demurrer, by a party made a defendant to a bill of discovery by underwriters, upon an allegation that an action upon a policy brought in the name of another as agent was in fact brought for the benefit of the party demurring, and that he was exclusively interested in the subject matter of the suit. It was indeed assumed in the Court below, that in cases of actions upon policies it was the common practice to make the owners defendants to bills of discovery, although they are not parties to the record at law. What may have been the recent practice of the Exchequer I am not very conversant with; but I am very confident that if there be any such practice in the Court it is of very recent date, and certainly at variance with the practice of the Court of Chancery, as the cases of *Irving v. Thompson* and *Kerr v. Rew* prove. Indeed, at the time when I was familiar with what was going on in the Exchequer, it was not usual to file bills of discovery in such cases: they all prayed relief. I have looked through many precedents, which, from the names attached to them, must cover a period not much short of a century, and I find but one which does not pray relief. The case of *Vandam v. Monro*, in 2d Anstruther 502, as there reported, would appear to have been a bill of discovery; and if so, it would be an instance of a bill [274] of discovery filed against the assured, not parties to the action; but, considering what the general practice was, it was most probably a bill praying relief.

Some cases, however, were referred to by the Lord Chief Baron as establishing a contrary doctrine, and some observations of Lord Hardwicke, in *Plummer v. May*, in 1st Vesey 426, were relied upon; but it is obvious that the bill in that case prayed relief, Lord Hardwicke saying, that there were charges in it which, if proved, would entitle the plaintiff to a decree against the defendant for an account. *The Bishop of London v. Fytche*, in 1st Brown 95, was also relied upon as an instance in which a bill of discovery was filed against a defendant who was not a party to the action. I have had the registrar's book searched, and it appears, under date 13th of June 1780, *reg. lib.* at folio 506, that the report in that respect is erroneous, and that Eyre, the clerk, was not a party to the bill of discovery. *Dummer v. The Corporation of Chippenham*, 14 Vesey 245, has also been referred to; but Lord Eldon's observations, in

page 253, only showed that, in his opinion, the principle of permitting a plaintiff in a suit against a corporation to seek discovery from an officer of the corporation might be extended to individual members of it. *Batch v. Wastell*, in 1st Peere Williams 245, appears to be a bill for relief and not for discovery only, and the object was to make assets in the hands of the defendant liable to the plaintiff's judgment. The cases of officers of corporations stand on principles entirely peculiar to themselves, and have obviously no application to the present case. *Angerstein v. Wentworth*, 1st Fowler 227, does not prove much, but as far as it goes, it is an authority in favour of the demurrer.

[275] Thus all the cases which have been supposed to support the doctrine upon which the judgment of the Court below proceeded, when examined into, are proved to want those circumstances which, from the mistake of the reporters, have been supposed to make them authorities for that purpose. A proposition was suggested, which is, I believe, quite new, namely, that a bill of discovery may be filed against any one whose admissions may be used for the plaintiff at law. This proposition I conceive to be wholly untenable, and what affords the most certain answer to it is, that in *Fenton v. Hughes* the declarations of Bate, assuming the facts to be as stated in the bill and admitted in the demurrer, would have been admissible in favour of the plaintiff to the bill of discovery. It is true that examining a person as a witness, who has important papers in his possession, is far less effectual than obtaining his answer to a bill of discovery; but this was fully considered by Lord Eldon in *Fenton v. Hughes* [7 Ves. 287, 289], and yet he held that this consideration, though well founded in fact, did not justify filing a bill against a person who might be examined as a witness. The demurring party might in this case be examined as a witness for the plaintiff to the bill of discovery, the defendant at law; as may the assured, not a party to the record for the underwriter, as stated by Lord Abinger in his judgment on this case.

The case of the lessor of the plaintiff in ejectment being compelled to answer a bill of discovery is no authority against the rule, but he is considered in all respects as a party to the record, which the assured is not, and therefore may be examined as a witness; and, therefore, if your Lordships were to sanction the principle upon which the judgment of the Court below has [276] proceeded, a very mischievous innovation would be made in the rules and practice of courts of equity as to compelling discovery, and an inquisitorial power would be established, by which persons not parties to any litigation might be compelled, in a contest between others, to discover the secrets of their own affairs, upon an allegation, which could not perhaps be denied, that they had some interest in the subject matter of a litigation between others; and as, if the defendant at law be entitled to the discovery in aid of his defence, the action cannot be permitted to proceed till such discovery be obtained, an easy expedient would be afforded of defeating the enforcement of legal rights by action at law, by filing bills of discovery against persons not parties to the record and out of the jurisdiction, upon an allegation of their being interested in the subject matter of the action. Of the possibility of such an abuse the present case furnishes a striking example. The rules of courts of equity, as they have hitherto existed, cannot lead to such an abuse; and I trust that your Lordships will maintain those rules, and thereby prevent the recurrence of such injustice in future. I therefore move that the judgment of the Court below be reversed, and the demurrer allowed.

Lord Lyndhurst.—It is quite unnecessary for me to go through the cases which have been referred to; it is sufficient for me to say, that I entirely concur in the opinion which has been pronounced upon this case. I consider the decision in *Fenton v. Hughes* as a decision precisely in point upon the present occasion. It was suggested that Bate had no interest; the record has been searched, and the notes of the case have been [277] examined, and it appears that he had a direct interest; that it was so asserted upon the record, that Bate was to share a part of the money that was to be recovered, and was liable or undertook to pay the whole or a part of the costs. The decision in *Fenton v. Hughes* [7 Ves. 287] has been acted upon from that time to the present, in two instances by Lord Chancellor Eldon, who considered the case with great care and great attention at the time. It has been confirmed by the case of *Powell v. Yeats*, about which the Master of the Rolls, Sir Thomas Plumer, at first doubted; but when the facts of *Fenton v. Hughes* were distinctly brought to his attention, he con-

firmed the judgment in that case, and acted upon it in the decision he pronounced in *Powell v. Yeats*.

The same point came before the Court during the time I held the Great Seal. I considered the law as settled by the case of *Fenton v. Hughes*, and acted upon it in the case referred to. Since that time it has come before the Court in two or three instances during the time of the present Vice Chancellor, who pronounced a most elaborate judgment in the case of *Irving v. Thompson* [9 Sim. 23] on this very point; the judgment being, I believe, the more elaborate in consequence of the decision from which this is an appeal. The decision which is now appealed from was founded on a misapprehension of the case of *Fenton v. Hughes* as to the facts of that case, and there is undoubtedly something equivocal, ambiguous, and vague in the report, in consequence of which the Vice Chancellor got the original brief containing the facts, and containing the bill in which the facts are such as my noble and learned friend has stated, and such as I have mentioned.

There was another case which has been relied upon, [278] which was considered as an authority for the judgment in this case; I mean the case of *The Bishop of London v. Fytche* [1 Bro. C.C. 96]; that was founded upon the apprehension that Eyre was one of the defendants on that record, whereas upon examining the record it appears that Fytche was the only defendant. It appears to me that that is not an authority to oppose to the authority of *Fenton v. Hughes*, which has been considered as law from that time to the present. I repeat what I before said, that any person looking to the judgment of Lord Eldon, in the case decided by him, will see that he considered the case with his usual attention and his usual care, and that in pronouncing the judgment he must be considered as pronouncing no law, but that which has been from that time considered as the rule of Court. I am therefore humbly of opinion that the judgment ought to be reversed.

Lord Brougham.—My Lords, agreeing entirely as I do with my noble and learned friends who have addressed your Lordships, I shall not trouble your Lordships further than by expressing my entire concurrence. I agree entirely as to the cause for postponing this judgment; the judgment has been postponed principally for the purpose of having those cases looked into upon which it was said that the judgment of the Court of Exchequer had been founded. The case of *Fenton v. Hughes* [7 Ves. 287] was a good deal commented upon at the bar in the course of the argument, as also the case of the *Bishop of London v. Fytche*. There is no doubt that the error which has prevailed in the reports of those cases, and the great vagueness of the case of *Fenton v. Hughes*, have given rise to this decision in [279] the Court of Exchequer. The manifest error in the case of the *Bishop of London v. Fytche*, and, I think, another error which appears in the report of some third case gave rise to considerable discussion, and to some doubt at the hearing; and according to my recollection, it was principally with a view of having this mistake and difference with respect to the cases examined, that the postponement of the judgment has taken place. It really does appear now very satisfactorily, from the full inquiry into all those cases in the late case of *Irving v. Thompson* before the Vice Chancellor, that those cases have been either mistaken or misrepresented, and that from those circumstances the error in this judgment of the Court of Exchequer has arisen.

Lord Lyndhurst.—I believe the third case to which my noble and learned friend alludes is not a single case, but I believe it is that class of decisions which is supposed to have existed in insurance cases.

Lord Brougham.—I believe so.

Lord Lyndhurst.—It would be desirable to ascertain whether those were bills of discovery or bills for relief; upon examination it turns out that the whole course of proceeding in those cases was not in the nature of bills for discovery, but bills for relief; and I apprehend, therefore, what is supposed to be the modern practice arises from misapprehension of the form of those bills.

Lord Wynford.—I rise to address your Lordships certainly with considerable reluctance, because I am bound to state to your Lordships that I agree in opinion with the noble and learned judge (my Lord Abinger) who decided the case in the Court below, and [280] I have the misfortune to differ from my noble and learned friends who have given their opinion upon this occasion.

I never heard before of any case being misreported, except the case of the *Bishop of London v. Fytche* [1 Bro. C. C. 96]. It was certainly stated at the time of the hearing here, that there was a mistake in the report of the *Bishop of London v. Fytche*, inasmuch as a person of the name of Eyre, who was supposed to have been a party in that suit, was actually not a party; but with respect to any mistake or misreport in the case of *Fenton v. Hughes* [2 Ves. 287], I never heard of any.

Lord Brougham.—I did not say that it was misreported, but that there was an uncertainty with respect to the facts of that case which has since been cleared up.

Lord Wynferd.—I was not aware that there was any uncertainty as to the facts; and as the facts are stated in the report which we had to refer to at the time this case was under consideration, it appeared to me then, as it appears now, that it was a very strong authority indeed against the opinion which my noble and learned friend has this day pronounced.

Your Lordships are not in possession of any of the circumstances of this case, or you would at once perceive that such gross injustice never was worked in any cause as will be worked in this, if your Lordships pronounce the judgment which it is recommended to you to pronounce in this cause. It is fit that you should be put in possession of some of these facts, and should know how some of the facts have been dealt with in another country. I have been in the habit of thinking that our laws were the wisest in the world,—that they [281] were better administered in this country than in any other; I shall be bound to confess, after the judgment which I am afraid will be pronounced to-day, “that they manage things better in France.” While we have been sleeping over this cause, they have in France got at the facts, and in France they have decided according to the justice of the case. They have disposed of the Queen of Portugal and her agents in that country as I had hoped your Lordships would have been enabled in this country to dispose of Her Majesty the Queen of Portugal, and her agent, Mr. Soares, in this country.

My noble and learned friend on the woolsack has stated, that if your Lordships uphold the judgment of my noble and learned friend, commercial people, holders of bills of exchange, will be in a fearful situation, because it would only be necessary to make some prince in Europe or America (but fortunately for the purpose of this cause, but though unfortunately for other purposes, there is but one prince in America who can be made) a party to any such cause;—that by making any foreign prince a party to the cause the action may be tied up, and no holder of a bill of exchange can ever recover upon it. There is a very short answer to that argument; how can that be done when it is stated, as it is in this cause, that the Queen of Portugal is the sole party to the cause and has the sole interest, and that Mr. Soares, the person whose name appears upon the record, is her agent,—a fact which is admitted? Can it be said, that if you decide that such a person is bound to make a disclosure, you would be opening a door for the filing of bills calling upon any sovereign of Europe or America to answer to the bill? That allegation, I [282] conceive, cannot be supported. I confess I am a little surprised that my noble and learned friend, who has so general and accurate a knowledge in matters of equity, should have had recourse to such an argument as that which he has used.

I found my observations in this cause upon the simple allegation, that the Queen of Portugal, who refuses to answer, is the sole person who can know any thing of the facts; that the Queen of Portugal, who refuses to answer, is the sole person who has any interest in the cause; for my noble and learned friend has admitted that what is charged in this bill, if not denied, must be taken to be true. It is charged in the bill, and it is not denied, that Mr. Soares had admitted that he has no interest whatever in this cause; that the only party upon the record who has the whole interest in this cause is the Queen of Portugal, who refuses to make any disclosure, and by refusing to make any disclosure will obtain a sum of money from the merchants of this country to which she has not the slightest pretence upon earth: a fouler fraud,—if I may use such a word as applicable to parties in the situation in which these parties are,—a fouler fraud was never committed upon the merchants of this country than will be committed if this judgment should pass, as I am very much afraid it will pass.

What are the facts of the case? Some time about the year 1829 the govern-

ment of Portugal was *de facto* in the hands of Don Miguel. Don Miguel negotiated a loan with two persons in France of the names of Outrequin and Jauge, and bonds were given to those persons, which bonds were to be delivered to different persons in the form of scrip. To the persons who con-[283]-tributed to that loan the loan was to be paid; bonds were given to those parties, and the loan was to be raised by bills drawn upon persons in England and in France,—bills exactly under the same circumstances with those in the present case. The decision in the court of France, which has disposed of the Queen of Portugal, is a direct decision upon this very point now under consideration. Bills were to be given in satisfaction of raising this loan on merchants in England and France. The bills upon England were endorsed by a person then a minister of the Court of Portugal, a person of the name of Couto; they were transmitted to this country, and were presented for acceptance to the present defendants, they were accepted by the present defendants. Those bills were to be given to the person who was the endorsee of the second set of bills. At this time Don Miguel was *de facto* the Governor of Portugal. By Don Miguel this loan was raised. Don Miguel was in the meantime dismissed from the Court of Portugal; he was turned out as an usurper, and Donna Maria was placed in his stead. The first act of Donna Maria was this: she repudiated the loan of Don Miguel. Perhaps she was right in that; she said that Don Miguel was an usurper, and therefore the bonds he had given and the loan he had raised were not binding upon the kingdom of Portugal, and would not be paid. So far she was right; but if it was right to say that the bonds were only invalid, it was only right to remit, to those who had given the bills, the bills which were advanced for the purpose of raising that loan. But though the loan was declared void, that was not thought proper by the council of Portugal. The council of Portugal, after Don Miguel had left that [284] country, sent for Mr. Couto, who had been actually deposed from his situation, who was appointed to that situation by Don Miguel,—never held any situation of that kind under Donna Maria, and he was compelled against his inclination, for he had some scruples of honesty about him, to endorse these bills to a Mr. Soares, in order that Mr. Soares might recover the money for those bills in this country, and remit it to Donna Maria, who had repudiated the loan, and who had therefore no more pretension to touch those bills than I have, or than any one of your Lordships. Immediately upon this Don Miguel gave notice to the acceptor of the bills not to pay them to Soares, and not to accept them on account of Soares. Outrequin and Jauge, the two persons in France, gave also the same notice not to pay the bills, because they said Soares was endeavouring to recover a sum of money for the Queen of Portugal which she had no right to, having repudiated the loan, and having declared that the bonds were void.

Now, after this, can any one allow on any pretence the Queen of Portugal, who is the real party in this cause, and the only party in this cause, to recover in this action upon bills of exchange, the consideration of which she herself by her own act has repudiated? I state that it would be an act of such gross injustice,—I hear my noble and learned friend say, and I am obliged to him for the admission, that it would be an act of gross injustice,—it cannot be denied to be an act of gross injustice; and I should be very sorry, if, in consequence of any supposed technical rules of the Court of Chancery, your Lordships were to be made parties to such injustice. This is a case of so much importance, not only with respect to these parties to whom it is of [285] very great consequence, but with respect to the administration of justice in general, that I, for one, with all my respect for the Court of Chancery, would rather that it should be blown up, than that this cause should be decided in the manner in which it is proposed to be. If we cannot do better here than they do in France, if we cannot get at the facts and decide upon the justice of the case, but are tied up by these absurd forms, for which no reason has been attempted to be given by my noble and learned friends, it would be better that we should have no Court of Chancery at all than one so fettered.

Lord Lyndhurst.—They did not examine the Queen of Portugal in France.

Lord Wynford.—They did not examine the Queen of Portugal, I am obliged to my noble and learned friend; we do not propose to examine the Queen of Portugal here; I know we cannot examine her here, but we can get some information as to who the persons are who may be examined here. We may do that which is asked for

by this bill; we may have a commission sent not only to Portugal but to France, to examine the only persons who can know any thing of the facts connected with the cause.

Lord Lyndhurst.—We do not decide that a commission may not issue.

Lord Wynford.—My noble and learned friend says, we do not decide that a commission may not issue. I know that; but who can issue that commission, unless the Queen of Portugal will, through some minister of hers, kindly inform us who are the persons to whom the commission is to be sent, and from whom the information is to be obtained. We are kept entirely in [286] the dark upon this subject, and by keeping us in the dark the Queen of Portugal will get into her pocket money which she has no more pretence for getting into her pocket than she has for taking the money of your Lordships.

But it is said, there is a distinct rule in the Court of Chancery, which prevents this being done. I am bound to suppose that there is such a rule, after my noble and learned friends, for every one of whom I entertain so much respect, have stated that there is such a rule, and that the thing is not to be doubted about. I am bound to suppose that all the reporters must be mistaken; but if the reporters are not mistaken, there is no such rule in the court of equity. If there is such a rule in the court of equity in this country, I beg to say in a vast number of cases it is absolutely impossible that justice can be got at. Suppose a bill of exchange obtained in the most fraudulent manner in the world, under circumstances of disgusting fraud, the man who gets hold of the bill of exchange will never bring an action upon that bill himself; he will hand it over to some person,—put an endorsement on it; he will get half a dozen endorsements put upon that bill, if, in consequence of that, he cannot be called upon to answer, and disclose all those circumstances. I am aware that if you have all those endorsers you may examine them as witnesses in the case, but you cannot get at the man by whom the bill has been passed from hand to hand, but whose name did not appear upon the back of the bill.

But there is another thing. It is of very little use to get hold of any facts in court unless you have a knowledge of those facts beforehand, in order so to use those facts at the time of the trial that they may be rendered [287] advantageous to the party. My noble and learned friend has admitted that a bill of discovery is much better in many cases than the examination of a witness. In the examination of a witness the answers come upon you by surprise, but by means of a bill of discovery you have it in your possession, and have an opportunity of thinking of it before it is used in court; and you not only know how the information is to be used when it is obtained, but you find out the means by which other matters can be examined in a court of justice, which it is impossible you could know any thing about, or be aware of, if the parties were not to be called upon to give evidence upon them before they come to a court of justice.

I will, in the first place, take the liberty of stating to your Lordships, that it does not appear to me that Lord Redesdale, one of the most eminent men who ever practised in a court of equity, was ever aware of any such rule as that which is now suggested. It is there that a bill of this nature, that is, a bill of discovery, must state the matter touching which a discovery is sought, the interest of the plaintiff and defendant in the subject, and the right of the first to require the discovery from the other.

Further, in the same book Lord Redesdale states that bills have been filed to impeach deeds on the ground of fraud. Now here not only no such rule as this which is relied on upon this case, for the purpose of defeating the merchants of England and putting the money into the pocket of the Queen of Portugal, is advanced, but the direct contrary is stated by Lord Redesdale, for it is equivalent to that. The noble and learned Lord says, "Where bills have been filed to impeach deeds on the [288] ground of fraud, attornies who have prepared the deed and other persons have been made defendants, for the purpose of obtaining a full discovery." Those were bills of mere discovery, and in bills of mere discovery attornies, who, your Lordships know, cannot be parties to the cause, and other persons, certainly not meaning other parties to the cause, may be made witnesses, for the purpose of getting at a full disclosure of the fraud, or any thing of that nature. If you were tied down to an examination merely of persons whose names are upon the record, I am sure in ninety-

nine cases out of a hundred they will escape, as fraud of the grossest kind will unquestionably escape in the case now under discussion.

Lord Redesdale says in another passage, "As the object of the Court in compelling a discovery is either to enable itself or some other Court to decide on matters in dispute between the parties, the discovery sought must be material either to the relief prayed by the bill, or to some other suit actually instituted or capable of being instituted." Now, I should think, your Lordships will say that this light never broke in upon Lord Redesdale, or he would not have written that part of his treatise respecting bills of discovery if such a thing had occurred to him.

Now this is the best book I can find, and the text book upon this subject. Your Lordships will find that in the case of *Wych v. Meah*, in 3d Peere Williams 310, Lord Talbot ordered the secretary of the East India Company to put in an answer, because the Company would not answer on oath; and he said, though the answer might not be read against the Company, yet it might be of use to direct the plaintiff how to draw his inter-[289]-rogatories. There is not a word said by Lord Talbot in that case applicable to this distinction, and we do not look into cases merely to find exactly the same facts, or to find parties exactly under the same circumstances; but we look into cases to discover general principles. I say, this case establishes the principle laid down by Lord Redesdale, that the Court will grant a discovery where it is necessary for the purposes of justice, the parties seeking it having an interest in obtaining it from the party from whom it is sought. My noble and learned friends, one or two of them, mentioned this case of the secretary of the East India Company, but none of them, upon principle, attempted to distinguish it from the present case. The secretary to the East India Company was no party to the record, but he was examined in the case, because the parties who were parties to the cause could not be compelled to make a disclosure upon oath. If the Queen of Portugal cannot be made a party, and cannot be obliged to make a discovery, or to state who her officers are, or give us any means by which we can find out the circumstances under which she has obtained these bills, or afford us any opportunity whatever of investigating the transaction,—if, I say, she can get this money into her hands, allowing the record of the court of equity in this country to charge her without denial on her part, that will occasion one of the grossest frauds that was ever committed in any country.

I do not recollect whether any objection was made to the accuracy of the report, in *Vesey senior*, of *Plummer v. May*. A bill was brought in that case by an heir-at-law against witnesses.

The demurrer was overruled on the ground that the [290] deed admitted every thing that was well pleaded, and that there was an express allegation in the bill that the defendant pretended to some right or interest under the bill. It will appear whether there was any thing further passed that I am not aware of, but nothing more appears, from the note which I made, to have passed. The reason given was that the witnesses had not an interest; if that be any part of the reason, it is very applicable to this case. The Queen of Portugal stands in a very different situation from the witnesses; as the plaintiff, she not only has an interest, but she has the whole and entire interest, and all which is now doing is doing for her. If my noble and learned friends can prevail upon your Lordships to overturn this judgment, the Queen of Portugal will obtain this money in her pocket, which otherwise she will never get.

With respect to the case of *Fenton v. Hughes* [7 Ves. 287], it is said that that judgment is discovered not to have been given on the ground stated by Vesey; but of that I know nothing. An action *qui tam* was brought in the name of the defendant, as the foundation of a bill of discovery and a bill of relief. The action was brought at the instance of the other defendant, Bate, under prayer for discovery, and a prayer for relief against both defendants, and that the plaintiff might have the benefit of the trial of the action. That does not look like a bill brought for relief, but for the purpose of obtaining facts to be used in an action at law commenced in the name of the defendant Hughes, not Hughes and Bate. Bate demurred to the bill, that the plaintiff had not shown any right to call upon him in equity for discovery, and that he might be examined as a witness. The demurrer was allowed on what ground? On the ground that Bate [291] was a mere witness, having no interest. It was decided upon that ground, and I suppose that to be an accurate report. It must be a

very inaccurate one if that is not the case; there is in that report no notice taken of his not being a party in the cause. If this be the rule of courts of equity, would not Lord Eldon, who, we know, had a short way of disposing of causes (for he was in the habit very much of disposing of causes in a short way, without going through all the points,) would not he have said at once, you cannot go on here, Bate is no party to the cause, there is an end of it. But Lord Eldon goes into all the cases, and decides it upon the point, that the party who called upon Bate had no interest.

The case I am about to allude to is a decision of the noble and learned judge in this very case. I think that every word is entitled to attention, not only from the great authority of that noble and learned judge——

Lord Lyndhurst.—Hear, hear.

Lord Wynford.—Though he has not had so much experience in courts of equity as my noble and learned friends now present have had, yet he has heard more of what passes in causes in general than almost any man in the country, and certainly was one of the most distinguished advocates ever at the bar.

Lord Lyndhurst.—Hear, hear.

Lord Wynford.—Though Lord Abinger has not attended so much to the courts of equity, he has been called upon, in the courts of common law, to attend to pleadings and answers in courts of equity. Lord Abinger says in this case, “The question is, whether a party suing is agent for another?” That is the very point which has not been touched upon yet; so there is [292] in this case—Soares is the agent for the Queen of Portugal. *Facit per alium facit per se*: what the Queen of Portugal does by her agent she does by herself, though her name is not upon the record. The name of Soares is upon the record in no other way than as agent for the Queen of Portugal. It would appear ridiculous to say, you shall not put the Queen of Portugal to answer because she does not appear upon the record, though it is admitted that the very persons who did appear had no interest in the concern, and that her Majesty was the person solely interested. Lord Abinger, after observing that Soares proceeding in his own name, but really on behalf of the Queen of Portugal, he ought to be restrained in his action until the party for whom he acts puts in his answer to the bill of discovery, goes on to say, “Why not apply that principle to an action brought on a bill of exchange or other security?” I say, why not? Is it possible on principle to distinguish these cases? It is known that most of the persons required to answer are not parties to the record; but they are the persons who can give the best information, and they are therefore required to give that information. That is the rule of common sense, and I trust it will not be prevented operating by the Court's being bound down by the technical rules of the Court of Chancery, even if I were obliged to confess, which I do not, that the authorities were all decidedly against me.

There is another case which I ought to mention, decided by my noble and learned friend on the woolsack, the case of *Glyn v. Soares*, in 3 Mylne and Keen:—“The acceptors have undoubted right to have that [293] fact ascertained, whether the party holding the bill is or is not the person who derived title under the individual or officer to whose order the bills were made payable; beyond that, they have no interest in the subject matter. It cannot be material to them how Messrs. Outrequin and Jauge had the money in their hands,—why it was they wished to remit it to Portugal. This is not a bill for the purpose of administering equities between the parties; it is not a bill in which the question who is entitled to the money can be discussed. It is merely a bill to aid the defence to an action at law, and it cannot correctly or properly raise any question which is not material for that purpose.” My Lords, I entirely concur in that; you cannot go into any question which is not material for the purpose for which the bill is filed, that is, to get at evidence which is shown to be material for the purpose of defeating an action unjustly brought against the person who filed the bill.

On these grounds I feel it to be my duty to support the judgment my noble and learned friend has pronounced; and after having heard the opinions my noble and learned friends have stated to your Lordships, I take them to proceed upon a mere technical ground, for which there is no pretence, in my humble judgment; and if that which they have expressed is declared to be the law, if I continued my attendance in parliament, I certainly would have brought in a bill to try whether I could prevail on the House to get rid of a law which must be pregnant with so much mischief, and



which will tend to inflict so much injury upon the country. I have felt this a very painful duty. I have stated the judgment which, in my opinion, you ought to give, and [294] feeling decided in my opinion, I could not reconcile it to my conscience not to come here and to state to your Lordships that I enter my protest against the decision about to be made.

Lord Brougham.—I did not say that *Fenton v. Hughes* [7 Ves. 287] was reported upon other grounds than those upon which the judgment was pronounced. What I said was, that there was some vagueness on the part of the reporter which had misled the Court below, and it is quite clear that the Lord Chief Baron was misled respecting the grounds of that decision by what passed before the Vice Chancellor; for he says Lord Eldon took time to consider and said, "that he had looked with great anxiety into the bill to see if he could discover any sort of interest that Bate had to make him any thing but a witness, and he goes through the topics to show that Bate was clearly a witness at law for the party who filed that bill; that if he could not be a witness on the other side by reason of any interest yet undiscovered, that was for the advantage of the plaintiff in equity." Then my Lord Chief Baron says, that Lord Eldon came to the conclusion that there is not such a charge of interest in Bate as justified him in retaining the bill against him; and then the Lord Chief Baron adds, that if the bill had stated that the plaintiff in the action and Bate had agreed to divide the profits, or if it had stated that Bate had some such interest in the suit as identified him in interest with the plaintiff in the action, though not himself a plaintiff upon the record,—it says, my Lord Chief Baron "should have thought it probable, from Lord Eldon's judgment, that he would not have allowed the de-[295]-murrer." Now, I say, there must have been some want of clearness in that report to have led the Lord Chief Baron to come to that conclusion, because, if Lord Eldon had examined the bill with that anxiety with which he usually did examine bills before him, he would have necessarily discovered that which appeared on this bill being examined by the Vice Chancellor with a view to another case, but again partly re-examined by him with a view to this case of *Irving v. Thompson* [9 Sim. 23], to which his attention was more particularly called in consequence of this very case then pending for judgment. He examined this bill, and what did he find? He found those very things which were the points of difference, that had led the Lord Chief Baron to suppose that what existed in *Fenton v. Hughes* did not exist in that case; for he says, "I have examined the bill, and I find that it was charged that Bate was interested in the success of the action, and was to be entitled to all or some part of the money to be recovered thereby; and that he was or would be liable to pay all or some part of the costs in case Hughes should not recover, or that there had been some agreement, bargain, or understanding between Bate and Hughes and the attorney who carried on the action respecting the costs of such action, which was carried on at the risk and expense of Bate." So that his honour the Vice Chancellor might very well proceed to conclude that there were actually those very allegations in the bill which the Lord Chief Baron supposed if Lord Eldon had seen fit in *Fenton v. Hughes*, he would have come to a different conclusion from that which he adopted; and that, notwithstanding, seeing those very allegations, he came to the conclusion of allowing the demurrer.

Lord Wynford.—I am much obliged to my noble and learned friend for having stated this, but it does not show that Lord Eldon took notice of the circumstance that Bate was interested.

Lord Brougham.—I only mean that it goes to show that *Fenton v. Hughes* [7 Ves. 287] was not decided on grounds other than those stated by the Vice Chancellor.

Lord Lyndhurst.—If the report is looked at, it will not be found inconsistent with that which is stated to be the effect of it. I have looked at *Fenton v. Hughes*, and it is not at all inconsistent.

Lord Chancellor.—The allegations in *Fenton v. Hughes* are as nearly as possible the allegations in this cause. They allege that Bate was the party really interested, that the person suing was not suing for his own benefit, and that the absent party Bate was so much interested in the result of the suit that he was to pay the costs. I say nothing about what may be the ultimate decree of the Court. My noble and learned friend seems to suppose that I apply the decision on this point to the facts of

the case. Now, it is a rule in equity, that when a case comes on upon demurrer we must take the facts as stated for the purpose of the demurrer. We know nothing of the facts; it may be a mere fiction, a mere fable. It will lie upon the parties to prove these facts respecting Don Miguel or Donna Maria; we must take the facts as stated on the bill for the purpose of trying the demurrer, but for no other purpose. I do not mean to say that the facts may not [297] be those stated by my noble and learned friend, for we really have not the facts before us in any shape; we must try the demurrer upon the facts as alleged in the bill, without regard to any other point.

Lord Wynford.—I conceive the principle which the Courts have adopted is this, that the Court says, unless you condescend to answer the bill you shall not go on with the action.

Lord Chancellor.—Then, again, my noble and learned friend has not distinguished very happily between bills for relief and bills for discovery, which is a very important distinction; this is a mere bill of discovery.

It is ordered, That the said order complained of in the said appeal be reversed; and that the demurrer to the plaintiff's bill in the Court below be allowed.

[298]

## FROM THE COURT OF CHANCERY IN ENGLAND.

Sir FELIX BOOTH, Baronet, WILLIAM MILLER, CHRISTY, WILLIAM CURLING, JOHN PETER DARTHEZ the younger, GEORGE HOLGATE FOSTER, WILLIAM ORMSBY GORE, WILLIAM HUGHES HUGHES, JOHN CHRISTOPHER LOCHNER, WILLIAM MITCALFE, AMBROSE MOORE, JOHN M'TAGGART, Sir FRANCIS PALGRAVE, THOMAS PHILLPOTTS, JOSHUA SCHOLEFIELD, GEORGE SCHOLEFIELD, WILLIAM SHADBOLT, THOMAS STOOKS, GEORGE TAYLER, WILLIAM VENABLES, and GEORGE POLLARD,—*Appellants*; The GOVERNOR and COMPANY of the BANK OF ENGLAND,—*Respondents* [9th and 20th July 1840].

[Mews' Dig. i. 350, 353, 977; iv. 150. S.C. 7 Cl. and F. 509, *q.r.*]

The London Joint Stock Bank, being a copartnership consisting of more than six persons, and carrying on the business of bankers in the city of London, agrees with a Canada bank to provide the necessary funds to pay at maturity all such bills as may be drawn by the Canada bank upon and accepted by George Pollard, manager of the London Joint Stock Bank, to a limited extent beyond the effects in their hands, and an agreement to that effect is signed by the trustees of the com-[299]-pany. In pursuance of this agreement the president of the Canada bank, on behalf of such bank, draws a bill of exchange, payable to the order of Francis A. Harper sixty days after sight, for the sum of £1000, directed to George Pollard as manager of the London Joint Stock Bank, and accepted by him at the London Joint Stock Bank. Held, eleven of the judges being present and concurring, that, having regard to the acts in force respecting the Bank of England, the acceptance by Pollard under the above agreement was illegal; that his acceptance was equivalent to an acceptance by the Joint Stock Bank; that it was equally a violation of their privileges, whether the London Joint Stock Bank at the time of the acceptance had or had not funds in their hands on account of the bank in Canada, equal to the amount of the bill accepted; and that in either case an action on the case could be maintained by the Bank of England against the London Joint Stock Bank for a violation of the privileges conferred upon the Bank of England by the bank acts.

On the 30th November 1837 the respondents, the Bank of England, filed their bill in the Court of Chancery against the appellants, whereby, after stating the several

acts of parliament relating to the Bank of England, they stated, that in the year 1836 certain persons associated themselves together for the purpose of establishing a banking establishment in the city of London under the style or firm of "The London Joint Stock Bank," and that they issued the following prospectus:—"The London Joint Stock Bank, Princes Street, Mansion House. Capital three millions, in 60,000 shares of £50 each. Directors, Sir Felix Booth and others. Manager, George Pollard, esquire. The business of the bank is conducted on the follow-[300]-ing principles: accounts of parties, properly introduced, are received agreeably to the present custom of London bankers, with this advantage, that interest is allowed on current accounts and on deposits. On the first day of every month interest at the rate of £2 per cent. per annum will be allowed on the smallest balance which may appear to the credit of each account at the close of any day during the preceding month. Sums of money received on deposit at such rate of interest and for such periods as may be agreed upon, reference being had to the state of the money market; and if required, bills or promissory notes, at not less than six months' date, will be delivered to depositors in lieu of receipts for sums of not less than £100. Interest at the rate of £2 10s. per cent. per annum allowed on sums not exceeding £2000 deposited without special agreement, which may be withdrawn at any time on giving ten days' notice. The agency of joint stock and other country and foreign banks undertaken on such terms as may be agreed upon. Investments in and sales of all descriptions of British and foreign securities, bullion, specie, etc. effected, dividends received, and every other description of banking business and money agency transacted. A bill committee of the directors sits daily, from 12 till 2 o'clock, to receive applications for discounts, which are considered confidential, and promptly decided upon. The board of directors meets weekly, when a full statement of the affairs of the bank is laid before them."

That in the year 1836 such company or partnership was formed for the purpose of carrying on the [301] trade or business of banking in London, under the style or firm of "the London Joint Stock Bank," in Princes Street, in the city of London.

The bill then stated, that the plaintiffs had discovered that the object and design of the said company was not only to carry on the business of a bank of deposit and the issue of bills and promissory notes, as stated in their said prospectus, but to borrow, owe, and take up money on their bills or notes at a shorter date than six months from the issuing thereof.

That in the deed or agreement of copartnership of the said company, which was signed by each person who became a partner therein, there was contained a power to the directors, or some other officers of the said company or partnership, to authorize persons to sign bills or notes and other negotiable securities.

That the said London Joint Stock Bank Company so carrying on the said trade or business of banking, under the said style or firm of "The London Joint Stock Bank," at the formation of the said company established a house for the purpose of carrying on the said trade or business of banking in Princes Street, Mansion House, in the city of London; and the said company or partnership have, ever since the formation thereof, carried on the trade or business of banking at such place aforesaid, and now do carry on such trade or business there, and have ever since the formation thereof and now have the whole of their banking establishment in London: that the entire management of all the affairs and property of the said company or partnership was in the board of directors and manager.

That there was a banking establishment carrying on business at Kingston, Upper Canada, in North America, [302] under the style of the Commercial Bank, Midland District: that previously to the month of May 1837, and subsequent thereto, the Commercial Bank, Midland District, issued bills of exchange and promissory notes for various sums of money payable on demand, or at less time than six months from the time of the acceptance thereof, and such notes and bills of exchange were by the Commercial Bank, Midland District, declared to be payable and were made payable by the London Joint Stock Bank.

That the said Commercial Bank, Midland District, had drawn divers bills of exchange and promissory notes, payable at a less time than six months from the time of the acceptance thereof, upon the said London Joint Stock Bank, for various sums of

money, and which said promissory notes and bills of exchange had been accepted by the said London Joint Stock Bank.

That the Commercial Bank, Midland District, had drawn and negotiated such bills of exchange and promissory notes upon the said London Joint Stock Bank company or partnership, with a view to maintain a circulation of paper money for the benefit of the London Joint Stock Bank company; and that the London Joint Stock Bank received the profit made thereby, by arrangement and agreement between them and the said Commercial Bank, Midland District.

That the London Joint Stock Bank, on the 26th April 1837, authorized George Tayler to write to the plaintiffs the following letter:—

“ London Joint Stock Bank, 26th April 1837.

“ Gentlemen,—Having received from a transatlantic chartered bank the offer of their agency, which would involve the necessity of this bank accepting their drafts [303] payable at a shorter date than six months, the directors of this bank are desirous of knowing whether the directors of the Bank of England would interpose any difficulty in the way of this bank accepting such drafts.—I have the honour to be, your very obedient servant,

GEORGE TAYLER, Chairman.

“ To the Governor and Court of Directors of the Bank of England.”

That the plaintiffs, on the 27th day of April 1837, sent, by their secretary, to the said George Tayler, in reply, the following letter:—

“ Bank of England, 27th April 1837.

“ Sir,—I am desired to acknowledge the receipt of your letter of the 26th instant, addressed to the governor and court of directors of the Bank of England, in which you ask whether the directors of the bank of England will interpose any difficulty in the way of the London Joint Stock Bank accepting drafts payable at a shorter date than six months; and in reply I have to state, that such acceptances would be an infraction of the privileges of the bank of England, and as respects the public would be illegal and void, and consequently could not be permitted by this corporation.—I have the honour to be, Sir, your most obedient servant,

JOHN KNIGHT.

“ To George Tayler, esquire, chairman of the London Joint Stock Bank.”

That at the end of the month of September 1837 plaintiffs received certain remittances from North America, and amongst various bills of exchange, which [304] formed part of such remittances, plaintiffs received a bill of exchange drawn by John S. Cartwright, who is president of the Commercial Bank, Midland District, on behalf of such last-mentioned bank, which bill of exchange was as follows:—“ £1000 sterling. Kingston, Upper Canada, 25th July 1837. Sixty days after sight pay this my first of exchange, second and third unpaid, to the order of F. A. Harper, cashier, the sum of £1000 sterling, value received, which place to account of the Commercial Bank, Midland District, with or without further advice. John S. Cartwright, president. To George Pollard, esquire, manager, London Joint Stock Bank, London.”

That plaintiffs, on the 2d of October 1837, duly presented the same at the office of the London Joint Stock Bank for acceptance, and the same was accepted by George Pollard, as the manager of the London Joint Stock Bank, on their behalf and for their benefit; and such acceptance was written upon the said bill of exchange, and was as follows:—“Accepted, 2d October 1837, at the London Joint Stock Bank, Geo. Pollard.”

That the said word “at,” included in the said words “Accepted, 2d October 1837, at the London Joint Stock Bank, Geo. Pollard,” was fraudulently inserted for the purpose of defrauding the public and the plaintiffs; and that the said bill of exchange was really accepted by the London Joint Stock Bank, and the London Joint Stock Bank held themselves and their assets responsible and liable to pay the same.

That, after the said bill of exchange had been so accepted, plaintiffs caused it again to be taken to the office of the London Joint Stock Bank, and required [305] an acceptance in words according to the tenor of the bill of exchange; and in answer to such requisition, one of the clerks of the London Joint Stock Bank stated that the acceptance was sufficient, and that the London Joint Stock Bank were ready and willing to discount the bill.

That on the 26th day of October 1837 plaintiffs caused their solicitors to write and send to the London Joint Stock Bank the following letter:—

“ 26th October 1837.

“ Gentlemen,—The attention of the governor and directors of the Bank of England has been drawn to bills of exchange which have recently appeared drawn by a bank in Upper Canada, for which it appears you act as London agents, upon your manager, and accepted at your office. The bank are advised that the acceptance of such bills, having less than six months to run, is a violation of their exclusive privilege, and we request to know whether it is intended to persist in the practice, as in that case we are instructed to take immediate proceedings to obtain an injunction from a court of equity.”

That the secretary to the London Joint Stock Bank by their direction, in answer to such last-mentioned letter, wrote and sent to plaintiffs' solicitors, on the 2d November 1837, the following letter:—

“ London Joint Stock Bank, 2d November 1837.

“ Gentlemen,—Your letter of the 26th ult., addressed to the directors of this bank, was laid before the board yesterday, and in reply thereto I am instructed to state, that the directors deny that any practice has been adopted by the London Joint Stock Bank which is a violation of [306] the exclusive privilege of the bank of England, the London Joint Stock Bank never having accepted, nor directed nor authorized their manager or any other person to accept, any bills of exchange having less than six months to run.”

The bill amongst other things charged, that the directors had authorized George Pollard to accept bills of exchange and promissory notes drawn upon the Joint Stock Bank company, in the manner and form in which the said bill of exchange, dated the 25th day of July 1837, had been accepted by Pollard.

That the form of acceptance had been resorted to in consequence of the acts of parliament giving such privilege as aforesaid to the plaintiffs, and with the intent and for the purpose of evading, eluding, or avoiding the operation of the said acts.

The bill likewise charged, that George Pollard had no connexion with the Commercial Bank, Upper Canada, in his individual character, and had held no correspondence with the Commercial Bank, Upper Canada, except as manager, agent, or servant of the London Joint Stock Bank.

That all the bills of exchange accepted by George Pollard were debited in books of account against the London Joint Stock Bank, and that the said bills of exchange were paid out of monies belonging to the said London Joint Stock Bank.

And the bill prayed, that an account might be taken of all bills of exchange and promissory notes accepted or caused to be accepted, or authorized to be accepted by the said defendants for or on behalf of the company, or accepted or caused to be accepted by the said London Joint Stock Bank company, payable at a less [307] time than six months from the acceptance thereof, and particularly of all bills of exchange and promissory notes drawn upon the said London Joint Stock Bank, accepted by George Pollard or any agent of the London Joint Stock Bank, in the form in which the bill of exchange dated the 25th day of July 1837 was accepted, payable at less time than six months from the acceptance thereof, and of the gains and profits of the said London Joint Stock Bank made by accepting the same; and that they might pay the amount of such gains and profits to plaintiffs; and that it might be declared, that the accepting by George Pollard of the said bill of exchange, dated the 25th day of July 1837, was a fraud upon plaintiffs; and that the said defendants might be restrained, during the continuance of the privileges so granted to plaintiffs, from accepting or causing to be accepted, for or on behalf of the said London Joint Stock Bank, any bill of exchange or promissory note payable at less than six months from the acceptance thereof, and from accepting or causing to be accepted by George Pollard or any agent of theirs, in the form in which the said bill of exchange dated the 25th day of July 1837 was accepted, any bill of exchange or promissory note drawn upon the said London Joint Stock Bank, payable at less time than six months from the acceptance thereof; and that the defendant George Pollard, and every agent and servant of the London

Joint Stock Bank, might in like manner be restrained from accepting any bill of exchange or promissory note in the form in which the said bill of exchange dated the 25th day of July 1837 was accepted, and that all the said defendants might in like manner be restrained from in any other manner borrowing, owing, [308] or taking up in England, for and on behalf of the said London Joint Stock Bank company or partnership, any sum or sums of money on the bills or notes of the said London Joint Stock Bank company or partnership, payable on demand or at any less time than six months from the borrowing thereof; and that the said London Joint Stock Bank, and each and every partner therein or shareholder thereof, might in like manner be restrained from accepting or causing to be accepted, for and on behalf of the said London Joint Stock Bank, any such bill of exchange or promissory note as aforesaid, and from in any other manner borrowing, owing, and taking up in England, for and on the behalf of the said London Joint Stock Bank, any sum or sums of money on such bills or notes as aforesaid of the said London Joint Stock Bank.

The appellants, except George Pollard, were the directors of the London Joint Stock Bank. They filed a joint and several answer; and George Pollard, who was the manager, but not a director, partner, or shareholder, filed a separate answer.

By these answers it appeared that on the 21st November 1836 the London Joint Stock Bank commenced business, and a deed of copartnership was executed, dated the 31st day of October 1836, between some of the directors of the first part, and the other directors who were trustees of the second part, and the several other persons whose names and seals were or should be subscribed and affixed thereto of the third part; whereby it was provided, that the business of the company should at all times be under the control of nineteen directors being shareholders, and that they should have the entire management of the business of the company, and ma-[309]-nagement and ordering of the capital and effects of the company, and the appointment and removal of every officer or servant of the company; and such person or persons as they should authorize should have the power to sign, draw, endorse, or accept all bills of exchange, promissory notes, and other negotiable securities; and the appointment of four or more persons to be trustees for the company, by whom all such contracts might be made as the directors might think fit, and all instruments might be made, on behalf of the company; and it was provided, that the directors might execute any power of attorney enabling any person to act on behalf of the company in any business or matter which should be stated in such power of attorney.

That at a board of directors, holden on the 19th of November 1836, the directors authorized Mr. George Pollard, manager of the bank, exclusively to endorse all such bills of exchange, promissory notes, and other negotiable securities, and to draw such checks, in the name or on account of the company or the trustees thereof, as might be necessary in the usual course of business.

In consequence of a letter received by Mr. Pollard, on the 22d of April 1837, from Mr. Harper, the cashier of the Commercial Bank of the Midland District, Upper Canada, to know upon what terms the London Joint Stock Bank would undertake their agency in London, and after the letter of the 27th April 1837, before stated, had been written by the bank of England, at a board holden on the 6th of May 1837 it was resolved, that a communication should be made to the Commercial Bank, Upper Canada, stating their readiness to accept [310] their account, on condition that their drafts to the extent of £40,000 on the manager of the London Joint Stock Bank be accepted by him in his individual capacity.

On the same day Pollard wrote a letter to Mr. Harper, stating that by the charter of the bank of England no joint stock bank could accept bills of exchange in London, or within sixty-five miles of it, at a less date than six months at least; but proposing, that, instead of their drawing bills requiring an acceptance, they should either issue promissory notes payable at the London Joint Stock Bank, or should draw upon him in the following form:—"To George Pollard, esquire, manager of the London Joint Stock Bank, London:" and that the due payment of his acceptances should be guaranteed by the London Joint Stock Bank.

On the 22d day of July 1837 George Pollard received from Harper a letter, dated Kingston, 21st June 1837, stating that the board of the Canada bank had taken into consideration both the modes proposed, so as not to come within the power of the act in favour of the Bank of England, and preferred that of drawing on Pollard as

manager at sixty days sight, being the dates at which bills were commonly negotiated, and which the public would prefer; and desiring that a guarantee of the bank might be sent to protect the drafts of the president of the Canada bank. This letter was submitted to a board of directors of the London Joint Stock Bank, holden on the 26th day of July 1837, when it was resolved, that in conformity with the request of the Kingston Commercial Bank, of the Midland District, Upper Canada, a letter should be written to the president and directors of such bank, enclosing [311] two of the printed forms of agreement, signed by the trustees of this bank, with the following additional words:—"And that the said London Joint Stock Bank will provide on your behalf the necessary funds to pay at maturity all such bills as may be drawn by the said bank upon and accepted by Mr. George Pollard, manager of the said London Joint Stock Bank, such bills being accepted by him in his individual capacity, with a request that the president and directors will return one of the said agreements, signed by them."

On the 29th day of July 1837 the directors of the London Joint Stock Bank, in pursuance of such resolution, caused their secretary to write to the president and directors of the Commercial Bank a letter approving of the mode of drawing, and enclosing agreements, one signed by the trustees of the London Joint Stock Bank, whereby they engaged that the capital stock and funds of the company should be liable for any balance that might become due to the Kingston Commercial Bank on their accounts with it, and that the London Joint Stock Bank would provide the necessary funds to pay at maturity all such bills as might be drawn by the Kingston bank upon and accepted by Mr. George Pollard, manager of the said London Joint Stock Bank; the other to be signed by the president of the Kingston bank, whereby the Kingston bank contracted to pay to the trustees of the London Joint Stock Bank on demand such sums of money as might at any time be due from them to the London Joint Stock Bank.

The president of the Commercial Bank drew the bill of exchange dated the 25th July 1837, which was accepted by Pollard in the way mentioned in the bill; [312] and it was afterwards agreed between Pollard and Harper that the bills should be addressed "to George Pollard, esquire, at the London Joint Stock Bank, London," omitting the word "manager."

The appellants denied that they had authorized George Pollard to accept any bill of exchange drawn upon the London Joint Stock Bank, and George Pollard denied that he had accepted the same on their behalf, but that the same was accepted on behalf of himself and for the benefit of the Commercial Bank in Canada; and they denied that the assets of the Joint Stock Bank were liable for the payment thereof, but they admitted that the London Joint Stock Bank, in conformity with the arrangement entered into between them and the Kingston Commercial Bank, out of money belonging to the said Commercial Bank in the possession of the London Joint Stock Bank, or out of their own money, from time to time paid all the bills of exchange of the said Commercial Bank drawn upon and accepted by Pollard in the form following; that is to say, addressed sometimes "To George Pollard, esquire, manager of the London Joint Stock Bank, London," and at other times "To George Pollard, esquire, manager, London Joint Stock Bank, London;" and accepted at first, "Accepted (date) at the London Joint Stock Bank,—George Pollard," and subsequently, "Accepted (date), payable at the London Joint Stock Bank,—George Pollard;" and Pollard denied that the bills of exchange were entered in the books of the London Joint Stock Bank, but were entered in his own private book; but when paid, the amount of the payments was entered in the books of the London Joint Stock Bank.

On the coming in of the answers notice was given to [313] the appellants that a motion would be made before the Master of the Rolls to restrain the appellants, the directors of the London Joint Stock Bank, and their officers, from accepting or causing to be accepted bills of exchange or promissory notes payable at less than six months from the acceptance thereof.

On the 5th day of May 1838 the motion came on to be heard before the Master of the Rolls, and on the 16th day of June an order was made, restraining the society or partnership called the London Joint Stock Bank, and every partner therein, and the appellant George Pollard, and every clerk, servant, or agent of the same partner-

ship, from accepting or causing to be accepted in the name of the said partnership, or in the name of the said George Pollard or any other name, on behalf of the said partnership, in the course of their banking transactions, any bill or bills of exchange payable on demand or at any time less than six months from the acceptance thereof.

From the order of the 16th day of June 1838 the appellants appealed, and the appeal came on to be argued, the judges being present.

Mr. Kindersley for the Appellants.—The words upon which the question turns are the same in all the acts:—"That it shall not be lawful for any body politic other than the Bank of England, or other persons united in covenants or partnership exceeding the number of six persons in England, to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof," limited by the [314] 7th George the 4th, c. 46. to the distance of sixty-five miles from London. The object of this clause in the acts was not to prevent an individual but a number of persons issuing paper upon which they might be sued. The acts must be construed strictly, as being in restraint of trade. The word "owing" comes between "borrowing" and "taking up;" there must be an owing in the nature of a borrowing and taking up. If Pollard was alone liable upon the bill of exchange, how can it be said that it was the bill of the London Joint Stock Bank; they were liable upon their guarantee, but not upon their bill. *Thomas v. Bishop* (2 Strange, 955), *Leadbitter v. Farrer* (5 Maule and Selwyn, 345), *Emly v. Lye* (15 East, 7), *Jackson v. Hudson* (2 Campbell, 447).

George Pollard was not authorized by the London Joint Stock Bank to accept bills on their behalf; it was his individual acceptance, and the acceptance of no other person.

Sir Frederick Pollock and Mr. Pemberton for the Respondents.—This case has been disposed of by Anderson and the bank of England. The Joint Stock Bank are the acceptors of this bill, and if an action were brought evidence might be adduced to show that it was an acceptance by the bank, by the means of their agent. The bank absolutely engages to pay the bills out of their own funds; it does not guarantee the payment, only in case of the death or bankruptcy of Pollard; and Pollard has no connexion with the Kingston bank except what arises from his being manager of the London Joint Stock Bank. From such a state of facts [315] it would follow that this was a mode adopted by them of accepting bills through their agent George Pollard, and that was the name in which they chose to accept bills and carry on business. If, supposing the bank had drawn their bills in the name of John Stiles, and it could be shown that they were paid at and by the bank, can any body doubt that a jury would find that the bank would be liable? If an agent makes a contract in his own name for his principal, it is competent for a jury to find that the name was used on behalf of the principal, and make the principal liable upon the contract.

The Joint Stock Bank owes the money due upon the bill; it is equally a debt, though the day of payment is postponed. This bill has been accepted by Pollard with a view fraudulently to evade the law; and, with the exception of Scotch marriages, all acts done to evade a law are fraudulent. An attempt to evade the stamp laws by passing over to another country would be void. Though an action could not be maintained against the Joint Stock Bank upon their bill, yet they may be shown to have violated the privileges of the bank; *Collis v. Emmet* (1 H. Blackstone, 313), *Minet v. Gibson* (3 Term Reports, 481), *Farlee v. Herring* (3 Bing. 625), *Wilson v. Barthrop* (2 Meeson and Welsby, 863), *Thomas v. Bishop* (2 Strange, 955), *Leadbitter v. Farrow* (5 Maule and Selwyn, 345).

It is said, will a court of equity interfere to prevent a violation of the stamp acts? No, any more than it will interfere to prevent smuggling, because it is not founded upon contract. This contract is founded upon valuable consideration—advances by the bank.

[316] Sir William Follett in reply.—This judgment cannot be supported by the law of England. The *Bank of England v. Anderson* (2 Keen, 328), decided, upon an inland bill, that it was a borrowing, owing, and taking up at interest of an inland bill. The judges confined themselves to the particular point decided by them, but declined to give an opinion whether more than six persons not in trade can accept a bill. This is the case of a foreign bill; the consequences of this judgment would be that more than six persons accepting a bill of exchange would violate the acts of



parliament; *Harvey v. Kay* (9 B. and C. 363), *Bramah v. Roberts* (9 Bingham, N. C. 963).

The East India Company has been in the habit of accepting bills of exchange at a less period than six months. The words of the act are, a borrowing, owing, and taking up money on their bills; there is no prohibition of their accepting bills of exchange. In every act bill of exchange is described as bill of exchange, and in no other terms.

The guarantee is not the guarantee of the company, but of six individuals, who cannot bind the company. The company is not liable to be sued upon it, but only the six individuals. The Joint Stock Bank is not liable to sue or be sued by their agent. Assuming that the Joint Stock Bank were liable upon the bill, it is not liable beyond its guarantee; but Pollard was liable upon the bill, and it is a settled principle of law that two persons cannot be liable. *Thomas v. Bishop* decides that the company is not liable. If it were necessary to inquire into the liability of parties, the negotiability of [317] bills would be entirely destroyed. There cannot be two acceptors of a bill of exchange; there is a series of authorities to show that if persons are not parties to a bill they cannot be sued upon it; *Emly v. Lye*.

The Joint Stock Bank could only be liable upon the ground that the name of Pollard was their name of business. There cannot be two principal joint debtors; it is an engagement from Pollard to pay the bill, with a guarantee from the Joint Stock Bank. But does this Joint Stock Bank owe money on their bills? It is not a borrowing of money, but an actual advance by them, and it must be a borrowing, owing, and taking up in England.

At the time of the establishment of the bank by the statute of Anne bills of exchange were perfectly well-known. Foreign bills depend upon the general law of merchants; no act of parliament has altered or interfered with foreign bills; they stand upon the general commercial law of the world; they were negotiable and transferable, no others were negotiable. But banks were perfectly well known. The goldsmiths notes are acknowledgment on receipt of money; not transferable, but only payable to bearer. The 5th and 6th of William the Third enabled them to issue bills and notes. In all the acts there is a distinction between bills and bills of exchange.

The words of this statute do not apply to borrowing. When is the borrowing? Is it at the time Pollard accepts the bill? Suppose it is not accepted, is it a borrowing? No actual borrowing, no liability on the bill. Whether there is any owing depends upon circumstances. When do they owe? But then it is said that it is a fraudulent evasion of an act of parliament. Is there any such case [318] as an evasion of an act of parliament? If it comes within the meaning of an act of parliament it is illegal; if otherwise, it is not. If a person goes abroad for the purpose of writing on unstamped paper, he may do it. A gift, with a power of revocation, for the purpose of evading the legacy duty, is good. A fraudulent preference is not an evasion of the act, but it is within its provisions. A person going to a foreign country to evade the laws of marriage may do it. Instead of having the advantage of the banker's acceptance, there is only the acceptance of Pollard. The public is not deceived; the object of the acts was to prevent a number of persons pledging their credit. There is no difference between a court of equity and a court of law in the construction of an act of parliament; if it is a violation of the law, it is a violation of the rules of equity; but not otherwise. The Master of the Rolls says that these bills must be considered their bills. How is it their bill? A foreign bill drawn by the Canada company. It is not issued on the credit of the Joint Stock Bank; no credit, but a foreign bank, and accepted by an individual. It is no part of the circulating medium of the country. It differs from the *Bank of England v. Anderson* in three particulars:—first, it is a foreign bill of exchange; second, accepted; third, there are funds in the hands of the bank to answer the demand.

Lord Chancellor (9th July).—If any doubt was entertained with respect to the accuracy of the decision in the case of the *Bank of England v. Anderson* [2 Keen 328], this House would not proceed to adjudicate upon this case, assuming that to be the law; but this House would call upon the [319] learned counsel to argue the case upon that ground, in order that it might come to a conclusion whether that was an accurate decision or not, having the advantage of the assistance of the learned

judges. But after examining that case, I certainly cannot bring myself to entertain any doubt with respect to the accuracy of the law there laid down, and I cannot conceive that the appellants have lost anything by its being assumed, for the purpose of the argument, that that case was properly decided.

Then, if we are to take that to be the law, the question is, how far the circumstances of this case create any distinction, so as to make the rule of law inapplicable to this case which was applied to the circumstances in the case of the *bank of England v. Anderson*? And in proposing the questions for the judges, your Lordships object will be so to put them as to draw from the learned judges an opinion, how far the difference of the circumstances in the two cases would affect the decision in point of law.

There are three circumstances relied upon as distinguishing this case from the case to which I have referred: the first is, that the bill of exchange that was accepted in that case was an inland bill of exchange, and in the present case it is a foreign bill of exchange. The next circumstance, and the most important one, no doubt, is the mode in which the acceptance was made, not being made by the company nor in the name of the company, but by George Pollard, under the circumstances that appear upon the face of these proceedings. And another circumstance is, that in the case of the *bank of England v. Anderson* it was a fact stated, that at the time the company accepted the bill they had [320] funds in their hands equal to the amount for which the bill was accepted; whereas in this case the contract is not confined to the circumstance of the company in London having funds in hand, but it is part of the contract that they should accept bills, looking to the company in Canada remitting the money, though not in hand at the time, but in time to meet the acceptance when due. With regard to the first point I do not perceive how there can be any distinction between the two cases, arising from the circumstance of the bill being a foreign bill in the one case and an inland bill in the other. The object of the acts of parliament is to protect the bank of England; and what they had to guard against, and which they have endeavoured to guard against, is the credit attached to a paper circulation within certain limits, arising from the credit of more than six persons being associated together within those limits; and therefore the circumstance of a transaction within the prescribed limits, having its origin beyond the limits of this country, does not appear to me to affect this question.

The first question is, "The London Joint Stock Bank, under circumstances which would have made it illegal in them as a company, and a violation of the rights and privileges of the bank of England, to have accepted and issued the bills herein-after mentioned, if drawn upon them, enter into an agreement with a bank in Canada to procure bills, drawn by such bank upon George Pollard, the manager of the London Joint Stock Bank, to be accepted by the said George Pollard, and to provide funds for the due payment of such bills, the money transaction arising therefrom being, in the accounts between the two banks, to be [321] treated in all respects as transactions between the said two banks. Is the acceptance of such bills by the said George Pollard in execution of this agreement lawful, regard being had to the acts in force respecting the bank of England?" That raises the question, how far the mode of acceptance excludes the transaction from the operation of those acts, or includes it within it.

The next question will be, "Would the acceptance of such bills be lawful, assuming that the London Joint Stock Bank, at the time of such acceptances, had funds in their hands on account of the bank in Canada, equal to the amount of the bills so accepted?"

The third question is to meet the case of their not having such funds; "Would the acceptance of such bills be lawful, assuming that the London Joint Stock Bank had not at the time of such acceptances any funds in hand belonging to the bank in Canada, but that such bills were accepted upon the credit of a contract by such bank to remit sufficient funds to the London Joint Stock Bank, to meet such acceptances before the time at which the bills would become payable?"

There is another mode in which this question might be tried, namely, Whether the transactions that took place would or would not have entitled the bank of England to have brought an action against the London Joint Stock Bank, for a violation of the privileges which the acts of parliament are supposed to confer upon them?

Another question, also, which might be raised, and upon which we should have the opinion of the learned judges, is, whether what has taken place is such [322] a violation of the acts of parliament as would subject the parties to a prosecution by way of indictment? To meet those points I propose to submit to the learned judges a fourth question in these words: "Could the bank of England maintain any action against the London Joint Stock Bank founded upon such transactions, or would any of the parties therein be liable to be personally proceeded against by way of indictment under either of the states of circumstances above supposed?" That last question, which applies to the action and prosecution, merely states the same proposition in two ways; it would be better to confine the last question to the liability of the parties to an action.

Lord Chief Justice Tindal (20th July).—My Lords, the facts stated by your Lordships as the ground-work of the questions proposed to Her Majesty's judges are these:—

The London Joint Stock Bank, under circumstances which would have made it illegal in them as a company, and a violation of the rights and privileges of the bank of England, to have accepted and issued the bills hereinafter mentioned, if drawn upon them, enter into an agreement with a bank in Canada to procure bills, drawn by such bank upon George Pollard, the manager of the London Joint Stock Bank, to be accepted by the said George Pollard, and to provide funds for the due payment of such bills, the money transactions arising therefrom, being in the accounts between the two banks, to be treated in all respects as transactions between the said two banks; and the first question proposed by your [323] Lordships on this state of facts is, whether the acceptance of such bills by the said George Pollard in execution of this agreement is lawful, regard being had to the acts in force respecting the bank of England? In answer to that question I beg to state to your Lordships that it is the unanimous opinion of those judges who heard this case discussed at the bar of your Lordships House (Tindal, C. J.; Littledale, J.; Parke, B.; Bosanquet, J.; Patteson, J.; Gurney, B.; Williams, J.; Coleridge, J.; Coltman, J.; Maule, J.; Rolfe, B.), that, assuming, according to the terms of that question, that the acceptance of such bills by the London Joint Stock Bank, if drawn directly on that company, would have been illegal and a violation of the rights and privileges of the bank of England, it appears to us to be a necessary consequence that the procurement by the London bank that bills drawn upon George Pollard, their manager, shall be accepted by the said George Pollard, under the agreement above stated for the providing of funds for the due payment of such bills, must equally be a violation of the rights and privileges of the bank of England, upon the principle that whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance.

The exclusive privileges conferred on the bank of England by parliament are founded on a contract between that body and the public. For the original grant, and also for the renewal and confirmation of such privileges, the bank of England has from time to time paid very large sums of money to the public, and no member of that public can justify either doing or procuring to be done any act which, for the protection of [324] such rights and privileges, has been forbidden by law. Now it is impossible not to see that the substantial parties to the transaction stated by your Lordships are the Canada bank and the London Joint Stock Bank, and that the manager used to cover the real transaction. It is the London bank, not the manager, who is to pay the bill, and the Canada bank engages to remit funds for that purpose before the bill becomes due. By means of this transaction the London bank takes upon itself the duty of an acceptor, that is, to pay the bill, not in default of the nominal acceptor, but in the first instance, in consideration of an arrangement that funds shall be remitted by the Canada bank (the drawers) for that purpose to them, the London bank. The plain object and intent of the various statutes which have been passed for the protection of the bank of England is, that the funds of a joint stock banking company shall not be pledged for the payment of a bill issued within a limited distance from London, and having less than six months to run. Such a pledge given by the acceptance of a bill by such a company has already been decided, by the case

of the *bank of England v. Anderson*, to be a violation of the rights and privileges of the bank of England. But if the bill be accepted by a servant or nominee of the banking company, and they contract with the drawer that they, the company, will pay it, their funds are bound for the payment; the bill is circulated upon their credit, not upon that of their servant or nominee, for it is impossible to suppose for a moment that bills accepted in such form and under such circumstances can be circulated in London upon the individual credit of the [325] nominal acceptor, or upon any other credit than that of the banking company, by whose procurement and direction and for whose benefit the acceptance is really given.

The consequence of such a transaction is, that a competition is necessarily created between a paper currency circulating upon the credit of the banking company and the paper issued by the bank of England, which is the very mischief intended to be prevented, for it is obvious that if the transaction is legal with respect to a bill at less than six months, it is equally so with respect to a bill at six days, or even at a shorter period. It is contended, on the part of the London Joint Stock Bank, that they are authorized to take any course with impunity which does not fall directly within the precise terms and letter of the prohibitory clauses, contained in the several acts which secure the privileges of the bank of England. It is to be recollected, however, that the clauses protecting those privileges are not merely prohibitory laws. The privilege granted to the bank of England by parliament is a positive right, conferred upon that body for a valuable consideration, which the law will no more permit to be infringed by third persons without responsibility than it will a monopoly, granted by letters patent under the statute of James the First. If, therefore, the acceptance of a bill by the London bank would be an infringement of such privilege, it cannot be less an infringement, if attended with the same injurious consequences to the bank of England, to procure another person to accept the bill for the benefit of the London bank, though such acceptance be made in the name of their appointed nominee, whom they are bound to indemnify.

[326] The second question proposed by your Lordships upon the above statement of facts is this, Whether the acceptance of such bills would be lawful, assuming that the London Joint Stock Bank at the time of such acceptances had funds in their hands on account of the bank in Canada equal to the amount of the bills so accepted?

And if the answer given to the first question be correct, the acceptance by a person procured for that purpose by the London Joint Stock Bank must be considered in the same light as if the acceptance had been made by the banking company in its own name; and if that be so, the answer to the second question will be found in the opinion given by the Court of Common Pleas to the Master of the Rolls, upon a case stated to that Court, and confirmed by that noble and learned judge, in the case of the *bank of England v. Anderson* [2 Keen 328]. The opinion of the Court of Common Pleas upon this point was thus expressed:—"The relation of debtor and creditor, created by the acceptance of the bill, appears to be considered by the legislature as equivalent to the actual borrowing of the money, owed on the one hand and credited on the other." And the Master of the Rolls, when reviewing the opinion of the Court of Common Pleas, says, "From the time of borrowing means from the time of owing the money on the bills or notes referred to, or, in the case now under consideration, from the time of the acceptance." This case of the *bank of England v. Anderson* was very fully argued, and was much considered both in the court of law and in the court of equity. From the latter court an appeal might have been made to your Lordships House; such an appeal, indeed, is said to [327] have been at first made, but afterwards abandoned, and the decision of the courts of law and equity was thereby acquiesced in. The authority of this case was not disputed in the argument at your Lordships bar upon the present occasion, and we see no reason to doubt the propriety of the opinions therein expressed.

The third question proposed is this: Would the acceptance of such bills be lawful, assuming that the London Joint Stock Bank had not at the time of such acceptances any funds in hand belonging to the bank in Canada, but that such bills were accepted on the credit of a contract by such bank to remit sufficient funds to the London Joint Stock Bank to meet such acceptances before the time at which the bills would become payable? And, notwithstanding the difference in the state of facts adverted

to in this question, it appears to us, that the answer we must give to it is the same as that which we have already given to the second question.

If a bill be accepted upon the undertaking of the drawer to supply funds for the payment of it, a mutual contract of lending on the one hand and borrowing on the other is thereby created; and, although the drawer may not fulfil his engagement by actually remitting the amount agreed upon before the acceptance, or even before the day on which the bill becomes due, the transaction is not the less a transaction of lending and borrowing to the amount of the money represented by the bill; which transaction takes effect as "a borrowing upon the bill" as soon as the bill is accepted. If, therefore, the bill be drawn, under such an engagement as above mentioned, at less than six months from the date, it must necessarily be considered as a bill payable [328] at less than six months from the borrowing of the money.

It is manifest that the introduction into the acts of the word "borrowing" instead of "date," to express the time of the currency of the bill, was only resorted to for the purpose of preventing the issue of bills appearing to be drawn at longer periods than six months from the date, but in fact issued at periods when the bill would fall due within a shorter time than six months from the issuing of them; and it is to be observed that bills or notes payable on demand are prohibited absolutely, without reference to any transaction of borrowing, upon which they may have been issued. The word "borrowing" is only employed with respect to bills and notes payable at a future time, in order to designate the period from which the six months are to be reckoned. A "borrowing" is assumed to exist as soon as the banking company begins to owe the money specified in the bill or note, that is, as soon as the acceptance or the note is put in circulation; and the expression "borrowing" is not used as descriptive of the consideration upon which the debt contracted by the bill or note is founded, but to denote the time from which the six months are to begin to run.

The last question proposed to us is this: Could the bank of England maintain any action against the London Joint Stock Bank, founded upon such transactions under either of the states of circumstances above supposed? And, in answer to this question, we are of opinion that an action might be maintained in either case.

It has already been observed, in answer to your Lordships first question, that the exclusive privilege [329] secured to the bank of England by parliament is in the nature of a right, granted to them by contract for valuable consideration. In the possession of such right they are entitled to be protected, and any infringement of such right is a private injury to that body, for which they are enabled to seek redress by action at law. Whether the right so granted be directly assailed by an act of the London bank in its own name, or through the medium and intervention of another person acting at their request, and by their procurement and for their benefit,—if they do or cause to be done in effect (though under cover of doing something different) that which is forbidden to be done by the acts passed for the purpose of securing to the bank of England the rights which they have contracted for, such banking company is, in our opinion, liable to be sued in an action on the case for an infringement of those rights.

In actions for the infringement of patent rights, it is of constant recurrence that the gravamen is laid, not as a direct infringement, but as something amounting to a colourable evasion of the right secured to the party; and we think that the acts of the London Joint Stock Bank, described in the foregoing questions put by your Lordships, do amount to an infringement of the rights and privileges of the bank of England.

Lord Chancellor.—The magnitude of the interests which are involved in the appeal, upon which the Lord Chief Justice has given your Lordships the benefit of the unanimous opinion of the learned judges, is such that I cannot regret that we have had the opinion of the learned judges; although it did not appear to me, on the argument, that any difficulty likely to arise [330] would have made it necessary to have taken the opinion of the learned judges, assuming that the law, as laid down in *The Bank of England v. Anderson* [2 Keen, 328], is good law, as to which no reasonable doubt can be entertained, and as to which I am very glad to find that the Lord Chief Justice has taken the opportunity of stating the opinion of the learned judges. There really can be no doubt as to the proper decision of the present question, because, if these rights

do belong to the bank, established as they are, and as they are asserted in the case of *The Bank of England v. Anderson*, it is quite impossible that those rights should be permitted to be destroyed by the arrangement which was resorted to in the present case. That appears to be the ground upon which the learned judges have come to the opinion of which they have now given your Lordships the benefit. It is an opinion I entertained from the commencement of the argument, and under those circumstances I move your Lordships, that the order of the Court below be affirmed, with costs.

Lord Brougham.—I entirely agree in opinion on this case with my noble and learned friend; indeed, I must say, as he has stated, that I never have entertained any doubt at all upon this case; and more especially when it is placed upon the footing on which it is here put, that of adopting the case of *The Bank of England v. Anderson*, and applying the principle laid down in that case to the facts of this case; and the facts in this case do not appear to me, any more than to my noble and learned friend or the learned judges, to be different. We must in future consider that *The Bank of England v. Anderson*, though originally a decision of only one [331] court, has now received the sanction of all the learned judges, of whose assistance your Lordships have had the benefit in this case; and the affirmance of the judgment in this case is in fact an affirmance of the judgment in *The Bank of England v. Anderson*, for the case stands on precisely the same principle.

Petition and appeal dismissed, and the order therein complained of affirmed, with costs.

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[332] FROM THE COURT OF CHANCERY, IRELAND.

ROBERT SIMPSON,—*Appellant*; JAMES O'SULLIVAN, HONORA O'SULLIVAN,  
and JOHN KEANE,—*Respondents* [20th July 1840].

[*Mews'* Dig. i. 103, 356; x. 1268, 1574; xiv. 1374. S.C. 7 Cl. and F. 550; and see 3 Dr. and War. 446; Dr. 89. See *Hinds v. Hinds*, 1850, 2 Ir. Ch. R. 230; *Makings v. Makings*, 1860, 1 De G. F. and F. 355; *Balfour v. Cooper*, 1883, 23 Ch.D. 472, as to interest. On point as to priority of powers, cited with approval in *In re Creagh*, 1890, 25 L.R. Ir. 140.]

By marriage settlement leasehold property is conveyed to trustees, to the use of James O'Sullivan for life, and after his death, to pay £100 a year, by way of jointure, to his wife for her life; and subject thereto, to the use of the heirs male of their bodies; with liberty for J. O'Sullivan to raise by deed, mortgage, or other writing, £1000, to be applied to any purpose he should please; but not to be raised by sale of the property. J. O'Sullivan mortgages his interest in the leasehold property and the £1000 for securing a debt, and becomes bankrupt. The bankrupt's interest therein being sold upon the death of the bankrupt, the purchaser files a bill against the quasi tenant in tail, the widow of the bankrupt, and the surviving trustee of the settlement, in whom the legal estate is vested, for the purpose of raising the sum of £1000 by sale of the leasehold property. Held, that an inquiry, directed upon the hearing of the cause, as to what was the annual value of the property and the value of the life interest of the bankrupt therein at the time of the sale, was an immaterial inquiry, and had no reference to what was to be adjudicated between the parties to the cause.

*Semble*, that the £1000 is a prior charge to the jointure of £100 per annum.

[333] James O'Sullivan the elder was possessed of all that part of the lands called the island or bog of Monamucky, otherwise Labonamucky, with its appurtenances, for a term of 999 years, by virtue of a certain indenture of lease of the 29th April 1795; and having built several houses on part thereof, on the 10th of May 1805 demised unto Jonathan Smith and Joshua Smith, both of the city of Limerick, a certain part of the said lands and tenements; viz., all that piece or plot of building ground

in and connected with New Clare Street, set out and described in a map annexed to the said lease, being part of the said bog of Monamucky, otherwise Labonamucky, for a term of 889 years, reserving thereout a yearly profit rent of £317 8s. sterling, to be paid half-yearly.

By indenture dated the 25th January 1808 between the said James O'Sullivan of the first part, James O'Sullivan the younger, second son of the said James O'Sullivan the elder, of the second part, the said respondent John Keane, and William Ferguson, of the third part, and the said respondent Honora O'Sullivan, then Honora Keane, of the fourth part, being the settlement executed previously to and in contemplation of a marriage, which was afterwards had and solemnized between James O'Sullivan, junior, with Honora Keane, James O'Sullivan the elder conveyed unto the said John Keane and William Ferguson, their executors, administrators, and assigns, all that piece or plot of building ground so demised to the said Jonathan and Joshua Smith by the said James O'Sullivan, and also one of the houses in Clare Street in the said city of Limerick, built by the said James, viz., the house next Mrs. Gavin's, and then lately occupied by Mrs. Dwyer, [334] discharged from all rents, taxes, and charges whatsoever, save window and hearth tax for the said house, to hold the said several premises to James O'Sullivan the younger for life, and from and after his decease, upon trust, to pay £100 sterling per annum to Honora, his said intended wife, and her assigns, for life, for her jointure, and subject thereto, to the use of the heirs male of the body of the said Honora by the said James her intended husband lawfully to be begotten, and for want of issue lawfully to be begotten between the said Honora and the said James, to the use and behoof of the said James O'Sullivan the younger, as his absolute profit; and it was by the said indenture of settlement covenanted by and between the said several parties thereto, that James O'Sullivan the younger should be at liberty to raise, by deed, mortgage, or by any other writing, a sum of £1000, to be applied to any purpose James O'Sullivan the younger should please, but that the same was not to be raised by way of the sale of the said lands, tenements, and hereditaments aforesaid.

That the said Jonathan Smith and Joshua Smith having suffered a considerable arrear of rent, reserved by the said lease of the 10th of May 1805, to accrue due, an ejectment for nonpayment of rent was, some time in the year 1809, brought against them by James O'Sullivan the younger and the trustees named in the said marriage settlement, who obtained judgment in the said ejectment suit, and the possession of the premises demised by the said lease was recovered under a writ of habere, which issued thereon.

By indenture of mortgage, dated the 24th day of January 1811, made between the said James O'Sullivan the younger, of the one part, and Quintin Hamilton, of [335] the other part, James O'Sullivan the younger assigned the estate comprised in the settlement, and appointed the sum of £1000, which he was thereby empowered to raise, to Quintin Hamilton, for securing the sum of £1500 lent to him by the house of Hamilton, Crowden, and Co., together with interest and costs, as therein mentioned, subject to a proviso that when the debt of £1500, with interest and costs, should be discharged, that then the said deed of mortgage should become void.

On or about the 1st of February 1817 a commission of bankruptcy was awarded and issued against James O'Sullivan the younger, who was thereunder duly found and declared a bankrupt; and Henry O'Sullivan of the city of Limerick, merchant, having been duly elected sole assignee of the estate and effects of the bankrupt, such estate and effects were accordingly duly conveyed and assigned to and vested in Henry O'Sullivan, as sole assignee under the commission.

On the 27th April 1818, under an order of the Court of Chancery, the bankrupt's estate in the premises comprised in the settlement, and his interest in the sum of £1000, were sold by auction to the appellant for £850; and by indenture of assignment of the 7th of October 1818, in consideration of £850 paid by the appellant to Quinton Hamilton, in part discharge of £967 19s. 10d. then due on his mortgage, were conveyed by Henry O'Sullivan and Quintin Hamilton to the appellant, his executors, administrators, and assigns, discharged, as to the £1000, from all equity of redemption. The equitable interest in the premises only passed under this conveyance, the legal estate therein being in the respondent John Keane, who was the surviving trustee under [336] the settlement. In the month of August 1836 James O'Sullivan

the younger died, leaving the respondent James O'Sullivan, his eldest son by his marriage with Honora O'Sullivan, him surviving.

Under these circumstances, in the month of February 1837, the appellant filed his bill against the respondents, for the purpose, amongst other things, of its being declared that he was entitled to the said charge of £1000, and that the same, with interest, might be declared to affect the whole of the premises comprised in the settlement and mortgage, and that a sale thereof might be made for the payment of what might be found due to the appellant in respect of the said sum of £1000 and interest.

The respondent James O'Sullivan put in his answer to the bill, insisting that the appellant ought not to have been considered as a purchaser, the purchase money not exceeding four years and a half purchase of the premises; and the respondent Honora O'Sullivan submitted by her answer, that her jointure ought to be freed and discharged from all claims in respect of the charge of £1000.

On the 1st June 1833 the cause came on to be heard before the Lord High Chancellor of Ireland, when his Lordship ordered and decreed that it should be referred to the master, to inquire and report what was the annual value of the lands, tenements, and hereditaments comprised in and conveyed to the appellant by the deed of assignment, dated the 7th day of October 1818, at the time of the sale thereof to the appellant; and what was the value at such time of the life interest of James O'Sullivan, the bankrupt, therein at the time of such sale, having regard to the situation thereof at that time [337] with respect to the deeds of the 25th day of January 1808 and 24th January 1811; and his Lordship reserved further directions until the return of the master's report.

From this decree the present appeal is brought.

Mr. Pemberton and Mr. Reynolds for the Appellant.—These inquiries cannot affect the defendants in this case, or lead to any result. No further directions can be taken upon them, even if it should appear that an inadequate price had been obtained for the property; but such a case is not made by the record, nor is there any party before the Court interested in that question.

Mr. Knight Bruce and Mr. Wakefield for the Respondents.—The small sum which had been obtained for the property is a sufficient ground for inquiry. The difficulty is, that the right of the assignee is not represented. The question is, whether, upon such an extraordinary purchase, the Court ought to have proceeded without the assignee being made a party? What is the meaning of the power? The tenant for life of the jointure is not liable to be affected by the charge. What is to become of the widow, when a party has a right to enter and hold the profits? A jointure means immediate provision.

Lord Chancellor (20th July).—It is unnecessary to call upon the counsel for the appellant to reply. I think, as the matter now stands, there is an end of this inquiry. It is [338] clear that the defendant in this case can have nothing to do with any question as to the price paid, as between the vendor and the person who has purchased this property.

The tenant for life of the property in question had the power of raising £1000; he did so, and became bankrupt; and the party now plaintiff claims, under an assignment of 1818, the benefit of that mortgage of £1000 and the estate for life of the bankrupt, and, therefore, became entitled by his purchase to the estate for life of the bankrupt, and to whatever interest the bankrupt had created under this charge of £1000, which was to be enjoyed by any body who had made it the subject of purchase, and which enjoyment he had a right to enforce against any subsequent charge. And whether he gave too little, or whether he gave too much, for the purchase of that £1000, is a matter of perfect indifference to the party who represents the inheritance. He is not a person who can be prejudiced by his having given an inadequate sum for it, or purchased it under circumstances which would entitle a party really interested in that question to set it aside. The defendant has no right to come before the Court for any such purpose; and why should he? What does it signify whether the assignee of the bankrupt has any thing to say against that transaction? So long as it remains unimpeached, the plaintiff is entitled to all the advantages which can be derived from that purchase. The plaintiff, therefore, having become entitled to whatever belonged to the tenant for life, there cannot be a question that he is entitled to recover it in



respect of this purchase, whatever objections may exist, though not proved, against the original transaction of 1818.

[339] It remains, therefore, to be considered what title the plaintiff acquired to that £1000! The settlement, certainly, is very inartificially framed, but I cannot conceive that there can be a doubt as to his having acquired an interest in that £1000, the power of creating which was, under the settlement, incident to the tenant for life, as appears from passages to be found in different parts of the deed. It is incident to the tenant for life, because it was a power to be executed by the tenant for life. He was tenant for life, with the power of raising by mortgage the sum of £1000 out of the estate; and I do not see any ground on which it can be said that this was intended to be a restricted power, as the provision is, that he shall be at liberty to raise by deed, mortgage, or by any other writing the sum of £1000, to be applied to any purposes he shall please. This power to raise by mortgage £1000, to be applied to any purposes he might please, was in addition to the value of the life estate he acquired. The jointure, of course, would come into operation only after the expiration of the life estate. It is not to be supposed, that if he had raised the £1000 the mortgagee was to be deprived of his interest, if the estate produced enough to raise that interest and also the £1000. It is not consistent with the practice of your Lordships' House to declare so much as to give an opinion beyond the immediate question, but as the question has been somewhat raised, I will say that I do not feel any doubt that the £1000, when raised, was to be a charge upon the estate from the period when it was raised, the interest to be paid by the tenant for life, and the party who lent the money to be the first person who had a charge upon the estate after the expiration of the tenancy for life.

[340] The Court below, under some misapprehension, probably, of the relative situation of these parties and their respective rights, has declined to make a decree for raising that £1000 from the produce of the estate, and has directed an inquiry and report "what was the annual value of the land, tenements, and hereditaments comprised in and conveyed to the appellant by the deed of assignment dated 7th October 1818, at the time of the sale thereof to the appellant, and what was the value at such time of the life interest of the said James O'Sullivan, the bankrupt, therein at the time of such sale, having regard to the situation thereof at that time with respect to the deeds of the 25th day of January 1808 and 24th January 1811." Now, it is obvious that the effect of that is, that it has no reference to what is to be adjudicated between the plaintiff and the defendant, and that whatever might be the result of that inquiry—whatever the Court might do upon it, it left the question between the plaintiff and the defendant where it was. That must have arisen from some misapprehension as to the situation in which those parties stood with regard to each other. It is clear, therefore, that that decree must be reversed. Your Lordships have before you a case in which the Court below, from a misapprehension of the course to be pursued, has directed an inquiry which does not touch any questions existing between the parties. It is the duty of this House, therefore, to remove that impediment by an assertion of the plaintiff's rights, and I apprehend that your Lordships, seeing that no decree has been made by the Court such as ought to have been made,—that the real question has not been entertained by the Court, in consequence of this mistake, the course [341] will be to declare the right, and then to leave the mode in which that right is to be enforced to the judgment of the Court below. I apprehend the order of the House, consistently with the practice, will be, to reverse the decree below, and to declare that the plaintiff is entitled, by virtue of the assignment of the 7th of October 1818, to the benefit of the charge created by the deed of the 24th of January 1811, and with this declaration to remit the cause, leaving to the Court below to make such decree as may be just and consistent with that declaration. That declaration will establish the plaintiff's title to the charge; the mode in which it is to be raised and the detail will be to be considered by the Court below, having the benefit of your Lordships' declaration as to the plaintiff's right, leaving the question open as to other matters. I do not know very well how that question with regard to the jointure could be declared; at the same time I have not much doubt about it; it is raised in the pleadings by the answer. Perhaps it might save the possibility of another appeal to declare the title, but there is a difficulty in doing it.

It is ordered, that the said decretal order, complained of in the said appeal, be

reversed; and it is declared, that the plaintiff in the Court below became entitled, by virtue of the assignment of the 7th of October 1818, to the sum of £1000 under the deed of the 24th of January 1811, in addition to the life interest of the bankrupt, James O'Sullivan.

[342] ON A WRIT OF ERROR FROM THE COURT OF  
EXCHEQUER CHAMBER.

LAWRENCE GWYNNE, Esquire,—*Plaintiff in Error*; JOHN BURNELL and JOSEPH MERCERON, Esquires, (Survivors of JAMES COLLINS, Esquire, deceased),—*Defendants in Error* [4th July 1839 and 28th July 1840].

[S.C. 7 Cl. and F. 572.]

Payment of money received by a collector for a given year to the account of a former year, is a breach of the condition of a bond for due payment. It is not competent for a court of error to award a repleader.

To an action on a bond by the commissioners of taxes against the sureties, the defendant by plea states, that the collector had lands and goods of which the plaintiffs had notice: the replication asserts that he had no lands and goods of which they had notice; and the rejoinder asserts that the collector had lands and goods which might have been sold, but omits to put in issue that the commissioners had notice; whereupon issue is joined. The jury having found that the collector had lands and goods,—Held, that the issue being found for the defendant, he was entitled to a verdict, but not to judgment, inasmuch as the issue, if it were any issue at all, was immaterial or insufficient; and that judgment could not be entered for the plaintiff *non obstante veredicto*, as the rejoinder could not be taken to be an implied confession that the commissioners [343] had no notice; and the plea, if true, would form a good defence to the action. Nor, taking into consideration the other pleas, could judgment be entered up for the plaintiff on the whole record, as the plea, that the collector had lands of which the commissioners had notice, not being put in issue by the pleadings nor disproved, remains a good bar to the action.

The plaintiff in error, together with Richard Bigg, a collector of assessed taxes for the year 1828 ending the 5th April 1829, and Samuel Cordozo entered into a bond, dated the 27th day of August 1828, with the defendants and James Collins, deceased, as commissioners under the land tax and assessed taxes act, in the penal sum of £4048. The condition of the bond (amongst other things) was, that the said Richard Bigg should well and truly pay or cause to be paid unto the receiver general of the said taxes, rates, and duties for the county of Middlesex all such sum and sums of money as should come to his hands as such collector upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts.

To an action brought on the bond by the commissioners against the sureties the defendants pleaded various pleas, but the only material plea was the second plea, which was a plea of general performance, on which the plaintiffs in their replication assigned, for one of their breaches, that Bigg had not paid over to the receiver general the monies received by him as collector of the taxes, in respect of the rates and assessments mentioned in the condition for the year 1828-29, and the fifth plea, and the pleadings arising thereon.

The fifth plea stated, that Bigg had lands and goods [344] within the jurisdiction of the commissioners, of which they had notice, which might have been seized and sold, but which continued unsold. To this plea plaintiffs replied, that Bigg had no lands within the jurisdiction of the commissioners which they could seize and sell, of which they had notice, and that all the goods and chattels of Bigg within their jurisdiction, of which they had notice, were seized and sold, and applied towards the satisfaction of the sums collected, but that the same were insufficient to satisfy Bigg's deficiencies, and that there were not any other goods and chattels of Bigg, of which

they had notice. To this replication the plaintiff in error rejoined, that Bigg had divers lands and goods within the jurisdiction of the commissioners, which might and ought to have been discovered and found, but which were not seized and sold, and tendered an issue thereon, in which defendants in error joined.

The action came on for trial at the Guildhall of the city of London, before Alderson J., when the jury found that Richard Bigg paid over to the receiver general all the sums received by him for the assessments for the year 1828-29, but that he did not pay all those sums to the service of that year, the sum of £2430 having been paid to the service of that year, and £693 to that of former years: that Richard Bigg had lands or houses, after the default, of the value of £121, which could have been seized or sold, and that he had goods, in like manner, of the value of £200, at the time of default, which could have been seized and sold: that the commissioners had not notice of the possession of houses or lands on the part of Richard Bigg, but that they had reasonable grounds for believing that he possessed household goods at the time of the default.

[345] On the 17th January 1833 the Court of Common Pleas decided, that the payment by Bigg of all the sums received by him for assessments for the year 1828-29, not to the service of that year, but to that of former years, was a breach of the condition of the bond; and that the sale of the collector's lands and goods did not form a condition precedent to the right to put the bond in suit against the surety, where the commissioners had no knowledge of their existence before the action was brought, 9 Bingham, 544. The special case being turned into a special verdict was brought before the Court of Exchequer Chamber on a writ of error, when the judgment of the Court of Common Pleas was affirmed; Lord Denman and Williams, J., being of opinion, that the sale of the property of the collector was a condition precedent to an action being brought by the commissioners against the surety; Littledale, J., Bolland, B., and Patteson, J., being of opinion, that a sale of the property of the collector *known* to the commissioners was a condition precedent to bringing such action; Lord Abinger and Parke, B., being of opinion, that a sale was not a condition precedent to bringing such action, even though the commissioners *had notice* of such property; see Bingham's N. C. p. 7.

To reverse this judgment the present plaintiff brought a writ of error in parliament.

On the 27th and 28th of June 1837 this case was argued, the judges being present (the judges present were, Littledale, J.; Parke, B.; Vaughan, J.; Bosanquet, J.; Patteson, J.; Gurney, B.; Williams, J.; Coleridge, J.; Coltman, J.); Sir William Follett for the [346] plaintiff in error and Serjeant Taddy for the defendants in error, when the following questions were put to the judges:—

A bond is given by the defendant as surety for A. B., a collector of assessed taxes for the parish of D., in the county of E., for the year 1828, to the commissioners of the assessed taxes, with a condition to the following effect:—"That if the above-bounden A. B. do and shall well and faithfully demand and collect all and every the sum and sums of money, in the said assessments charged and specified, of the respective persons from whom the same shall or may be payable, and shall and do, in case of nonpayment thereof, duly enforce the powers of the said acts against such persons who may make default therein; and also well and truly pay or cause to be paid unto the receiver general of the said taxes, rates, and duties for the said county of Middlesex all such sum and sums of money as shall come to the hands of the said A. B. as such collector, upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts; and also do and shall, when thereunto required, at such times and places as shall be appointed for that purpose, give and render or cause to be given and rendered, unto the commissioners appointed or to be appointed to put the said acts in execution, or to any two of them, a just and true account in writing of all such sum and sums of money which he the said A. B. shall have collected and received by virtue or on account of the said assessments, and shall forthwith pay and deliver the same [347] unto the said commissioners, or any two of them, or unto such person or persons whom they or any two or more shall appoint, then this obligation to be void, or else to remain in full force and effect."

A. B. paid to the receiver general of the taxes for the said county all the sums of

money collected and received by him, and which came to his hands as collector, for the year 1828, at the proper days and times mentioned in the condition, and appointed by the acts of parliament (the 43 George 3d, c. 99, and 3 George 4th, c. 88) for payment thereof (see special verdict); but he did not pay all those sums to the account or service of that year, but a part only, and the residue he paid to the account or service of former years for which he had been collector, (but the defendant not having been surety for the said A. B. for the former years,) and by such payment the account of former years was paid up and satisfied. Was this conduct of A. B. a breach of the condition of the bond?

2dly, A. B. had, after the time of such breach (supposing that a breach took place), certain lands and goods in the district and within the jurisdiction of the said commission, of which the commissioners had knowledge before an action was brought on the bond. An action being brought, is it a defence to that action that the commissioners did not, before suit, seize and sell the said lands and goods?

3dly, Is it a defence to such action that the commissioners did not seize and sell, supposing that the commissioners had no knowledge, before the commence-[348]-ment of the suit, of the existence of such lands or goods?

4thly, To an action on such a bond by the commissioners a plea was pleaded similar to the fifth plea, to which there was a replication and rejoinder similar to those to that plea; the jury found that there were lands and goods of A. B. within the jurisdiction after the default, and before the commencement of the suit, but that the commissioners had not notice thereof. Ought the issue raised by the rejoinder to be found for the plaintiff or the defendant?

5thly, Supposing the verdict be entered for the defendant on the said issue, and supposing it is not a defence to the action that the lands and goods of A. B. were not sold by the commissioners, unless they had notice (meaning knowledge) of their existence, can the verdict be entered for the plaintiff *non obstante veredicto* on the implied confession in rejoinder, that if there were lands and goods, etc. the commissioners (the plaintiffs) had no notice of their existence?

6thly, Supposing the judgment could not be so entered, and the issue raised by the said rejoinder be immaterial, can a court of error award a repleader, and ought it to do so in this case?

7thly, Supposing a court of error cannot or do not award a repleader, what judgment ought it to pronounce? Ought it to be a judgment for the plaintiff on the whole record, on the ground that the other pleas, or the issues found thereon, contain a sufficient confession, or afford sufficient proof whereon to found a judgment for the plaintiffs, disregarding the immaterial issue?

[349] On the 4th July 1839 the opinions of the judges were delivered as follows:—

Coltman, J.—The first question proposed by your Lordships in this case does not appear to me to be doubtful.

The condition of the bond is (amongst other things) that Richard Bigg shall well and truly pay to the receiver general all such sums of money as shall come to the hands of the said Richard Bigg, as such collector, upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts. Now, the monies in question not having been paid to the service or account of that year in respect of which they had been assessed, but in payment of what must for this purpose be considered as the private debt of the collector, cannot, I think, be considered as having been paid according to the true intent and meaning of the acts; the condition of the bond, therefore, has been broken, and the bond forfeited.

To the second question proposed by your Lordships it ought, I think, to be answered, that the defence suggested would be a valid defence to an action brought against the surety. The question turns upon the proviso in the thirteenth section of 43 Geo. 3. c. 99. construed with reference to the fifty-second section of the same act. In stating the opinion I have formed, I speak with all deference for those who may differ from me on this and other points; but it seems to me, that, unless it is held that the commissioners are bound to exert legal diligence against the principal before suing the surety, the surety will be deprived of the benefit which the act intended to give him. [350] The statute, section fifty-two, gives power to the commissioners to seize and sell the whole real and personal estate of the collector making default.

It is obvious that the exercise of this power may be, and is likely to be, highly advantageous to the surety, and I conceive that the intention of the act was to give the surety the benefit, in the first instance, of this process, instead of compelling him to pay the whole amount of the arrears, and leaving him to seek for his indemnification by an action at law, or other more circuitous course, against his principal, at the risk of being defeated by accident or chicanery. This construction appears to me to be also most agreeable to the natural and obvious meaning of the words made use of in the proviso, and to be the sense in which any ordinary persons about to enter into a contract of suretiship would understand them. By putting a refined and artificial sense on the expressions, and by construing them otherwise than as the party contracting would be likely to understand them, we should be making the act of parliament a snare to those who might bind themselves as sureties upon the faith of its provisions.

To the third question proposed it should, I think, be answered, that it is no defence to the supposed action that the commissioners did not seize and sell lands, of the existence of which they had no knowledge before the commencement of the suit.

By the statute 43 Geo. 3. c. 99 § 13. it is provided, that no bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands, etc. of such collector, in pursuance and by virtue of the directions and powers given to the commissioners by that act. The question [351] thereupon for consideration is, what the lands are which are to be sold under the directions and powers given by the fifty-second section of the act? By that section the commissioners, in their respective jurisdictions, are authorized and empowered to seize and secure the estate, real and personal, of the collector, to him belonging, or which shall descend to his heirs, executors, or administrators, wheresoever the same can be discovered and found. Now, although the word "wheresoever" is an adverb of place, and its proper sense should seem here to be in what place or in what hands soever, yet, taking the whole sentence together, it obviously implies that the collector may have property which cannot be discovered by the commissioners; and when the section goes on to direct the commissioners to sell and dispose of all such estates as shall be for the cause aforesaid seized and secured, it seems to me that by necessary implication the words "such estates" must be construed to mean such estates as the commissioners shall have discovered, for they cannot have seized and secured any other. This construction seems to me to be called for by considerations of public convenience, and to be in no wise unjust towards the surety, who may reasonably be expected, and, from a regard to his own interest, will naturally take care, to inform the commissioners of any property belonging to his principal which can be discovered.

I cannot but look upon the surety as being in a considerable degree identified with the party for whose acts he has undertaken to be responsible, and at least as having much better means of knowledge as to his circumstances than the commissioners; and if the surety is not able to discover the concealed property of his [352] principal, it seems to me unreasonable to expect that the commissioners shall do it.

To the fourth question the answer, I think, ought to be, that the issue raised by the rejoinder must be deemed to have been found for the defendant.

To clear the way for the consideration of this question, it is necessary to state with particularity the substance of the pleadings.

The fifth plea alleges three matters of substance; first, that the collector was possessed of divers lands and goods which were subject and liable to be seized and sold, and might have been seized and sold; secondly, that the plaintiff had notice of this; thirdly, that the lands and goods had not been sold.

The replication alleges that the collector had not any lands of which the plaintiff had notice, and that some of his goods had been seized and sold, and that there were no other goods belonging to him within the jurisdiction, of which the plaintiff had notice.

The rejoinder is, that the collector had divers lands which the commissioners could and might have seized and sold, and that all the goods of the collector which could, and might, and ought to have been discovered were not seized and sold in

manner and form as the plaintiff had alleged, and thereof the defendant put himself upon the country.

Now, in the allegations of this rejoinder, as it seems to me, no assertion of notice to the plaintiff is involved. That it is not asserted in express terms is clear, and I see no reason to think that the defendant intended to involve it; on the contrary, he appears to have omitted it designedly, and to have inserted what seems intended as a substitution for the allegation of notice, when he avers [353] that the goods could, and might, and ought to have been discovered. I cannot, therefore, see any ground for extending the sense of the issue tendered beyond what the words naturally import.

Taking this to be the effect of the rejoinder, it cannot but occur to ask whether any issue at all is joined? For the rejoinder contains nothing contradictory to the allegations in the replication; on the contrary, the two are entirely consistent.

To make an issue, regularly, there should be an affirmative on one side and a negative on the other, meeting each other directly; and various cases are to be found in our law books in which, for a neglect of this rule, it has been held that no issue had been joined, and that the defect was not aided after verdict, but that the verdict was a nullity. See *Sandback v. Turrey*, Croke, Jac. 585; *Oxford v. Rivett*, Croke, Car. 79—93; *Derby v. Hemming*, Croke, Car. 593; *Kirle v. Lees*, 3 Leon, 66.

There are other cases, however, in which the same strictness has not been observed, and in which, after one party has made an allegation and offered to go to the country upon it, and thereupon the similitur has been added and a trial had, it has been considered as an agreement by both parties to go to trial upon that allegation, and an informal mode of joining issue upon it, which, as far as that informality is concerned, is aided, after verdict, by the statute 32 Henry 8. c. 30; see the cases of *Walthall v. Aldrich*, Croke, Jac. 588; *Parker v. Taylor*, Croke, Car. 316; *Burton v. Chapman*, Sid. 241; 2 Keble, 278. 280. It is difficult to reconcile these two classes of cases with each other; but it appears to me reasonable to adhere to the latter class, and to hold that where the parties have, by going to the country [354] on a particular point, agreed to treat it as an issue joined, it should be considered, after verdict, as being such, though informally joined.

The result is, that the parties in this case are to be considered as having joined issue upon the allegations contained in the rejoinder, that rejoinder not importing any allegation of notice.

I consider, therefore, the issue as being in substance only this, whether Richard Bigg had any lands and goods which were not seized and sold.

The rejoinder in terms says, in addition, that the lands might have been seized and sold, and that the goods could, and might, and ought to have been discovered; but it does not appear to me that under these terms any separate issuable matter of fact is asserted, or that by the insertion of them the nature of the issue is changed; for, when it is said that the lands could and might have been seized and sold, it is but the statement of a conclusion resulting necessarily from the existence of the lands; and when it is said that the goods could and might have been discovered, the assertion, standing nakedly, as it does, is but the assertion of a possibility, which necessarily results from the fact of their existence. When it is alleged that the goods ought to have been discovered, that is not an allegation of a fact to be proved, but of a legal obligation supposed to result from the facts alleged.

Considering, therefore, the only fact in issue to be, whether Richard Bigg had lands and goods not sold before the action brought, and it being found by the verdict that he had, I think that the issue raised on the fifth plea is found for the defendant.

But although the informal mode in which the issue is [355] joined is, I think, cured, after verdict, by the statute, there is another defect in the issue which is not aided by the statute, namely, its immateriality; for, notwithstanding some early cases to the contrary, it is now well settled that a verdict, though it may cure an informal, cannot cure an immaterial, issue. The verdict, therefore, though found for the defendant, cannot give him any title to a judgment in his favour.

The case is the same if the true view of the pleadings is, that no issue at all is joined; for in that case the verdict is to be considered as a nullity, as far as the fifth

plea is concerned, and consequently the defendant cannot be entitled to judgment upon it; *Sandback v. Turvey*.

To your Lordships' fifth question it ought, I think, to be answered, that judgment cannot be entered for the plaintiff *non obstante veredicto*, on the implied confession in the rejoinder, that the plaintiff had no notice of the existence of the lands and goods in question.

The ground on which such a judgment may be given is explained by Lord Holt in *Staple v. Heydon*, 2 Lord Raymond, 924, 6 Mod. 10, 2 Salk. 579, 3 Salk. 121, where he is reported in substance to have said, "Where the defendant confesses a trespass, and avoids it by such a matter as can never be made good by any sort of plea, there, in such case, judgment shall be given upon the confession, without regard to the finding upon an immaterial issue; but where the matter of justification is such a matter as, if it were well pleaded, would be a good justification, there, though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff's action; and the books do, [356] all of them, if they be narrowly looked into, turn upon this difference, where the confession is full and the matter of the plea is ill in substance;" and the form of entering up the judgment is quite consistent with the principle here laid down by Lord Holt. See Viner's Abridgement, Judgment, D. plac. 1, Willes, 366.

The present case does not fall within the rule so laid down, for the defendant's plea, if true, in point of fact, is a valid defence to the action; and no instance can be found in which judgment has been given *non obstante veredicto*, except where the plea pleaded by the defendant has been insufficient in point of law.

But it is said, that the Court must consider it as established upon this record, that one of the material allegations of the plea, namely, that of notice to the plaintiff, is not true; for the replication asserts that the collector had not any lands of which the plaintiff had notice, nor any goods, but those sold, of which they had notice; and the rejoinder, by not re-asserting the notice, must be considered as having admitted its non-existence, and consequently the record must be considered as if the plea had not contained any allegation of notice, in which case it would have been insufficient in law.

Now, although it should be conceded that, upon the trial of the issue raised, the want of notice must be considered as admitted, it would not follow that when the issue is found to be immaterial, and the question arises whether there ought to be a repleader or a judgment *non obstante veredicto*, the non-existence of notice is to be considered as an established fact.

The case seems rather to range itself in the class of those in which the defendant may have failed through mispleading, rather than an inherent defect in the [357] substance of his defence. He may have mistaken the law, and selected the wrong fact to put in issue; but if a repleader were awarded, he might, for any thing the Court can see, succeed in establishing the plea originally put forward as the ground of his defence.

But it may be argued, that, in the case supposed in your Lordships question, the finding of the jury has established the non-existence of notice. To this the answer is, that the finding in question is of a matter not within the compass of the issue; and the Court, I conceive, cannot pay any regard to a finding by the jury which has no tendency to decide the issues raised by the pleading, for the jury is sworn only to decide the issues joined, and the parties cannot be supposed to have come prepared to try any thing else. The jury, in the case supposed, have found as a fact that there was no notice to the commissioners; but the question, whether there was such notice or not, not having been put in issue, cannot be considered as ever having been tried, and judicially determined.

These reasons, combined with the absence of all precedent for pronouncing a judgment *non obstante veredicto*, in a case where a valid and sufficient plea was pleaded in the first instance, have led me to the conclusion that such a judgment cannot be given in the present case.

To your Lordships sixth question the answer is, that a court of error cannot award a repleader.

In the case of *Holbeck against Bennett*, 2 Saunders 319, 2 Keb. 769. 689. 825, 2 Lev. 11, it was said by Lord Hale, that, in the King's Bench, on error from the

Common Pleas, it was anciently the custom to award a repleader, for which he cited many records; but he [358] said it was obsolete, and not in use in his time, and had not been done for 100 years.

Subsequently to this case it has been commonly received in the law, and it is to be found in many text writers, that a repleader cannot be awarded by a court of error, and I think rightly so; for it is to be observed, that to deny a repleader where it ought to be awarded, is error; *Staple v. Heydon* [Ld. Raym. 924; 6 Mod. 10; 2 Salk. 579; 3 Salk. 121]. And it seems to follow, that if a court of error can award a repleader, it would be bound to do so in all cases in which the inferior Court ought to have done so. If, then, it were held that courts of error have the power to award a repleader, it would follow that they have done wrong in the course they have been pursuing for so many years; a supposition which cannot be admitted, under a system of laws professing, as the English code does, to rest mainly upon precedent.

To your Lordships seventh question it should be answered, that if judgment cannot be entered for the plaintiff *non obstante veredicto*, and if the Court cannot or do not award a repleader, the judgment given in the Court below ought to be reversed, and that judgment cannot be pronounced for the plaintiffs on the whole record, on the ground suggested.

Your Lordships question renders it necessary to consider the doctrine on which the case of *Goodburne v. Bowman*, 9 Bingham, 532, rests; and it will appear, on consideration, that the present case does not fall within the principle on which that case, as I understand it, proceeded.

The declaration in *Goodburne v. Bowman* was for a libel. The defendant pleaded the general issue, and several special pleas justifying the libel as true. The [359] verdict was for the plaintiff on the general issue and on one of the pleas of justification, and for the defendant on the other pleas.

The plaintiff applied for judgment *non obstante veredicto*. The Court were of opinion that the special pleas contained a confession of the action, and that the answer set up was insufficient by way of avoidance.

But it was observable in that case, that some of the allegations of the declaration were admitted by implication only, and not in express terms; and a doubt might be suggested whether there was a sufficient confession of all the material allegations of the declaration; the Court, therefore, went on to say (as I understand their meaning) that, even if they were not fully confessed by the special pleas, yet, inasmuch as they were put in issue by the plea of the general issue, and had been proved upon the trial, and a verdict had thereupon, they were as effectually established on record as if directly and in terms confessed; and the justification being bad in substance, they held that the plaintiff was entitled to judgment on the whole record.

But the present case is different; no question is made here whether there is a sufficient admission of the material allegations contained in the plaintiff's declaration; but the ground on which the plaintiff is not entitled to judgment is, that the Court cannot see that the avoidance is insufficient, inasmuch as, upon an examination of the fifth plea, and the issue raised upon it, the Court cannot see sufficient ground for assuming the falsity of the allegation of notice contained in the plea. Now, if it had appeared judicially, from any other part of the record, that the plaintiff had had no such notice, the case of *Goodburne v. Bowman* would have furnished a precedent in the plaintiff's favour.

But I see nothing in any other part of the record which can clear up the ambiguity on this point, the finding of the jury respecting notice not being entitled to be considered as a judicial determination on that point, for the reasons adverted to in a former answer.

In this state of the case it seems to me, that the judgment which ought to be pronounced should be, simply, a judgment of reversal, which will leave it open to the parties litigant to bring a new action, if so advised.

Coleridge, J.:—In answer to the first question propounded by your Lordships I beg to state, that, in my opinion, the conduct of A. B. in the case supposed was a breach of the condition of the bond. Upon this question it will not be necessary to state the reasons for my opinion at any great length.

The bond and the condition are framed to secure the due discharge of the duties of the collector in his office. His office is but for a year's duration, and his duty



(amongst other things) is to pay the receiver general, at the times specified, the monies which he shall collect upon the assessments for the year, in discharge of those assessments. To pay them in discharge of the arrears of former assessments is no more such a payment than to pay them on any private account to the receiver general, or to any other person, would be. Whether this were done with or without the participation or collusion of that officer seems to me immaterial.

The condition is broken, if, with the knowledge and [361] by the act of the collector, in whole or in part, the monies collected are not paid in discharge of that assessment under which they were collected.

In the case supposed in your Lordships second question, I am of opinion that it is a defence to the action, that the commissioners did not, before the suit, seize and sell the lands and goods there mentioned, if such action be brought against the surety. This seems to me to flow, as a necessary and direct consequence, from the language of the first proviso in the 13th section of the 43d George the Third, cap. 99, and I can give no effect to that proviso, which was evidently framed to make a distinction between the principal and surety in favour of the latter, unless by so construing it. The bond is taken under the provisions of that section, and it seems to me that the proviso is virtually incorporated in the condition of the bond; and that it limits the liability of the surety to the making good the deficiency remaining after sale of the collector's lands and goods. Many reasons in support of this view of the case occur to the mind, and have already been suggested in the printed judgment already delivered in the case of *Gwynne v. Burnell and another*, now before your Lordships; but it seems to me more satisfactory to rely on the unambiguous language of the proviso itself. According to that, the surety is made liable to be sued, not for every deficiency, but a particular and limited deficiency, i.e., that which shall remain after sale of the lands, tenements, goods, and chattels of the collector. That liability only he must be taken to have contemplated when he sealed the bond. To hold that he may be sued, before sale, for the general deficiency, is to [362] subject him to a different and enlarged liability, and in effect to expunge the proviso from the statute.

3d. I am equally of opinion, that the want of seizure and sale by the commissioners will be an answer to the action, although they had no knowledge, before the commencement of the suit, of the existence of the lands and goods.

This opinion I express with much diffidence, because I have reason to fear that it differs from that entertained by some of my brethren; but I arrive at it upon the same principle which led me to my answer to your Lordships' second question; the principle, namely, of collecting the meaning and intention of the statute from the unambiguous expressions used, rather than from any notions which I may entertain of what is just or expedient.

Having considered, with attention and respect, the reasons that have been stated in support of a contrary opinion, I am bound to say that they have not satisfied my mind. The question arises, simply, on the construction of the proviso before referred to; in terms it is silent as to notice to the commissioners, or knowledge had by them. The words are, "no such bond shall be put in suit against any surety for any deficiency, other than what shall remain unsatisfied after sale of the lands, etc. of such collector, in pursuance and by virtue of the directions and powers given to the commissioners by this act;" and the question is, whether these words are to be understood as if, instead of them, the statute had said, "all lands, etc. of such collector, of the existence whereof, or otherwise, the said commissioners shall have been apprized by the said surety [363] before the commencement of such suit." This is the question, and the test by which I think it ought to be tried is this, whether this addition is a necessary implication from the words already used, in order to give them a sensible meaning and effect. If by this test I can see that the proposed addition is already necessarily contained, although not expressed, in the statute, it is of course not the less cogent, because not expressed; but I cannot concede that we are at liberty, upon any ground whatever, to add a new term to the statute. In saying this I am not unmindful of the dicta to be found in our books, nor of decisions upon old statutes, which seem to warrant a more free dealing with the written law; and whenever acts of parliament shall again be framed with the generality and conciseness with which the legislature spoke some centuries since, it may be fit to consider the soundness of that principle of interpretation which they involve; but it is enough to

say, that it is wholly inapplicable to a modern statute, in which the legislature is careful to express all it intends in so many words, that to go beyond their necessary implication is to make, not to interpret, law. The principle, then, on which I rely will not let in the consideration of particular circumstances in each case, or a regard to a greater or less degree of convenience,—a more or less complete effect to be given to the presumed intent of the legislature; nothing, in short, which is founded on what the legislature might better have done, nor simply even what the legislature intended. The sole legitimate inquiry is, I conceive, what intention is to be found in the words of the act expressed or implied; unless, by words written or words necessarily implied, [364] and, therefore, virtually written, the intention has been declared, we cannot give effect to it.

Now that the words are sensible by themselves, as read without any implied addition,—nay, that the proviso being framed confessedly for the benefit of the surety,—the absence of the proposed addition will more largely effectuate its general intent, can, I think, scarcely be denied. The argument, indeed, takes another direction, that it is necessary to qualify or restrain the proviso, by implying the necessity of knowledge in the commissioners, in order to prevent the words from having their full natural operation, because that would defeat the very object of the section itself. This seems to me avowedly to be an alteration of the statute, and, therefore, I should not feel removed from my position if I were to concede that the effect of my interpretation would be what is alleged; I am not, however, driven to such a concession. If the commissioners do their duty, they will, before the appointment of collectors in any of the three modes pointed out by the 9th, 13th, and 14th sections of the statute, and before the admission of any persons to be sureties, take care to inform themselves of the properties of the collectors, in such a manner as to prevent any practical difficulty arising from the proviso. I observed, in passing, that, though there are three modes of appointment mentioned in the statute, and in one of them the commissioners themselves are the parties to select the collector, yet the same form of condition, and the same proviso, applies to all; a circumstance not without its weight in respect of the argument founded on the difference as to the knowledge of the circumstances of the collector, which, [365] it is said, may be presumed to exist between the commissioners and the sureties.

I do not notice in detail the different suggestions which have been made in favour of the qualified interpretation of the proviso, and which are founded on considerations of inconvenience, or liability to fraud, in the literal one, because my argument, if a sound one, denies the admissibility of any such considerations. But one argument which has been usual demands an answer: it is said, that, the proviso being for the benefit of the surety, justice requires that he should inform the commissioners of those circumstances which bring him within its reach. I own this appears to me to beg the question, or to misrepresent the situation of the parties. If my contract has only been to be answerable for what shall remain after seizure and sale of my principal's property, if you cannot sue me for any thing till you have exhausted that primary fund, what principle of justice requires that I should undertake the responsibility of discovering that fund? Why am I to help you to the performance of this condition, which is to give you a right of action against myself? If, indeed, it can be shown that I collude with my principal, or take any step to conceal or make away with his property, any presumption may properly be made against me. Something analogous to this, though not expressly in point, is the course of decisions with regard to the landlord's re-entry, under the 4th George 2, cap. 28, where no sufficient distress is found on the premises. The burthen of search in every part of the premises, and of proof that no distress was there, is cast on the landlord; but if the tenant is shown to impede such search in [366] any way, the presumption immediately shifts, and is cast upon the tenant.

I cannot but feel, in conclusion, that the argument on the other side is but a disguised attempt to alter a law which is thought to be imperfectly expressed. To do this is always unjust in the particular case, because it works an *ex post facto* alteration of the contract between the parties, and unsound in legal principle. My sense of the practical importance of this doctrine must be my excuse for having troubled your Lordships so long with my answer to the third question.

4th. In answer to your Lordships' fourth question, I beg to state that, in my

opinion, on the facts supposed, the issue raised by the rejoinder ought to be found for the defendant. The allegation and denial of notice in the plea and replication appear to me immaterial; the rejoinder, therefore, rightly passed them over, and tendered the issue on that which was material, on which there has been a sensible finding by the jury.

5th. As a judgment of *non obstante veredicto* is always upon the merits, and assumes, not only that the defence, even if good in form and true in fact, is bad in law, but that it discloses a confession of the plaintiff's case, the hinge upon which the answer to your Lordships' fifth question will turn must be, whether the rejoinder, being by the supposition, but not in my opinion, bad in point of law, though true in fact, also confesses the remaining allegations of the replication which it has not denied? In terms a pleading of this description, which merely selects for denial one of many facts alleged in the previous pleading, admits nothing as to the residue. For the purpose, indeed, of trial before [367] the jury, every thing is admitted but that which is denied; where, however, the fact so denied and found is immaterial, a distinction has always been taken between a pleading of this sort and one which confesses and avoids. In the case of *Plummer v. Lee*, 2 Meeson and Welsby, 495, the Court of Exchequer acted upon this distinction. The same distinction in principle appears to have been recognized as early as in the case of *Potts v. Polehampton*, 1 Lord Raymond, 390, in which Lord Holt took this difference,—that where the defendant's plea confesses the duty demanded by the plaintiff, and does not avoid it sufficiently, if the issue be immaterial and found for the plaintiff, he shall have judgment; but if the defendant's plea goes in discharge of the action, and the issue is taken immaterially, and a verdict for the plaintiff, a replader shall be granted. I therefore beg to answer this question in the negative.

6th. In the case of *Bennett v. Holbeck*, Lord Hale said that it had even then become obsolete for the Court of King's Bench to award a replader on a writ of error, and it has ever since, I believe, been the understood practice that a replader cannot be awarded by a court of error. Your Lordships are not in possession of the record, and I do not see how you can carry into effect that which judgment of replader is intended to produce. This judgment directs that the parties replead, and the cause begins again from the point at which the defect in the pleading appears; it is calculated, therefore, to bring them to a material issue in fact or law; and the House would be called on to perform the functions of an original court, for the trial of the error, without having the record in its possession, or the means of summoning a jury, giving a day to the parties, [368] or using any of that machinery by which, in the Courts below, causes are regularly carried on to judgment.

7th. Your Lordships' seventh question is new; in answering it, I must assume that the opinion which I have ventured to express in answer to your third question is erroneous; and also, that if there had only been the fifth plea pleaded, the Court below should have directed the parties to replead. In that state of things, as I have already stated that I think your Lordships cannot award that judgment, I see no other course, that would have been open for this House, but, simply, to have reversed the judgment for the plaintiff, pronounced below. The question then arises, whether the fact of there being other pleas and other issues on the record, so found that upon them a satisfactory judgment could have been pronounced for the plaintiffs below, if the fifth plea had not been pleaded, will enable this House now to pronounce that judgment, although the fifth plea be there, and the issue arising on it not disposed of satisfactorily? Upon principle, I should have no difficulty in answering this question in the negative; the fifth plea is pleaded to the whole cause of action. In what way a material issue raised upon it may be disposed of, the House cannot at all anticipate judicially; it may be for the defendant below, and if so, all the other issues become wholly immaterial. To pronounce judgment then, as to the whole record, in this state of it, is to exclude one party from a defence on which he relies,—to prejudge one defence by conclusions drawn from the demerits of other defences. This injustice is prevented by the rule, which I had always considered universal and inflexible, that [369] each plea was to be looked at by itself for all purposes, except where, by reference, it incorporates any of the allegations of another.

If, indeed, the House saw that the issue on any one good plea was in favour of the

defendant, the merits of the other pleas might be disregarded ; but that is only because they then become immaterial as to the final issue of the cause.

I have stated that, upon principle, this did not appear to me a difficult question ; but I am aware of the case of *Goodburne v. Bowman*, where, in a considered judgment of the Court of Common Pleas, expressions are to be found at variance with the opinion I have expressed. I feel the full weight of that high authority, but I am bound to express to your Lordships the opinion which I still entertain ; and it is some satisfaction to me to observe, that the principle on which I rely is expressly asserted in the same judgment, and that the departure from it, which I cannot acquiesce in, is not necessary to the decision then made by that Court. Upon the whole, therefore, my answer to this question is, that, on the supposition made, the judgment below ought to be simply reversed.

Williams, J.—1st. As it so happens, singularly enough, it seems, that upon the first question proposed there is no difference of opinion, I shall trouble your Lordships very shortly in answer to it. I think that the payment of part of the money received by the collector for the year 1828 to the account or service of former years was a clear breach of the condition of the bond ; it seems to me that such application of the money differs in no respect from the payment by the collector of any other [370] debt contracted at any other time and in any other manner.

2d. The answer to the second question must depend upon the true construction of the proviso in the thirteenth section of 43 Geo. 3. c. 99 ; that section, after declaring that collectors, if required, shall find good and sufficient security by bond, in the manner prescribed, has the following proviso : “ That no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector, in pursuance and by virtue of the directions and powers given to the respective commissioners by this act.” In considering the true intent and meaning of this proviso, I pass by the opposite inconveniences, which have been pressed in argument, by observing, that they may probably be considered as balancing each other. Our business, however, is with the construction of the statute, and if that be ascertained, consequences are to be neglected, and the proper construction is, to give effect to the intention of the legislature as far as possible ; and if there be provisions seemingly inconsistent, to reconcile them, so as to further that intention. This, I apprehend, is true generally, and will probably not be doubted. If, however, any authorities be requisite, they may be found in Comyn's Digest, Parl. R. 10. Now, that the proviso was introduced expressly for the benefit of the surety, seems to me to admit of no doubt ; I can attribute to it no meaning or effect at all, except that be the object. The language seems to me to be perfectly plain and appropriate ; the object also is quite consistent with the position of the surety, and has relation to the principal, because there is nothing in the bond in [371] question or in that relation to raise an inference that the former should be liable except upon failure of the latter. This proviso also is introduced in a manner equally consistent with this view of the subject ; in the earlier part of the section the liability of the surety is described, and then comes the proviso imposing a restriction upon that liability ; except, therefore, the application of the land and goods, if any, be deemed a condition precedent to calling upon the surety to make good the deficiency, no effect is given to the proviso, and it might as well be expunged altogether ; either the proviso does impose this condition, or, in my opinion, it does nothing. I am desirous to bring before your Lordships, in as compact a form as possible, what occurs to me upon this part of the subject ; it has been pursued more fully and in detail, if that should be thought worthy of reference, on a former occasion. I have before observed that the words of the proviso seem to me plain and unambiguous ; they are, “ no such bond shall be put in suit for any deficiency other than what shall remain unsatisfied after sale of the lands, goods, etc. of the collector ; ” that is, no bond shall be put in suit for the arrears of the collector, but only for the deficiency, if any, after his property has been applied, as in reason and justice it ought to discharge those arrears, as far as it will go.

The distinction seems to me to be obvious, and plainly marked, between the collector and the surety. By the fifty-second section, which contains the directions and powers alluded to, in the proviso the commissioners are authorized and empowered (not required) to make sale of the lands and goods of the collector ; against

him, therefore, the bond may be put in suit before sale, for he [372] is not within the benefit of the proviso; whereas that was framed expressly for the protection of the surety, and he (the latter), in my opinion, cannot be sued before sale made, if practicable.

When I before observed to your Lordships that the language of the proviso seemed to me to be free from doubt, I was not unmindful of the criticism which has been made upon the words "no bond shall be put in suit," as if they were distinguishable, and might have a different meaning, from "no action shall be brought" or "no proceeding shall be had or taken." I, however, am unable to perceive any distinction, and cannot but think that, both in common parlance and in legal acceptance, the terms are identical, and have precisely the same meaning. That they would be so understood in a popular sense, I think, is beyond a doubt, and that they ought to be so understood legally, I also think. I observe that Lord Tenterden, in the case of *Pepper and Others v. Cooper*, 2 B. and A. 431, where the question was upon this same act of parliament, uses two of the phrases in exactly the same sense. His Lordship, whose general precision and accuracy of expression are well known, observes, "I am clearly of opinion that the bond might be put in suit without selling the goods of Pepper, who was a mere surety, for, though it appears on the face of the bond that he was a collector also, still he is not the collector contemplated by the act, whose lands and goods must be sold before proceedings are had upon the bond against the surety." And what is the distinction between "proceedings had upon the bond" and "action brought upon the bond?" Mr. Justice Holroyd says, "I also think that this bond may be put in suit against [373] the surety, although it may happen that another person has been jointly appointed collector, with first selling the lands and goods of that person, for the collector contemplated by the act, whose goods are to be sold previously to the bond being put in suit, is the collector who has made default." Having mentioned this case with a view to the understanding of the expressions upon which I was commenting, I beg leave to observe, that I would by no means press or strain any inference deducible therefrom; I am quite aware that it is no authority bearing upon the present case, nor any thing like it. The decision merely is, that, whereas two collectors had been appointed, and one only had made default, it was not necessary to sell the non-defaulting collector's lands and goods before having recourse to the surety; but it is at the same time undeniable that both the learned judges do expressly allude, to say no more, to the sale of the defaulting collector's lands and goods as a condition precedent to resorting to the surety. This view of the subject seems to be in conformity to what was very early laid down upon it in chap. 8. of *Magna Charta*:—"How sureties shall be charged to the king. We, or our bailiffs, shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor himself be ready to satisfy; therefore neither shall the pledges of the debtor be distrained as long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt; and if they will, they shall have the rents and lands of the debtor until they be satisfied of that which [374] they before paid for him, except that the debtor can show himself to be acquitted against the said sureties."

The third question I must beg leave to answer with some qualification, the reason for which I hope to make apparent, when, in answer to the next question, I shall have to consider the effect of the rejoinder to the replication to the fifth plea, the finding of the jury thereon, and the general result therefrom. If I am to suppose that the commissioners "had no knowledge," after due and reasonable diligence exerted by them to ascertain the fact of the existence of lands and goods of the collector which they might have seized and sold, it seems to me that, under such circumstances, a good defence could not be made by the surety. If, however, the commissioners "had no knowledge," from the same cause that always occasions ignorance, simply not trying to learn I think there may be a good defence from the fact of the possession of the lands and goods by the collector, after his default, and before action brought, even though the commissioners, upon the supposition last made, were ignorant of the existence of either. This is said upon an assumption at present (to be considered more fully presently) that neither from the statute nor from any general rule of law is the surety bound to give any notice, or furnish any knowledge (your Lordships, it seems, understanding the expression to be equivalent,) whatever to

the commissioners of the existence of the lands or goods of the collector. I will endeavour to explain my meaning by reference to the pleadings themselves: suppose the fifth plea to have stood as it does, omitting the allegation of notice; if the replication, by appropriate allegations, had shown reasonable diligence [375] in the commissioners to discover lands and goods of the collector, and that none could be found, it seems to me that such replication would have been an answer to the plea; if, on the other hand, the replication had merely stated that the commissioners had no notice or no knowledge of any lands or goods, it would, in my opinion, contain no answer at all, and would be bad on general demurrer.

4th. The fourth question raises the point upon which so great a difference and variety of opinion unfortunately exist amongst the judges; and in our answer to the question I adopt the supposition contained in it, namely, that issue has been joined upon the rejoinder, and upon that issue that there is a finding of the jury in the words stated in the question, and that finding is in its terms for the defendant below. Whether it be so in substance remains to be considered; and for this purpose it may be necessary to advert to the course and state of the pleadings from the said fifth plea downwards. That plea alleges, that, before the exhibiting of the bill, the collector had lands and goods within the jurisdiction of the commissioners, which might have been seized, etc., of which the plaintiffs had notice. The replication thereto is, that the collector had no lands of which the plaintiffs had notice, and that all the goods of which the plaintiffs had notice were seized and sold, and that after such seizure there were no goods, etc. of which the plaintiffs had notice, liable to be seized, etc. The rejoinder (dropping all mention of notice) states, that, after failure by the collector, he had lands which ought to have been seized and sold, and that all the goods, etc. of the collector at his failure, which could and might have been discovered and found, were not seized and sold, and [376] concludes to the country, and the plaintiffs do the like. And how far the facts contained in that rejoinder and the corresponding finding of the jury amount to a defence, without the fact of the plaintiffs below having notice of such lands and goods, is the question; and that, perhaps, may be tried, as conveniently as in any other manner, by examining whether the fifth plea would have been a good defence to the action, if the allegation of notice had been omitted altogether. The statute is entirely silent upon the subject; the proviso, in especial aid and protection of the surety, contains no allusion to notice being requisite from him; nor is there, in my opinion, any thing in the relation of the surety to his principal requiring any such notice from him. The language of the fifty-second section, "wheresoever the same can be discovered and found," to which reference has been made upon this part of the case, seems to me to have relation merely to the powers of the commissioners in the pursuit of the property of the collector, and to enlarge those powers. I cannot think that it bears upon the question of notice from the surety, or that it is possible to construe the meaning of the expression to be, that such property as the commissioners had not notice of from the surety must be deemed property "that could not be discovered and found;" and, moreover, when, it may be asked, is notice to be given by the surety? It is not pretended that any is due to him, and, accordingly, the first information he will receive of the failure of his principal, and his own liability, will probably be by the service of the writ.

But, further, it seems to be material to ascertain what the rule of law generally is with respect to the necessity of averring notice; and upon this point I take [377] it to be clear that, where a fact lies equally within the knowledge of both parties, the party pleading need not aver notice to the other; and still less is it necessary where the means of knowledge are more especially within the reach of that other. Upon a point, I presume, partly questionable, I should be sorry to weary your Lordships with unnecessary citation, and will, therefore, refer generally to the case of *Cutler v. Southern*, 1 Saund. 117, and note 2. by Serjeant Williams, and to 2 Saund. 62 a., note 4. As this point, however, seems to me to have an important bearing upon the whole subject, I will refer more particularly to one case only, of some notoriety, in which this question arose. I allude to the case of *Rex v. Holland*, 5 Term Reports, 607, which was an information against the defendant, with others, for malversation in office, whilst one of the council at Madras, for not having foreseen and provided against the outbreak of Tippoo Sultan. The seventh count of that information charged, especially, that the defendant had not sent notice of the rupture between the

Sultan and the East India Company to the governor at one place and a general at another. To the information there was a general demurrer, and the objection to the said seventh count was, that there was no averment of notice to the defendant of the said rupture, which he was charged with not notifying to others. The court, observing that the case was one of great importance, took time to consider of their judgment, which Lord Kenyon afterwards delivered. Upon this point he is reported to have said, "The objection" (that is, to the seventh count,) "that notice to the defendant was not sufficiently averred, seemed to be pretty much abandoned by the defendant's counsel, [378] in consequence of what fell from the court. The rules stated by Mr. Wood in his argument seemed to show the true grounds upon which notice is or is not required to be averred;" and, upon reference, it will be found that the rule which received the matured approbation and adoption of the court is thus laid down:—"Notice here means knowledge," (as your Lordships understand it in this case,) "and where the matter is as much in the knowledge of the defendant, or more than in any other person, the law presumes that he had knowledge;" 16 Vin. Abridg. Notice, A. 2, placita 10 and 12. No one is bound by the law to give notice to another of that which that other person may otherwise inform himself of. And again, "Notice is not necessary where the thing lies as much in the cognizance of the one as the other." "Now, here" (continued the late very learned Baron) "all the facts, of which the defendant should have had notice, are of such a nature that it was his duty, as a member of the council, to know them."

It remains, therefore, to consider how the matter stands, as between the surety and the commissioners, in this particular, and in so doing I shall reject all attempts at an inference arising from general probabilities, (such as, the care and foresight of the surety in entering into the engagement, or the contrary,—what inquiries he might or might not make into the substance of his principal,) as utterly precarious and insecure. It seems to me that our duty is to examine what and with whom the means of knowledge are, according to the provisions of the act of parliament itself. Now, so far as the surety is concerned, the statute, as might be expected, is silent; as to the recommendation of caution, or means [379] of information, he is left to himself. With the commissioners, however, the case is otherwise. By the ninth section the commissioners are to appoint assessors, who are to act upon oath, and, moreover, are to be charged and instructed by the commissioners in the requisites for discharging their duty. Further, by the same section, the assessors are to return two or more able and sufficient persons, of the places for which the assessors act, to be collectors. It seems to be clear, therefore, that, in the due performance of their duty, the assessors are bound to inquire into the sufficiency of the persons returned, including, of course, their substance and property; and if the matter had rested here, it might, perhaps, have been not unreasonably considered as a statutory mode, pointed out to the commissioners, of ascertaining, by deputed authority, the means of the persons to be appointed. But the section goes further, and enacts, that the persons so returned by the assessors are to be appointed by the commissioners; and, as persons are presumed to do their duty, (and particularly when acting upon oath,—for the commissioners also are sworn,) it must be taken as against them (the commissioners), that they became acquainted with the property of the persons about to be appointed, and of this collector Bigg among the rest. And this supposition and construction are the more probable and reasonable, because the collector is not required by the thirteenth section to find security at all events, but only if required by the commissioners. This, therefore, seems to imply that the commissioners ought to inquire in each case, or else how can they exercise a discretion as to requiring or dispensing with security in the case of each appoint-[380]ment; and why, then, is notice to be required from the surety of those who, by the very supposition of having done their duty, have acquired knowledge already?

Upon the whole it seems to me, that this case is brought abundantly within both or either of the rules or conditions dispensing with the necessity of averring notice. When, therefore, I find that the rejoinder contains the same allegations which would have been sufficient to make the fifth plea good and a defence to the action, and that on the twelfth issue (in the terms stated in the question) raised upon the rejoinder, the finding is for the defendant below, my opinion is that the issue ought to be found for him. It is true that the jury do also find (in the manner stated) "that the commissioners had not notice." But it is to be observed, first, that this fact is not included in the issue, and next, that, admitting the finding of such a fact to be

within the competence of the jury, it is not, without more, (for the reasons, such as they are, already given at a length, I fear, inconvenient to your Lordships,) available for the plaintiffs below. This circumstance, therefore, does not affect the conclusion at which I have arrived, and which is as above stated.

I have mentioned, at the outset, that my answer to this question proceeds upon the supposition, that there is an issue joined, and that too in the terms of the rejoinder to the replication to the fifth plea. I must, however, take leave to state to your Lordships, that I entertain great doubt (to say no more) whether there be any issue joined at all; because there certainly is not an affirmation and denial of the same fact or facts in that replication and rejoinder, except, indeed, all that is alleged in [381] the replication about notice can be considered as wholly without meaning, which it seems very difficult to say.

5th. To avoid repetition, I have endeavoured to bring together, in answer to the third and last questions, almost all that occurs to me upon the whole subject; and from those answers it is obvious that my opinion is against a part of the suppositions contained in this (the 5th) question. Adopting, however, as I am bound to do, those suppositions, my answer is still in the negative; because, first, I do not think there is any such admission as that alluded to, and next, if there be, that the consequence would follow, that judgment *non obstante veredicto* can be entered for the plaintiff below. It surely cannot be carried to the extent of admitting no notice or knowledge after due means used to obtain it. Differing, as I have the misfortune to do, from my brother Littledale, upon the point of notice, I agree entirely with his observations upon this part of the case in the Court below. He is thus reported: "The plaintiffs below may contend that they are entitled to judgment *non obstante veredicto*, but there seems to be a great difficulty in doing that, for the rejoinder is not one which shows that the defendant below has no defence upon the whole case, which is the ground for entering such a judgment; for the finding of the jury, that Bigg had lands and goods, is not like an allegation which furnishes no defence; but it is part of an allegation which, coupled with something else, would constitute a defence, and that something else is imperfect, and does not form part of the issue which the jury ought to try, and which, if found one way, would show that was a defence, but in the other way not."

[382] If, as is certainly done continually, a *venire de novo* may be awarded by a court of error, it seems difficult to assign any very good reason why it may not award a repleader. My learned brothers, however, have almost all expressed an opinion that it cannot be done. Lord Hale is reported to have said, (after referring to many cases in which a repleader had been awarded,) "that it is obsolete, and not in use at this day." The books of practice assume that it cannot be done, and I cannot find any instance of the revival of the usage since the time of Lord Hale. I am not prepared to say, therefore, that a repleader can be awarded.

7th. The latter part of this (the 7th) question has been, in substance, answered by what I have already said upon the 5th, viz., that the other pleas, or the issues found thereon, do not, in my opinion, contain a sufficient confession, or afford sufficient proof whereon to found a judgment for the plaintiffs upon the whole record. The earlier part involves in it the result of the whole inquiry, which is, in my opinion, that the judgment of the Court below ought to be reversed; but inasmuch as there does not appear to be any appropriate issue whereon to sustain the finding of the jury in favour of the defendant, which otherwise would have entitled him to it, I do not think that judgment can be pronounced for him.

Patteson, J.—1st. In answer to the first question proposed by your Lordships, I am of opinion that the conduct of A.B., as therein described, was a breach of the condition of the bond therein mentioned. The words of the condition of that bond are, that he shall "well and truly pay or cause to be paid, unto the [383] receiver general of the said taxes, rates, and duties for the county of Middlesex, all such sum and sums of money as shall come to his hands as such collector, upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts." The intent and meaning of the said acts (amongst other things) was, that the monies collected in each year should be carried to the account of such year. Now, though A.B. paid to the receiver general all the monies collected by him in the year in question, yet he did not pay the whole



to the account of that year; he did not, therefore, pay the monies according to the true intent and meaning of the acts; he paid them in discharge of a debt which he owed in respect of the collection of former years, in violation of the intent and meaning of the acts; whether with the consent of the receiver general or not, seems to be immaterial; and his conduct in so doing seems to me to be as much a breach of the condition of the bond, as if he had applied the monies to the payment of any other debt which he owed.

2d. To the second question proposed by your Lordships I answer, that in my opinion, it is a defence to an action brought by the commissioners on the bond, that they did not, before suit, sell and seize the lands and goods of A. B., of which they had knowledge.

This is an action against a surety who has entered into a bond under the provisions of an act of parliament, 43 Geo. 3, c. 99. Before entering into that bond, he would naturally look at that act, with a view to discover the nature of his engagement, the liabilities he was to incur, and the means of protection afforded him. He would construe the act, in the plain and obvious sense [384] which its language imports, and surely he would have great reason to complain if a court of law, upon any question of his liability arising, should put a forced and technical construction on that language to his prejudice. He finds that the act, in the 13th section, directs the commissioners, in case of default in the collector, to prosecute, that is, put in suit the bond:—"Provided always, that no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector, in pursuance and by virtue of the directions and powers given to the respective commissioners by this act." Those directions and powers are contained in the 52d section of the act, which authorizes and empowers (not requires) the commissioners, in case of default, to make sale, in a summary manner, of the collector's lands and goods, wheresoever the same can be discovered and found. The commissioners are not obliged to seize and sell the collector's property; they may put the bond in suit against him without doing so, for he is not within the proviso in the 13th section; yet they may first seize and sell the collector's property, if they please, and may afterwards put the bond in suit against him; and if they do so, it is plain that, as the bond comes within the 8th and 9th William 3, cap. 11, sec. 8, they cannot recover more than what remains due, after deducting the produce of the sale. Now, the proviso in the 13th section was obviously intended to put the surety in a better situation than the collector; but if that proviso be not held to constitute a condition precedent, their situation will be precisely the same; and indeed it seems to me to be impossible to give any effect at all to [385] that proviso, except by construing it as any unlearned man would do, viz., as a condition precedent. It has been suggested, that the commissioners might exercise their powers under the 52d section for the benefit of the surety, after enforcing the bond against him, and so give effect to the proviso; but, on examining again the words of the 52d section, it is clear to my mind that the commissioners could not be justified under it in making sale of the collector's property, to satisfy a debt which had been already discharged by the surety, and, as far as the commissioners are concerned, been altogether satisfied. That section empowers the commissioners to seize the collector's property if he shall neglect to pay any sums received by him; but they are not at once to sell; they are to give ten days' public notice of a meeting, and in case the monies be not paid and satisfied, they are required to sell, to satisfy, and pay into the hands of the receiver general the sums due, with costs and charges, and render the overplus to the owner of the property. It seems to me, that if the surety has paid the monies due before any seizure of the collector's property, it cannot be said that the collector has neglected to pay, so as to authorize the commissioners to seize, within the meaning of that section; nor, again, if they could seize, and hold a meeting with ten days' public notice, could it be said that the monies due were not paid and satisfied, so as to require or empower them to sell; nor, if they did sell, could they pay the monies into the hands of the receiver general, he having already obtained the amount from the surety. The powers given by that section are, as I apprehend, primarily intended for the benefit of the commissioners in the [386] exercise of their public duty; and if they have no longer any public duty to perform, which they have not as soon as the monies

due are paid, they have no right to exercise those powers. The benefit to the surety from the exercise of those powers seems to be a secondary object, and arises only from the proviso contained in the 13th section. Without that proviso, the surety could have no right at any time to call for the exercise of those powers for his benefit; and as the terms of that proviso plainly relate only to a sale antecedent to his being sued, I am at a loss to see by what construction of the act he could call for the exercise of those powers after he had paid the money.

3d. The third question proposed by your Lordships is one upon which I have entertained much doubt; but I have come to the conclusion that it is a defence to the action, that the commissioners did not seize and sell the lands or goods of the collector, if any such existed, although they had no knowledge of their existence. No words can be found in the act of parliament which require any such knowledge, and there are provisions as to the appointment of collectors, by which the commissioners have the means of knowing whether they are able and sufficient persons. Those provisions, indeed, apply only to the time when the collectors are appointed, and do not give the commissioners any greater facilities for discovering the property of the collectors than any other person may have. It may be said, that if the mere existence of any such property, though unknown, and perhaps concealed, and therefore not seized and sold, were to defeat the remedy against the surety, it is obvious that much opportunity [387] for collusion and fraud would be afforded, and all attempts to enforce the payment of monies by the surety might be from time to time defeated, without any real neglect on the part of the commissioners; and that it is very reasonable to require, that the party, for whose benefit a seizure and sale are to take place, should give such information to the commissioners as will enable them to make such seizure; or, at all events, should not set up the want of such seizure as a defence, unless he can establish that the commissioners have been guilty of a culpable neglect in not making it. Every act of parliament, as well as any other document, must have a reasonable construction; and I apprehend that such construction ought to prevail as will effectuate the obvious intention of the legislature, provided no violence be done to the language which it has adopted. It may also be said, that the very object and intention of the legislature, in requiring that the collector should find sureties, would be frustrated, if it be held, that the existence of any unknown or concealed property of the collector would defeat the remedy against the surety; at the same time that the benefit intended for the surety might be amply preserved, by requiring the seizure and sale of the known property of the collector, as a condition precedent to his being sued for the monies due. These reasons led me upon a former occasion to entertain the opinion, that knowledge of the existence of such lands and goods was necessarily implied in the proviso which limits the power of suing the surety. I am, however, free to confess, that, after further consideration of the act of parliament, I am not so sure of the intention of the legislature as to feel that I was warranted in entertaining that opinion; and, as it may [388] be possible, that, by putting such a construction upon the act, I am altering or adding to it, instead of simply interpreting it, I feel myself bound to abide by the literal meaning of the words, and to hold that the existence of any unsold lands or goods, which the commissioners might have seized and sold, is a bar to the action, whether they knew of them or not.

4th. In answer to the fourth question proposed by your Lordships, I am of opinion that the issue raised by the rejoinder, (if any issue at all be raised,) ought, upon the finding of the jury, to be found for the defendant. In considering the effect of similar pleadings upon a former occasion, I came to the conclusion that the issue, though informal, involved the question of notice. I am free to confess that, upon further consideration, I think that I then came to a wrong conclusion. The replication here asserts that A. B. had no lands of which the plaintiffs had notice; that all the goods of A. B., of which the plaintiffs had notice, were seized and sold, and that A. B. had no other goods of which the plaintiffs had notice. The rejoinder asserts that A. B. had lands which might have been sold, and that all the goods of A. B. which might have been discovered and sold were not seized and sold, and concludes to the country; and the plaintiffs join the similiter. Here is no assertion on the one side and denial on the other. Put the replication and the rejoinder together, and the separate assertions of the plaintiffs and defendant will be found

jointly to amount to this: that A. B. had lands and goods which might have been sold, but of which the plaintiffs had no notice. The plaintiffs have not denied the existence of lands and other goods besides those sold simpliciter, but only the existence of [389] lands and other goods of which they had notice. The defendant has not asserted the existence of lands and other goods simpliciter, but only the existence of lands and other goods which might have been sold. The replication relates to lands and goods of A. B. in a particular condition or predicament; the rejoinder relates to lands and goods of A. B. in another and different condition or predicament. The more I consider the matter, the more satisfied I feel that no issue at all is raised by the rejoinder; neither an informal issue, which would be cured by verdict, nor an immaterial one, which cannot now be cured at all. But if any issue be raised, I think that it must be an issue in the words used by the defendant in his rejoinder, which concludes to the country, and which do not involve the question of notice; and if it be an issue in those words, it ought to be found for the defendant.

5th. The fifth question proposed by your Lordships is one which, according to my view of it, is of very general importance, as a question of pleading. It involves the consideration whether any pleading which concludes to the country, except, perhaps, the anomalous statutable plea of bankruptcy, contains any confession of the matters stated in the previous pleading, and not denied.

Here I take the issue, if any there be, as I have already stated, to be in the words of the rejoinder, and to be an immaterial issue, for want of involving the question of notice; assuming always, as this question does, that notice is material. Still, as the rejoinder concludes to the contrary, and tenders an issue, it must be taken to traverse the whole or some part of the replication. Clearly it does not traverse the whole; it [390] omits that part of the replication which relates to notice, and traverses the seizure and sale of all the lands and goods which might have been seized and sold. Now, the distinction between pleadings by way of traverse and pleadings by way of confession and avoidance is familiar to all lawyers, and it is the latter only upon which questions of this sort have hitherto arisen. One of the last cases on this subject is that of *Gale v. Capern*, 1 Adol. and El. 102, in which the defendant pleaded, by way of set off, a promissory note alleged to have been made by the plaintiff to a third person, and by him indorsed to the defendant; the plaintiff replied, that the said supposed debt on the said promissory note did not arise within six years. It was contended that this replication was no confession of the making and indorsing of the note; that it was not only a denial of its having been made and indorsed within six years, but that it was ever made and indorsed. The court, however, held otherwise, and considered the replication as a pleading by way of confession and avoidance, and not by way of traverse. The replication there concluded, as it of necessity must, to the court, because it introduced new matter. The case of *Lambert v. Taylor*, 4 B. and C. 138, does not go to the same length. Indeed, in the judgment there delivered by Lord Tenterden, it is admitted for the purposes of the cause, that the plea of the statute of limitations, as generally pleaded, does not admit a cause of action. Unquestionably, for the purposes of trial, a traverse of one out of several allegations in the preceding pleading admits the facts stated in the other allegations, and renders it unnecessary to adduce any evidence in support of them, and so far it is an implied confession of them; yet it seems to [391] be only a confession *sub modo*, and not an absolute confession, as all pleadings are which go on to attempt an avoidance. I have always understood that judgment *non obstante veredicto* is only to be allowed in a very clear case, where the defence set up is good in form and true in fact, but insufficient in law; and so the pleadings show that the defendant has no defence upon the merits, in any way of putting his case. Now, that is by no means the result where the plaintiff has averred some fact amongst others, showing together a sufficient cause of action; but which fact, being separately traversed, turns out to be immaterial. In such a case, how can it be said, that if the traverse had been properly taken, the jury might not still have found for the defendant? For I am not now considering the effect of any special finding of the jury, but, simply, of their finding in the words of the issue; besides which, there is in this case a good plea, containing an averment of notice, and that plea is not disproved in any material part of it; for the issue which arises out of it is, by the hypothesis, immaterial. Unless, therefore, the averment of notice be treated as struck out of that plea, and so the plea be rendered bad, the plaintiffs cannot have judgment

*non obstante veredicto*. Now, the dropping of that averment in the rejoinder can, at the most, amount only to a departure in pleading, which makes the rejoinder bad; it cannot have the effect of striking out that averment from the plea itself. In a very late case, in the Court of Exchequer, the distinction between judgment *non obstante veredicto* and a repleader was much considered; I allude to the case of *Plummer v. Lee*. That was an action of debt on an award by an administratrix; the declaration stated, that, on the 12th of July 1833, a [392] settlement of part of the accounts took place between the deceased and the defendant; it then stated a submission to arbitration by the plaintiff as administratrix and the defendant and an award. The first plea traversed the making of an award; the second traversed that the settlement took place on the day mentioned in the declaration; the third traversed the making of such settlement at any time. On the trial the plaintiff had a verdict on the first and third issues, the defendant on the second. After argument, and time taken to consider, the Court held that the second plea did not contain any confession, and that judgment *non obstante veredicto* could not be given, but awarded a repleader. This case appears to me to be a direct authority to show, that the traverse of an immaterial allegation is not to be taken as an absolute confession of the other allegations in any pleading. Upon the whole, therefore, I am of opinion that the verdict cannot be entered for the plaintiffs on an implied confession in the rejoinder.

6th. In answer to the sixth question, I am of opinion, that a repleader ought to have been awarded, in the case stated, by the Court below. I think, however, that a court of error cannot so award. Lord Chief Justice Hale expressly states, that in his time the practice of awarding a repleader in the Court of King's Bench, upon error from the Common Pleas, was obsolete, and not in use; *Bennet v. Holbeck*; and so it has been laid down in our books of practice ever since. Upon a writ of error the parties are not before the Court upon a day given, and though a practice may have prevailed in ancient times for the Court of King's Bench to award a repleader, into which Court the record itself was always removed from other courts on a [393] writ of error, and became a record of the King's Bench, yet it does not appear that any such practice ever prevailed in the House of Lords; nor, I believe, is any instance known in which parties have pleaded before the House of Lords, or in which that House has ever issued jury process, or given any judgment except on a writ of error brought. Yet such must be the consequence, if a repleader be awarded in the case supposed by the sixth question, unless, indeed, the transcript of the record be remitted to the Court in which the original pleadings took place, with a direction that the parties should replead before that Court; a course of proceeding for which no precedent can, I believe, be found.

7th. The seventh question proposed by your Lordships raises a considerable difficulty. In answer to it I am of opinion, that if there be but one issue on the record, and that be an immaterial issue, of such a nature that the Court below ought to have awarded a repleader, but has in fact given judgment for one of the parties, a court of error ought, simply, to reverse such judgment, without giving any judgment in favour of the other party; but where there are several pleas, some or one of which, or the issues found thereon, contain a sufficient confession, or afford sufficient proof wherein to found a judgment for the plaintiff,—whether the immaterial issue on the other plea shall thereby be aided, is a matter of some nicety.

No authority can, of course, be found upon this subject in the older reports before the statute of Anne, which introduced several pleas; nor have I been able to find any direct authority since that time, except the case of *Goodburne v. Bowman*. In that case the rule, that, in considering the merits or demerits of one plea, re-[394] course cannot be had to another, unless expressly referred to, is fully recognized; but it is said that an application to enter judgment *non obstante veredicto* is founded upon the whole record, and, therefore, that all the pleas may be taken into consideration. With the greatest respect for that Court, I must confess that I have great doubts as to the soundness of the view there taken as to the effect of several pleas. It seems to me to be essential to the due course of pleading, and to avoid confusion, that no blending of pleas should in any instance be permitted; and that, whatever may be the number of pleas placed upon the record, each plea should be treated, both in itself and in its consequences, as if it were the only plea on the record. It is to be

observed, that in that case the court intimated an opinion that the pleas respectively did contain a sufficient confession, and, therefore, what was said as to the finding on the plea of not guilty, being received in aid of any supposed defect in the other pleas, was in some measure extrajudicial, though entitled to the highest respect. The present case, however, is distinguishable from *Goodburne v. Bowman*, inasmuch as in that case the pleas themselves, out of which the immaterial issues arose, were held bad; but here the plea, out of which the immaterial issue arose, is good; and, therefore, even if the finding on that issue be disregarded, still the plaintiffs cannot have judgment, for the good plea, not disproved, still remains a good bar to the action. The case of *Goodburne v. Bowman* came under consideration in the Court of Exchequer in the case of *Plummer v. Lee*, which I have already cited; but a distinction was taken between them, inasmuch as in the latter case no one of the pleas concluded to the court, and no one [395] contained an absolute confession. In that case the immaterial traverse was of an allegation in the declaration; and, even supposing that the Court might, under those circumstances, have entirely disregarded the finding on that issue, not so as to have aided that immaterial issue by the allegations in the other pleas, but treating it as if no such traverse had been taken, yet in the present case that course cannot be pursued, because to disregard the immaterial issue would be also to disregard the plea out of which it arises; which is an affirmative plea, and contains a good answer to the action, and has not been disproved in any material part of it. My answer, therefore, is, that upon these pleadings judgment cannot be given for the plaintiff, disregarding the immaterial issue, neither can judgment be given for the defendant; but the judgment of the Court below must, simply, be reversed.

Bosanquet, J.—I am of opinion that the conduct of Richard Bigg amounted to a breach of the condition of the bond. Payment of the money collected in 1828 to the account of former years was as much a breach of duty as payment to one of the creditors.

2d. To the second question, I am of opinion that the neglect of the commissioners to seize and sell lands and goods of A. B., of which they had knowledge, before action brought, is a defence to such action. It appears to me that the proviso, which is introduced for the benefit of the surety, makes such seizure and sale a condition precedent to putting the bond in suit, where the commissioners have knowledge of the existence of such lands and goods.

3d. But I think, that, unless the commissioners had [396] such knowledge before the commencement of the action, the existence of such lands and goods within their jurisdiction is not a defence, for the proviso must receive a reasonable construction. The thirteenth section directs the commissioners to prosecute if the collector makes default; which direction is followed by a proviso, that the bond shall not be put in suit for any deficiency other than such as shall remain after sale of the lands and goods of the defaulter. But if the commissioners have no knowledge of such lands or goods, they are bound by the directions of the statute to prosecute. The legislature cannot, with reason, be supposed to intend that the commissioners should delay the commencement of a prosecution against the sureties until they have ascertained, by all possible means, whether the collector is possessed of any lands or goods, and that if, after such suit commenced, any, the smallest portion, of the property shall be discovered, a suit honestly commenced, pursuant to the direction of the statute, shall be defeated by a plea of the existence of such minute amount of property within their jurisdiction. Possibly, if the existence of property were communicated to the commissioners after action brought, proceedings against the surety might be stayed until the property had been sold, and the deficiency ascertained; but whatever might be the effect of an application for a stay of proceedings, the question now is, whether the proviso creates an unqualified condition precedent, or only a condition qualified by knowledge of the commissioners? And I cannot think that it was intended, by the introduction of this proviso, to render it impossible for the commissioners with any safety to comply with the directions to prosecute.

[397] It has been suggested, as an objection to this construction, that, if by notice to the commissioners is meant notice to all the commissioners, it would be next to impossible to comply with such condition, considering the great number of persons who fill that character; and that, if notice to less than all be sufficient, a notice to one who may have no knowledge of the bond would be sufficient to defeat an action

duly commenced by the obligees. But, in putting what I think a necessary limitation on the words of the statute, to prevent unreasonable consequences, I do not feel myself driven to adopt a condition, the compliance with which would be either impracticable or nugatory.

The commissioners are directed to appoint a clerk, and any two commissioners may act. There can be no doubt that notice to such clerk would be sufficient; so likewise would notice to the obligees in the bond, or to either of them, or to either of the commissioners, who direct the bond to be put in suit in the name of the obligees. But I neither think that notice to all the commissioners is necessary, nor that notice to a person who, though a commissioner, does not act as such, would be sufficient to constitute a defence. The notice of which the necessity is brought into question upon the pleadings in this case is a notice to the plaintiffs, the obligees in the bond, previous to their commencement of the action; and I think that, whatever would amount to notice to them, would be sufficient, but nothing less.

4th. I think that the issue joined on the fifth plea ought to be entered for the defendant. The issue tendered by him, viz., that there were lands and goods of A. B. within the jurisdiction, has been found in his favour. [398] The notice, which is negatived by the finding, forms no part of the issue, nor the allegation that the commissioners could and ought to have sold, which is an inference of law.

5th. Supposing the verdict to be entered for the defendant on the said issue, and supposing it is not a defence to the action, that the lands and goods of A. B. were not sold by the commissioners, unless they had notice (meaning knowledge) of their existence, still I think that the judgment cannot be entered for the plaintiffs *non obstante veredicto*, on an implied confession in the rejoinder that if there were lands and goods the commissioners had no notice of their existence. The plea alleges that A. B. was possessed of divers lands and goods of which the plaintiff had notice, and which might have been seized and sold, but which lands and goods then continued unsold. The replication avers that there were no lands which the commissioners could seize and sell, of which they had notice, and that they had seized all the goods and chattels of which they had notice. It admits the existence of some property, and that the commissioners had notice of it, but insists upon the sale of all the property of which they had notice; notice of unsold property is therefore alleged on the one side, and the want of notice of any property unsold is asserted on the other. The frame of the replication clearly invited the defendant to take issue in the terms of it, by which the sale of all the property known to the commissioners would have been denied; but the defendant, by his rejoinder, avoided such denial, departed from the good defence set up by his plea, and chose to reply on the mere existence of property within the jurisdiction as a new ground of defence. Nevertheless, [399] I cannot say that, by omitting to re-assert in his rejoinder the notice which he had alleged in his plea, he has so confessed the want of notice as to authorize a judgment against him, founded on such a confession.

In *Staple v. Haydon* Lord Chief Justice Holt took this difference, that "where the defendant confesses a trespass, and avoids it by such matter as can never be made good by any sort of plea, then in such case judgment shall be given upon the confession, without regard to such immaterial issue; but where the matter of the justification is such a matter as, if it were well pleaded, would be a good justification, there, though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff's action;" and he added, "the books do, all of them, if they be narrowly looked into, turn upon this difference,—where the confession is full, and the matter of the plea is ill in substance."

6th. That, though judgment *non obstante veredicto* cannot be given upon an implied confession in this plea of want of notice, it does by no means follow that a replender ought in such a case as this to be awarded. If the fault of the rejoinder had consisted in a defective mode of pleading the matter relied on, some ground might be afforded for a replender, supposing that proceeding could be awarded after a writ of error; but here the ground taken for the defence in the rejoinder is defective upon the merits, and cannot by any pleading be made available. The defendant having studiously declined to insist upon the notice mentioned in the plea, and chosen to put his defence upon the mere existence of lands and goods within the jurisdiction,

could not [400] make that defence good by any sort of amendment; his omission to include in his traverse the want of notice was no mistake or mere error in form.

A judgment *non obstante veredicto* is always upon the merits; a replender upon the form or manner of pleading; see Tidd's Practice, 953. But whether a replender ought or ought not to have been awarded in the Court below, it cannot, I apprehend, be awarded by a court of error, according to the express authority of Lord Hale in *Bennett v. Holbeck*; and even if it could, I am humbly of opinion that it ought not to be awarded in this case, since it could have no other effect but that of enabling the defendant to set up some new defence.

7th. The seventh question involves two inquiries: first, whether the pleas and issues contain a sufficient confession, whereon to found a judgment for the plaintiffs, disregarding the immaterial issue; secondly, whether they afford sufficient proof to found such judgment.

I have already stated my opinion, in answer to the fifth question, that the rejoinder to the fifth plea does not contain a sufficient confession of want of notice of unsold property to authorize such a judgment; but, although want of notice be not confessed, still it appears to me that by the same rejoinder the plaintiffs' cause of action is confessed, and, consequently, that if it be not sufficiently answered, (which, for the reasons already given, I think it is not,) the plaintiffs are entitled to judgment. The ground of the plaintiffs' right to recover is the breach, by Richard Bigg, of the condition of the bond, in neglecting to pay to the receiver general the sums collected for taxes.

The declaration, as usual, states a money bond payable to the plaintiffs on request, in the terms of the [401] instrument. Oyer of the condition having been had, but no breach then assigned, the defendant in his second plea pleads performance generally, and then in his fifth plea sets up, as a defence to any right to recover on the bond, that Richard Bigg faithfully collected all sums of money from every person charged, and in every case long before the commencement of the action, and from thence continually hitherto was possessed of lands and goods within the jurisdiction of the commissioners, of which the plaintiffs had notice, and which might have been sold, but which were unsold. This appears to me to have been a good plea. The plaintiffs having before, in their replication to the plea of performance, assigned nonpayment to the receiver general as a breach of the condition, proceed, in their replication to the fifth plea, to allege in answer thereto, that after Richard Bigg had collected, and after he had neglected to pay the receiver general, as in their replication to the second plea mentioned, Richard Bigg had no lands which they could sell, of which they had notice, and that all the goods of which they had notice were sold. The effect of this allegation is, that the condition of the bond had been broken, and that there were no lands or goods of Richard Bigg which the commissioners were bound to sell after the breach of the bond had been committed. The defendant, in his rejoinder to this replication, does not merely omit to traverse the neglect to pay to the receiver general, but expressly says, that, after the supposed collection and receipt of the money, and after the supposed omission and neglect to pay the receiver general, Richard Bigg had lands and goods within the jurisdiction which might have been sold, thereby admit-[402]-ting, as it appears to me, that the condition of the bond had been broken by such nonpayment to the receiver general, and relying on matter insufficient to excuse the defendant from responsibility upon the bond. He that excuses a nonperformance supposes it, *Meredith v. Allen*, 1 Salk. 138.

If this view of the pleadings be correct, then the plaintiffs will be entitled to judgment *non obstante veredicto*, upon the confession in the rejoinder of the plaintiffs' cause of action, notwithstanding the verdict on the immaterial issue.

Had the matter of this rejoinder been originally pleaded as a defence instead of the fifth plea, (supposing such defence to be insufficient in substance,) the plaintiffs, I apprehend, would be entitled to judgment, notwithstanding the verdict formed upon the issue tendered by it, on the ground of the confession of the cause of action which it contains; and if that it be so, I can see no reason why the existence upon the record of the plea which has been departed from, and abandoned as the ground of defence, should deprive the plaintiffs of the benefit of this confession.

If the rejoinder to the replication to the fifth plea does not contain such a confession of the plaintiffs' cause of action as to entitle them to judgment thereon, I am not aware of any pleading on this record by which it is more distinctly confessed.

Supposing, therefore, that no such confession appears, the remaining question will be, whether, notwithstanding the verdict found for the defendant upon the immaterial issue tendered by this rejoinder, the plaintiffs are not entitled to judgment upon the rest of the record?

[403] Before the statute of Anne, which allowed defendants to plead several pleas, a motion for judgment *non obstante veredicto* could only be founded on the confession contained in the same plea on which the issue arose. "If," as Lord Chief Justice Tindal says, in the case of *Goodburne v. Bowman*, "such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied." If, however, several defences are pleaded, one of which is wholly insufficient, and incapable, by amendment, of being made a good defence, and upon which, therefore, no repleader ought to be awarded, and other defences are well pleaded, upon which material issues are joined, and found for the plaintiffs, I do not see any good reason why the plaintiffs should not be allowed to take advantage of the finding upon those issues, in the same manner as they might do if the ineffectual defence had not appeared upon the record. In *Goodburne v. Bowman* the Lord Chief Justice further says, "In the present case there is a verdict on the general issue, which finds that the defendant did publish the libels. And although, in considering the merit or demerit of any individual plea, recourse cannot be had to another, unless expressly referred to by such plea, yet, as the application to enter a verdict is founded on the whole record, by which it appears that the defendants have committed the grievance complained of, and have not shown any sufficient justification, it may be considered, in that point of view, that there is enough to warrant the application." In that case, indeed, the Court thought that the special pleas did sufficiently confess the action, but did not sufficiently avoid it. But if the principle above men-[404]-tioned be correct, the plaintiff may avail himself of a finding by the jury as well as of a confession of the defendant, notwithstanding a verdict for the defendant upon an immaterial issue, provided a repleader ought not to be awarded; and it must be observed, that the Lord Chief Justice took care to show that the defendant was not in that case entitled to a repleader.

Then, how does this case stand upon the record? The plaintiffs declare upon a bond; oyer is demanded of the condition; the execution of the bond is denied by the defendant, and found for the plaintiffs. Then performance of the condition is pleaded, to which the plaintiffs reply, a breach by nonpayment of money to the receiver general. The defendant in his rejoinder alleges payment, on which an issue (the ninth) is joined, and found for the plaintiff to a certain amount, viz., £693. Fraud and covin in obtaining the bond are pleaded, which are negatived by the jury. Two other pleas are demurred to, upon which judgment is given for the plaintiffs. No material issue, either in law or fact, has been found for the defendant; but an immaterial issue is found for the defendant, arising upon a rejoinder which is defective, not merely in form, but in showing any answer in substance to the plaintiffs' right of action, capable of being made good by amendment in form.

If this pleading had not been brought upon the record, the plaintiffs would have been entitled to judgment. Upon what principle, then, are they to be deprived of the benefit of all that has been established in their favour, in consequence of a proceeding which is wholly ineffectual, entitling neither the plaintiffs nor the defend-[405]-dant to judgment; and why may not such a proceeding be disregarded, as altogether nugatory? Authority upon the subject is not to be looked for in the older books, since no such case can have arisen before the statute of Anne, already referred to. The only modern case upon the point, of which I am aware, is that of *Goodburne v. Bowman*; the principle to be collected from which is, that where a verdict is found upon an immaterial issue, in a case which does not authorize the award of a repleader, and the whole cause of action is confessed, or proved upon some other plea or pleas on the same record, the plaintiffs are entitled to judgment.

This case was adverted to in *Plummer v. Lee*, and though the principle is said to have been suggested in *Goodburne v. Bowman* for the first time, the justice of it is not controverted; but the case is distinguished from that before the Court, on the ground that in the latter no plea contained a confession of any part of the cause of action, and there was no issue found upon any plea establishing the truth of the whole of it, and a repleader was awarded. The principle promulgated in *Goodburne v.*



*Bowman* appears to me to be consistent with reason and justice. The award of a *venire de novo*, to try the immaterial issue, would be wholly useless; and as this is not a case for a repleader, I humbly offer my opinion to your Lordships, (though, certainly, not without hesitation, in consideration of the novelty of the case, and in deference to the opinions entertained, I believe, by my learned brothers,) that judgment may be entered for the plaintiffs upon the whole record, on the ground that the issues found thereon contain sufficient proof whereon to found a judgment for the plaintiffs, disregarding the immaterial issue.

[406] Parke, B.—My answer to the first question proposed by your Lordships is, that, in the case suggested, the conduct of A. B. was a breach of the condition of the bond, by which he was well and truly to pay to the receiver general all the sums of money collected by him, according to the true intent and meaning of the statutes 43 Geo. 3, c. 99, and 3 Geo. 4, c. 88.

It seems to me that this condition is to be construed precisely in the same way as if another person had been collector for a former year, the appointment being annual; and it could not admit of the least doubt but that it would have been a breach of such a condition, if the money received, instead of having been paid to the receiver general, to the account of the year for which it was received, had been lent to a former collector, to enable him to pay his arrears, although that collector had really so applied it. The question is precisely the same, so far as relates to the breach of the condition of the bond; and the payment to the account of a wrong year is, in effect, an appropriation by A. B. to the payment of his own debt, though, certainly, the damage is not the same, (from the circumstance of this debt being due to the public,) as if he had applied it to the payment of a private debt of his own. It makes, however, a most material difference to the parishioners, who are a fluctuating body, whether the collections of each year are paid to the account of that year or to that of a former year, for which the same person has acted as collector. In the latter case suspicion is lulled, and no inquiry made until the sureties of the former year, or the collector himself, are dead, or insolvent; and the inhabitants of the parish are rendered liable for the arrears due from their predecessors, and have the amount levied [407] upon them; an evil which might have been avoided if each year's collection had been duly paid, as it ought, to the account of that year.

2d. In answer to the second question proposed, I have humbly to state the same opinion which I did in the Court below, that it is no defence to the action on the bond, that the defaulter had lands and goods within the district, and that the commissioners had knowledge of their existence before the action brought, and did not, before suit, seize and sell them.

This question depends entirely on the proper construction to be put on the 43 Geo. 3, cap. 99, sec. 13, coupled with other provisions of that statute.

The thirteenth section enacts, that security shall be given by collectors by bond, with sureties, if required by the commissioners, and that "every such bond given by way of security as aforesaid shall be prosecuted by such commissioners on any failure or default by the collector;" "provided always, that no such bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands and goods of such collector, in pursuance and by virtue of the directions and powers given to the respective commissioners by this act."

These directions and powers are in section fifty-two, which enacts, "that in case of default by a collector in paying the money received by him, the respective commissioners, or any two of them, in their respective jurisdictions, are empowered and authorized (not required) to imprison his person, and seize and secure the estates, both real and personal, belonging to him, or which shall descend and come to the hands or possession of his heirs, executors, or administrators, [408] wheresoever the same can be discovered or found; and the commissioners who shall seize and secure the estates shall appoint a time for a meeting of all the commissioners, who are empowered and required to sell and dispose of the collector's estate, to satisfy the arrears and costs, if the collector does not pay." These being the material provisions of the statute, it seems to me that, according to their true construction, it is discretionary in the commissioners whether they will seize or not; and that if they do not choose to seize, they may put the bond in suit, and that the proviso does not operate unless they

do seize; and, secondly, that if the proviso be obligatory on the commissioners in all cases, it does not constitute a condition precedent, but is directory only.

The fifty-second section, of which I have stated the substance, appears to me to leave it clearly in the discretion of the commissioners whether they will seize the estate or not. They have the power of determining whether it is worth while, considering the nature of the property, its probable value, and the difficulty and expense of obtaining and converting it, to put in force the power of seizure.

The proviso, therefore, in the thirteenth section, which expressly refers to the directions and powers in the fifty-second section, and which are discretionary, ought to be read just as if the former section had provided, that the bond should not be put in suit for any deficiency other than such as remained after sale of the estate, real and personal, pursuant to the discretionary power in the commissioners; that is, "if the commissioners should think fit, in their discretion, to seize the estate, real and personal." If this is not done, this consequence will [409] follow: that the commissioners, who have a discretion by the fifty-second section, and that, no doubt, for the benefit of the parish at large, and the public, and all persons interested, to seize or not, are yet compellable to do so, under the penalty of not being able to sue on the bond for the deficiency if they do not so;—that if they, in their discretion, think the public interest and the interests of all best consulted by not incurring the expense of a seizure of property of no value, the public must suffer, by losing the remedy on the bond against the sureties, for it is in truth their loss. If the commissioners took this bond, and were acting for their own benefit, there might be some reason for saying, that if they did not choose first to take the estates of the principal, they should not sue the surety; but if they act, as they do not, for themselves, but for the public, it appears to be impossible to preserve the discretion given by the fifty-second section, without qualifying the thirteenth section, and making the proviso therein a contingent direction or order not to sue, if the discretion should be exercised, until the sale should have been completed. I am, therefore, of opinion, that this proviso in the thirteenth section has no operation, unless the commissioners choose to seize under the powers of the fifty-second section. But if this construction be not correct, and the proviso is obligatory on the commissioners in all cases, then arises the other question: Is the compliance with the enactment a condition precedent, and the non-compliance a bar to the action? I must say, I am of opinion that it is not. In the first place the language of the proviso is not, that no action shall lie or be maintained on the bond, but it comes by way of qualification on the former part of the clause, which commands the [410] commissioners to prosecute the bond on any failure or default. It is, therefore, a command to them not to put the bond in suit in the particular case contemplated by the proviso, but it is no more. Had the legislature intended to make the non-compliance with this regulation an absolute bar, I cannot help thinking they would have used different language; but it is not on the use of the precise expression that I place so much reliance, as on the consideration of the consequences to which the construction contended for would lead. If we construe the words literally, and say, therefore, that no action is maintainable unless they seize and sell the lands or goods of the defaulter, (whether they have knowledge, or by reasonable inquiry could obtain the knowledge, of them, or not,) no action could be safely brought; and the public, whose suit it is, would be defeated of their remedy, by the proof of the collector having any interest whatsoever, in possession or reversion, however remote, in lands, or any goods, however small in value, (and there is no one, however poor, who has not some,) in any place within their jurisdiction, or even without, for it may be made a question whether under the fifty-second section their power does not extend to lands and goods anywhere; this construction would operate, practically, to defeat the remedy on the bond altogether.

The consequences, therefore, to which such a construction would lead, at all events would require some implied exception in the provision of the statute, and it is, I understand, conceded by many of my brethren, that it cannot be a condition precedent in all cases. If the commissioners have notice or knowledge of the existence of such lands or goods, it is said that the sale [411] must be a condition precedent, otherwise not; but if so, can we say that if they could, with reasonable diligence, ascertain their existence, the sale should not in that case also be a condition precedent? There is a difficulty in drawing a distinction between the two cases, and

much difficulty also in determining the fact of knowledge, or of the power to ascertain the existence of lands or goods. Is such knowledge or power of one of the commissioners,—a somewhat numerous body, to be sufficient?

These inconveniences and difficulties, coupled with the want of a direct and positive enactment that the sale shall be a condition precedent, induce me to think that the proviso, if not discretionary (of which I have said enough), was directory only, to the commissioners who act, to take all proper steps in the first instance. It does not follow, because it is directory, that it is not obligatory; and I conceive that for the non-compliance with that proviso there would be a remedy, either at law or in equity, though the want of such remedy would not, as it seems to me, necessarily prevent the clause from being construed to be directory.

For these reasons I cannot help thinking, that the legislature did not intend the proviso in question to be a condition precedent, and that the existence of lands or goods unsold should, under any circumstances, be a bar to an action.

3d. My answer to the second question which your Lordships have proposed, includes an answer to the third. For the reasons I have given before, I think that it is no defence to an action on the bond, that the commissioners did not seize and sell lands or goods of the [412] defaulter, of the existence of which they had no knowledge, before the commencement of the suit.

4th. To the fourth of your Lordships' questions my answer is, that, in the case supposed, the verdict ought to be entered on the issue raised by the rejoinder for the defendant. The plea is, in substance, (in so far as it is material to state it,) that the collector performed so much of the condition of the bond as relates to the receiving all the monies assessed from the person liable; and as to his deficiency in accounting for what he received, that he was possessed of and entitled to divers lands and goods, as of his own property, within the jurisdiction of the commissioners, of which the plaintiffs had notice, and which lands and goods still remain unsold.

The replication to this plea is, that the collector, after this breach of the condition, had no lands within their jurisdiction, which they could seize and sell, of which they had notice.

The rejoinder drops all mention of the notice, and simply avers that there were lands which they could and might have seized and sold, and concludes to the country, and the plaintiffs add the similitur. I think this issue was, for reasons I shall afterwards give, wholly immaterial, or rather, in reality, no issue at all; and if a court of error had a power to award a repleader, it ought to award it. I think the jury ought, upon the fact found, which is, that there were lands which the commissioners could have seized and sold, to have found for the defendant; for that is the averment which he makes, and which is put in issue.

5th. But, supposing the verdict to be so entered, [413] then, upon the supposition contained in your Lordships' fifth question, I am of opinion that this was an immaterial issue, upon which a repleader ought to have been awarded, (confining my opinion at present to the question on the 5th plea, and the pleadings arising out of it,) if the court of error had power to do so, but that judgment *non obstante veredicto* cannot be entered for the plaintiff.

The principle upon which such a judgment proceeds, as against a defendant, is, that he has confessed the plaintiff's action, and avoided it by matter which is, in substance, no answer to the plaintiff's action; and in such a case, although the issue raised upon that matter has been found for the defendant, yet the court gives judgment for the plaintiffs as upon a confession. There are four descriptions of judgments for a plaintiff,—on verdict, demurrer, *nul dicit*, and confession; *Rea v. Philips*, Strange, 395; and this belongs to the last, and is classed under that head, and all the cases in the books, which I have been able to find, are founded on that principle. Thus, in the form referred to by my brother Coltman, 14 Viner, title Judgment, D. pl. 1, the judgment proceeds upon the confession in the plea of the matters in the declaration, and want of sufficient matter in bar: the same in Carthew, 372, 2 Roll's Abridgment, 99, Willes, 365, 366. The cases, *Lacy v. Reynolds*, Croke, Elizabeth, 214; *the King v. Philips*, Strange, 394; *Drayton v. Dale*, 2 B. and C. 293; *Earl of Lonsdale v. Nelson*, 2 B. and C. 312; *Lambert v. Taylor*, 4 B. and C. 138; *Clears v. Stevens*, 8 Taunt. 413; *Lewis v. Clement*, 3 B. and A. 704; and *Rickards v. Bennett*, 1 B. and C. 223, are all cases of judgment [414] on pleas in confession and avoidance,

bad in substance (for if bad in form merely, such a judgment will not be given; *Staple v. Heydon*); and after a very diligent search, I have not been able to discover a single case of this species of judgment, or any other plea than those which are, technically, in confession and avoidance.

But it is said, that if a plea traverses one out of several matters alleged in the declaration, it confesses the remainder to be true, and, in like manner, the rejoinder confesses such part of the replication as it does not deny; but I do not think it confesses the remainder, in the sense which is required to found such a judgment; *Hudson v. Jones*, 1 Salk. 91. That which is traversable and not traversed may be said, no doubt, to be admitted for some purpose; that is, it cannot be made a matter in dispute on the trial; and if it were taken by protestation, under the form of pleading before the new rules, the matter would have been equally put out of the issue, but there would have been great difficulty in maintaining that this was a confession, for the purpose of giving the plaintiffs judgment. The effect of a traverse of one fact out of many is merely this: that the party pleading rests his defence on a denial of that fact only; but if the decision of it in favour of the defendant turns out to be immaterial, I conceive the Court cannot give judgment as on a confession of the other facts. I am fortified in this opinion, not merely by the absence of any authority to warrant such a judgment, but by some cases of a similar nature, in which the Courts have decided that a repleader ought to be awarded; for, if the position be true that a defendant confesses that fact, [415] in a declaration or replication, which he does not deny, it must be equally true of a plaintiff denying one matter which is immaterial, out of several matters in a good plea; and yet in this case Lord Holt says, in *Pitts v. Polehampton*, and in the same case in Lord Raymond, 391, there must be a repleader. In *Sergeant v. Fairfax*, 1 Levin, 32, and 1 Keble, 23, which was an action of debt for rent against the assignee of the lessee, (as it seems from the latter report,) the plea was, that the defendant assigned over to a stranger, with the consent of the plaintiff; and the issue was on the consent, and after verdict, (whether for the plaintiff or defendant is uncertain,) a repleader was awarded. The case is reported several times in Keble, and this appears to be the result. But I must own that no great weight ought to be attached to this authority, from the inaccurate mode in which it appears to have been reported. In a recent case in the Exchequer, *Plummer v. Lee*, the Court decided that where the defendant traversed an immaterial averment, there could not be judgment *non obstante veredicto*, but that there must be a repleader.

For these reasons I cannot help thinking, that if the replication in this case had averred two distinct facts, and the rejoinder had traversed one, which was immaterial and was found for the defendant, it would not have admitted the other, so as to warrant judgment *non obstante veredicto*. But even if it were so, the doctrine would not apply to such a case as this; for here, in truth, the issue is immaterial,—one on which no judgment can be given, not because an immaterial fact is traversed, but because there is in reality no issue at [416] all,—no affirmance on one side of the same proposition which is denied by the other; and the case belongs to a numero us class of immaterial issues, which are to be found in the books, where issue is taken by one party on that which is not alleged by the other. I would instance the cases of *Enys v. Mohun*, Strange, 847, 1 Barnadiston, 182, 220, which was an action against the assignee of a lease, to whom the estate of the lessee had come by assignment: plea, that the lessee did not assign to defendant; and after issue joined a repleader was awarded, it being an issue joined on what is not alleged in the declaration; and the cases in Gilbert, C. P. 48, Croke, James, 585, *Walker v. Brook*, 1 Lord Raym. 133, all afford instances of the same kind. In the present case the replication is, that the collector had not any lands of which the commissioners had notice, which pleading is bad on special demurrer, as being a negative pregnant; that is, an issue that rather supposes an affirmative than the contrary, but good after verdict; Gilbert, C. P. 153. If the replication had been proper, it should either have denied that there were lands, or admitted that there were, and averred that the commissioners had no notice of them; but this informal replication does not deny that there were lands, nor does it admit that there were: but it means, in effect, this: either that there were no lands, or, if there were, that the commissioners had no notice of them. The rejoinder contains no answer to this proposition, but avers, simply, that there were lands; a fact which was never denied

by the plaintiffs; and on this ground I am satisfied that this is a purely immaterial issue,—more properly no issue at all,—which is not cured [417] by verdict, upon which no judgment can be given, and for which, in the Court below, a repleader ought to have been awarded.

6th. In answer to the sixth question proposed by your Lordships I have to state, that, in my opinion, it is not competent for a court of error to award a repleader.

Upon this point we have the express authority of Lord Hale, *Bennett v. Holbeck*, who said that course had been disused then 100 years, and could not be practised. To the same effect is *Crosse v. Bilson*, 6 Mod. 103; and I believe no instance can be found in recent times of such a proceeding. The reason for this, probably, is, that the authority given by the writ of error is confined to giving judgment, whether of reversal, affirmance, or *venire de novo*, on the existing record, and that the parties are not before them to replead; they have no day in court, and are not necessarily present when the judgment is pronounced. The defendant in error has the means of compelling the plaintiff in error to assign errors by *scire facias quare executionem non*; and the plaintiff in error may oblige the defendant to appear, and join in error, by *scire facias ad audiendum errores*, or the defendant may come freely; but, this done, the record in error does not usually state the presence of both parties when judgment is given; and judgment may certainly be affirmed in the absence of the defendant, as is stated by Mr. Justice Powell in *Staple v. Heydon*. Be this as it may, there is no doubt but a court of error does not now possess this power. If a court of error could award a repleader, I think it ought to do so in this case.

7th. I think the answer to the seventh question pro-[418]-posed by your Lordships ought to be, that the judgment should be for the plaintiff *non obstante veredicto*, on the ground that the fifth plea confessed the right of action on the bond, and did not avoid the same by sufficient matter; that is, that the judgment should be affirmed. But if I am wrong in supposing that the sale of the lands was not a condition precedent, then I am of opinion that the judgment for the plaintiffs below ought to be reversed, simply; and they must begin *de novo*. I do not think that any aid can be lawfully derived from the other pleadings in this case, though I am not prepared to say that it may not in some cases.

It was said in *Goodburne v. Bowman*, and very truly, “that most of the cases in which the question of a repleader was considered were before the statute of Anne, when only one plea could be put on the record; and that if such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied.” The Lord Chief Justice proceeds to state, “that in that case there was a verdict upon the general issue,” and “that, although in considering the merit or demerit of any individual plea recourse cannot be had to another, unless expressly referred to by such plea, yet, as the application to enter the verdict is founded upon the whole record, upon which it appears that the defendants have committed the grievance complained of, and have not shown any sufficient justification, it may be considered that, in this point of view, there was enough to warrant an application for judgment *non obstante veredicto*, and that no rule was better established than that the court will not grant a repleader unless complete justice could not be answered without [419] it;” and he cites *Symmers v. Regem*, Cowp. 510. This doctrine, so laid down by the Chief Justice, is, I believe, new; at first I felt considerable doubt as to its being well founded, but it is extremely convenient and reasonable, and I am not prepared to say that any valid objection can be made to it, provided it be explained and qualified in the manner I will mention; but, unfortunately, that qualification will exclude the present case. Where it applies, a new mode of entering up the judgment upon the record would be required, treating the issue found for the defendant as immaterial, and proceeding, notwithstanding the verdict on that issue, to give judgment upon the other issue found for the plaintiff. Nor am I satisfied that the doctrine laid down by the Chief Justice would not apply to a case in which the other issues, one or more, being each material and decisive of the whole cause of action, are each found for the plaintiff, although they, severally or together, did not confess or traverse all the material facts alleged in the declaration; for it may be well said, that a repleader is to be granted, to enable the parties to plead properly such a plea as would be decisive of the action; and if they have already done so, under the power given by the statute of Anne, and raised one or more correct issues, each

of which would decide the action, and the court may give judgment on the finding on the material issue or issues, such a course is unnecessary; and I am disposed to think, on that ground, after full consideration, that the Court of Exchequer was *wrong* in awarding a repleader in the case of *Plummer v. Lee*, already referred to, although it would have been rightly awarded if the only plea had been the traverse of the immaterial fact alleged [420] in the declaration. But I am of opinion, that *this* doctrine will not help the plaintiff in this case, because the matter of the fifth plea has never been tried at all by a proper issue. The defendant had liberty to plead that plea, and has a right to all the benefits of it; and if it be good in point of law. (which, for this purpose, I must assume,) he had a right to have the facts properly disposed of by a proper issue. This has not been done. As the issue was found in his favour, he would have a right to ask for a repleader if the plea stood alone, and cannot be deprived of that right if it is joined with others. I am, therefore, of opinion, that, assuming the plea to be good, the other pleadings would not help the plaintiff, and the judgment ought to be reversed.

Vaughan, J.—My Lords, I have considered with attention the various questions which, in this complicated case, your Lordships have propounded to the judges, some of which, being "*inter apices doctrinae placitando*," may be expected to provoke much difference of opinion. I have found great difficulty in bringing my mind to a satisfactory conclusion upon some of them, which may cease to be matter of surprise when it is remembered, that, after the most anxious consideration, not only have different judges taken different views of the same questions, but the same judges, after much ruminating, have felt themselves constrained to give different judgments upon the same question, as the case proceeded through its several stages in the Courts below.

1st. To the first question, which appears to be the most easy of solution, I answer, that the conduct of [421] A. B., under the circumstances stated, in paying over to the receiver general any part of the monies collected by him for the year 1828, to be applied to the service and account of former years, was a direct breach of the condition of the bond; but as the case of a surety has ever been regarded with favour both in courts of law and equity, his liability must be clearly demonstrated. He has executed a bond with a condition, by which he stipulates that on A. B. being appointed collector of the taxes for the district in question, for the year 1828, he will be responsible for his collecting, and well and truly paying over to the receiver general, all such monies as shall come to his hands by virtue of the assessments of that year. True it is that A. B. did faithfully collect all the sums due upon those assessments, and did pay them over to the receiver general, but with a specific appropriation of part, viz. £693, to the account and service of a former year, for which year the defendant below was not his surety.

Adverting to the provisions of the act 43 Geo. 3, cap. 99 (so often referred to), which creates and defines the obligations and duties of the collector and of his surety, I am of opinion that A. B. thereby incurred a forfeiture of the penalty of the bond. But in looking at the general frame and context of the act of parliament, one cannot fail to observe, that the duties and responsibility of the collector and his surety are several and distinct, expressed in different terms, and depending upon very different provisions. The office of each is an annual office, and in considering the question submitted to us, we must carefully avoid confounding the duties of these respective officers for any one particular year with [422] the duties of any prior or subsequent year. It may happen accidentally, but not necessarily, that the collector of the preceding year may also be appointed collector for the subsequent year, and that the surety of the former year may chance to become the surety for the collector of the following year, and so *vice versa*. The principal, or collector, engages that he will duly collect, and well and truly pay over to the receiver general, all sums received by him, by virtue of the assessments made in the year 1828, to the service and account of that particular year, and the surety becomes responsible for the faithful discharge of this duty; but if, instead of paying over the sums collected in 1828 to the service and account of that year, he directs the same, or any part of them, to be applied to the extinction or liquidation of an arrear which he had suffered to accumulate in any former year, I have no hesitation in declaring that he becomes as much a defaulter, to the extent of such misappropriation, as if he had applied the money to the payment of his own private debt; and *pro tanto* the parish becomes liable to be re-assessed to

make good such deficiency, and may resort to the surety for indemnification to the extent of the default. Whether this conduct of A. B. amounted to a breach of the condition of the bond cannot, in my humble judgment, be tried by a more infallible test than that suggested by Baron Parke, in delivering his judgment in the Court of Exchequer Chamber, wherein he observes, that the condition of the bond is to be construed as if another person, and not A. B., had been collector for a former year; and could it then admit of any doubt that it would be a breach of the condition "to pay well and truly to the receiver general," if the money had been lent by [423] A. B. to such former collector to enable him to pay his arrears? Although the money had been so applied, it is in effect, for this purpose, an appropriation by A. B. to the payment of his own debt.

To my mind this proposition, involved in the first question, appears so plain, and so directly in unison with the opinions (I believe) of all the judges, (whatever difference may be found to exist in the answers to be returned to some of the subsequent questions,) that I cannot prevail upon myself to waste more of your Lordships' valuable time upon the consideration of it.

2d. The second question opens a more extended field of discussion, and is calculated to excite much greater difference of opinion. We are told that A. B., at the time of the supposed breach of the condition of the bond, had certain lands and goods within the jurisdiction of the commissioners, of which they had knowledge before any action brought upon the bond; and we are asked, whether, an action being brought, it would be a defence to that action, that the commissioners did not, before suit, seize and sell the said lands and goods?

The answer to this question seems to depend upon establishing the proposition, that such seizure and sale was a condition precedent, which must be complied with before the surety can be sued; and whether it be such a condition precedent must be determined by the true construction of the proviso in the thirteenth section of 43 Geo. 3, regard being had at the same time to the power and authority given to the commissioners, by the fifty-second section, to deal with the person and property of the collector making default. It has been [424] argued, and I think correctly, that the clause enabling the commissioners to seize the lands and goods of the collector is not imperative, but directory only, and is not a step necessarily preliminary to putting the bond in suit against the principal; but I conceive that the legislature has drawn a distinction, and expressed it in words too plain to be mistaken, between the liability of the principal and of the surety, and has, with the most guarded caution, placed the responsibility of the latter upon the more favoured footing. After directing the form of the bond to be taken from the surety, that section proceeds to enact, that "every such bond given by way of security shall be prosecuted by the commissioners on any failure or default of the collector," but accompanied, and followed, by this remarkable proviso, which I regard as the inducement or consideration influencing the mind of the surety to enter into the obligation; viz., "provided always, that no such bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after the sale of the lands, tenements, and chattels of such collectors, in pursuance of and by virtue of the directions and powers given by this act." If this proviso, admitted on all hands to have been introduced for the sole purpose of giving protection to the surety, and of easing the burthen of his obligation, does not disarm the commissioners of any power to call him to account until the deficiency of the collector has been ascertained, after giving credit for the proceeds resulting from the sale of his lands and goods, pursuant to the powers in the fifth section, in reduction of the balance, I ask, what language could be devised more clear to convey the notion of a strict condition precedent than the words of this [425] proviso? To my mind this is a solemn declaration made by the legislature, (contemplating the reluctance with which persons might become sureties in bonds of this description,) that whoever executed them should not be prosecuted for the default of the collector until after the commissioners had first seized and sold all the real and personal estate of the collector, of which they had any knowledge, and, having given credit for the proceeds in reduction of the debt, might then, and then only, enforce the bond against the surety. How far the neglect or failure of the commissioners to exercise the powers delegated to them, of proceeding against the lands and goods of the principal, for the purpose of making them available in diminution of the

debt or balance to be afterwards claimed against the surety, may render them obnoxious to any proceedings, by mandamus or by suit in equity or otherwise, we are not called upon to discuss; but, surely, their neglect to discharge the trust reposed in them affords no just ground for prematurely accelerating the liability of the surety. So harsh a construction of the proviso in the thirteenth section would be fraught with injustice, and virtually operate as a fraud upon the surety. I am, therefore, of opinion, upon the plain letter of the act of parliament, upon the clear intention of the legislature, to be collected from the whole frame and spirit of its various enactments, and upon the reason of the thing, that the neglect of the commissioners to seize and sell the lands and goods of the collector, of which they had knowledge, before the action was commenced, would, if properly pleaded, afford a good ground of defence to such action.

[426] 3d. To the third question, which assumes the want of knowledge in the commissioners, and their ignorance of the fact of the existence of any lands or goods belonging to the collector within their jurisdiction, before the commencement of the suit, I answer *de non existentibus et non apparentibus eadem est et ratio et lex*. Upon this short ground, and on this plain and sound principle, I am of opinion that his defence must fail, where the commissioners have had no notice.

4th. The fourth question, whether the issue raised by the rejoinder to the replication to the fifth plea ought to have been found for the plaintiffs or for the defendant, depends upon the matters involved in that issue. If the rejoinder, not having traversed the fact of notice to the commissioners, (a most important part of the issue tendered by the replication,) can be considered as having the legal effect of impliedly admitting the want of notice to the commissioners of there being any lands, etc. of A. B. within their jurisdiction, before the commencement of the action, I think that the verdict on that issue should have been found for the plaintiffs. But I cannot satisfy my mind, that the defendant below, by his rejoinder, can be taken to have made any such admission. The allegation in the replication, that the commissioners sold all the lands of A. B. of which they had notice, is one entire and substantive allegation, the whole of which the defendant might and ought to have traversed, but, by omitting one very essential part of it, he has thereby raised an immaterial issue, (if any issue be raised,) in which I think the fact of notice not involved. Taking this [427] view of the subject, the finding of the jury, that A. B. had lands, etc., properly affirms all that was put in issue, and, therefore, entitles the defendant to have it entered in his favour; but, as it is an immaterial issue, what are the legal consequences resulting from such finding of the jury will be seen in the answer to the subsequent questions.

5th. To the fifth question, if I am correct in supposing that the verdict should be entered for the defendant, upon the issue raised by the rejoinder to the fifth plea, and that it would be no defence to the action, that the lands of A. B. were not sold by the commissioners, unless they had notice of their existence, I think that judgment might be entered for the plaintiffs *non obstante veredicto*, provided the fifth plea can be considered as amounting to a confession of the cause of action, and an insufficient avoidance of it. The rule, as applicable to cases of this description, is laid down with great precision and perspicuity by Lord Chief Justice Abbott, in *Lambert v. Taylor*. He says, the plea being bad, the defendant certainly cannot have judgment, although the issue is found for him, the issue being taken on an immaterial matter; and the question, whether the plaintiff can have judgment, or whether there ought to be a repleader, (supposing the court competent to award a repleader,) depends upon the question, whether the plea does or does not contain a confession of a cause of action. If a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict. The same rule was recognized, and confirmed, by the Court of Common Pleas in the case of *Goodburne v. [428] Bowman*, and by the Court of Exchequer in *Plummer v. Lee*.

Let us apply this test: the fifth plea states, that A. B. did well and faithfully demand and collect all the sums of money charged in the said assessments, and then avers that he was possessed of and entitled to certain lands within the jurisdiction of the commissioners, of which the plaintiffs had notice, and which they might have seized and sold, to satisfy the sums so collected and detained, and not duly paid over by him in pursuance of his bond. This plea confesses a cause of action, and contains matter in avoidance of it, capable of being moulded into an issue, which, properly framed,



would have determined the merits of the case. But mark the mode in which the plaintiffs deal with this plea in their replication: they state, that, after A. B. had collected the sums assessed, and omitted to pay them over to the receiver general, he had no lands within the jurisdiction of the commissioners which they could seize and sell, of which the plaintiffs had notice.

Without discussing the question, whether the plaintiff's replication was not inartificially drawn, and open to a special demurrer, inasmuch as it traverses, not the single fact, whether A. B. had lands within the jurisdiction of the commissioners, nor the fact, *simpliciter*, whether the plaintiffs had notice, but the compound proposition, that he had no lands whereof the plaintiffs had notice, perhaps the more correct mode of replying to a plea so framed would have been, either to have traversed the fact of A. B. having lands, or the fact of the plaintiffs having had notice; the one or the other, but [429] not both; the failure to maintain either being fatal to the defendant's bar. Such being the plea and the replication, the defendant rejoins, that A. B. had lands within the jurisdiction, omitting to traverse so essential a part of the issue tendered by the replication as the fact of notice.

It appears to me, that the plaintiffs might have demurred to this rejoinder, as tendering an immaterial issue, (if not amounting to a departure,) passing by and losing sight altogether of the fact of notice, upon which the strength and sufficiency of the bar rested. Instead of doing so they have countenanced this error, and concurred, by adding the *similiter*, in sending an issue to be tried by a jury, which cannot dispose of the merits of the case. How, then, is the verdict to be entered on this issue?

With unfeigned deference to the opinion of others, I conceive, as I have before stated, that the verdict should be entered for the defendant, the jury having found the only fact involved in it in his favour, viz., that A. B. had lands within the jurisdiction of the commissioners.

There being, therefore, a plea upon the record which confesses a cause of action, and which contains matter in avoidance of it, which might have determined the rights of the parties, but which has failed to do so, from their mutual neglect to observe the rules of good pleading, I think the plaintiffs are not entitled to enter up judgment *non obstante veredicto*, upon a supposed implied confession in the rejoinder that, if there were lands within the jurisdiction of the commissioners, the plaintiffs had no notice of them. For the reasons suggested by my brother Coleridge and the learned Baron Parke, I agree that the neglect of the defendant to traverse the fact of notice does not amount to any such implied admission of it.

6th. Supposing the judgment could not be so entered, and the issue raised by the rejoinder be (as I apprehend it must be) adjudged immaterial, we are called upon to declare our opinions upon the jurisdiction of a court of error to grant a repleader, and upon the expediency of doing so in the case before us. I believe it has been a prevalent notion in Westminster Hall, of late years, that a court of error cannot award a repleader; and the neglect or forbearance to exercise this right, through a long succession of years, is strong evidence against the existence of it, since the statute of Anne, which allowed defendants any number of pleas the court might be pleased to sanction, and since the practice of granting new trials has grown into daily use, the awarding of a repleader, even by the Courts below, has become of rare occurrence, inasmuch as the Court from whence the record issues is likely to render such proceeding unnecessary. In the case of *Bennett v. Holbeck* Lord Hale is reported to have said, that in ancient times it was usual to award a repleader on a writ of error from the Common Pleas to the King's Bench; and that he had searched, and found several rolls, not less than seven in number, (the earliest in the 21 Edward 1, and the latest in the 33 Edward 3,) in which a repleader had been so awarded; but he adds, it was grown obsolete, and not in use at that day. I am not aware that the jurisdiction of a court of error to award a repleader, (assuming it once to have existed,) has ever been [431] abolished by any legislative enactment, or declared illegal by any judicial decisions. But since the time of Lord Hale more than a century and a half has elapsed, and sunk the practice (if ever it existed) into absolute desuetude, and involved the right in deeper obscurity. I cannot, therefore, venture to affirm the jurisdiction of a court of error to award a repleader, and consequently cannot recommend the expediency of doing so in this case.

7th. This leads me to the last and the only remaining question, viz., what judgment ought to be pronounced, supposing a court of error cannot or do not award a repleader? To which I answer, in a word, that judgment cannot be pronounced for the defendant, because the issues found for him are immaterial issues; neither, as it appears to me, can judgment be pronounced for the plaintiff on the whole record, or on the 5th plea, *non obstante veredicto*, for the reasons I have before stated. Deeply regretting the time and cost which have been expended in a fruitless litigation, I come to the conclusion, which I have arrived at after much fluctuation of opinion, with great reluctance, viz., that the judgment of the Court below should be reversed, and the plaintiffs be at liberty to retrace their steps and begin *de novo*, if they shall be so advised.

Littledale, J.:—My Lords, in answer to the first question, I am of opinion, that the conduct of A. B. was a breach of the condition of the bond, for the reasons already given by my brothers.

2d. and 3d. As to the second question and the third question, they are so much connected together, that, with the [432] leave of the House, I should propose to give an answer which applies to both.

Two questions arise on the construction of the statute of 43 Geo. 3, cap. 99. The first is, whether the sale of the lands and goods of the collector be a condition precedent to putting the bond in suit against the surety? The second question is, whether, if it be a condition precedent, it applies to all the lands and goods of the collector, or only to those which were known to the commissioners; and I use the term "known," because the word "notice," which occurs in the pleading, sometimes means that knowledge which is acquired by specific information given with a particular object, as in the instance of notice of dishonour of bills of exchange and other cases, but, as applicable to the present case, I mean, by the term known, knowledge, in whatever way it is acquired.

Upon the first of these points, I think the sale of the lands and goods of the collector is a condition precedent to putting the bond in suit. The 13th section, after prescribing the form of the bond of the surety, says, "Every such bond given by way of such security, as aforesaid, shall be prosecuted by the commissioners on any failure or default of the collector;" and then there immediately follows, "Provided always, that no such bond shall be put in suit against any surety for any deficiency, other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector, in pursuance of and by virtue of the directions and powers given by this act." Here, therefore, is a provision that the bonds shall not be put in suit for any deficiency, other than what shall [433] remain unsatisfied after a particular thing done. It is quite clear, that if the lands and goods have been sold, the bond can only be put in suit for the difference; but if there are lands and goods, and they can be sold by the commissioners under the powers and directions of the act, the meaning of the clause is, that the deficiency must be ascertained first; for, otherwise, it is putting the bond in suit for the whole, when the act says it shall only be so for a deficiency. It is a very reasonable provision for a surety, that he shall not be called upon till all has been got from the collector that can be raised.

But it is necessary to see what are the powers and directions given by the act, by which the deficiency is to be ascertained; they are contained in the 52d section, which enacts, that, if the collector makes default in the particulars enumerated, the commissioners are authorized and empowered to imprison the person, and seize and secure the estate, both real and personal, of the collector, wheresoever the same can be discovered and found; and the commissioners, who shall so seize and secure the estate, shall and they are empowered to appoint a time for a meeting of the commissioners; and the commissioners present at such meeting, in case the accounts of the collector be not delivered, or the money detained by him be not paid, are empowered and required to sell and dispose of all such estates which shall be, for the cause aforesaid, seized and secured. It is said that this clause, as to seizing the estates, is only directory to the commissioners, as they are only authorized and empowered, and not required, to seize, and that this is more strongly shown, because in a subsequent part of the clause they are required to sell, and, [434] therefore, a different phraseology is used. There is not the least doubt but that the clause as to seizing is only directory, and only gives a discretion to the commissioners, that if

the collector makes default they may seize and secure the estates; and then, if, at the subsequent meeting, the collector does not pay up his deficiency, they are required to sell; which is all very reasonable,—that they shall not be required to sell if he can redeem his estate; and then it is said, that, because the clause to seize is only discretionary with the commissioners, they need not seize unless they think proper; and as the powers and directions as to the seizure and sale of the estates are not, in point of fact, exercised, and need not be so, unless the commissioners think proper, the deficiency, after the exercise of these powers, is out of the question, and does not and need not arise, and the bond may be put in suit without regard to that. But I think not; the 52d clause is as to conduct to be pursued towards the collector, and the commissioners will, no doubt, exercise their discretion as will best accord with the discharge of their duties to the crown, to the parishioners, and the collector; but if they do not think it right to enforce their powers, the sureties are not to suffer by that. The proviso in the 13th section is introduced for the benefit of the surety, and the meaning of it, in my opinion, is, that they are not to be called upon till the commissioners have done all in their power to make the collector pay; and if, for any reason, they omit to do that, they are not to call on the surety.

If it be not a condition precedent, I do not see how the surety can have the benefit of the clause, for, if the surety be compelled to pay the whole, I do not think he [435] could have a mandamus to the commissioners to seize and sell. Their power is only to seize and sell if the collector has not paid the money; but if the money has been paid by other means, the collector is no longer indebted to the commissioners. Besides, if a mandamus was to go, it must be for the whole direction of the clause; and that is, that the money arising from the sale shall be paid to the receiver general, and then the surety would have to petition the crown to be repaid; and I should doubt whether a court of equity would compel a sale, unless to carry the whole clause into effect, and so as that the surety might petition the crown, when the money had got into the hands of the receiver general. Perhaps the commissioners might, of themselves, sell, in order to relieve the surety. But, besides my doubting the power of the commissioners to sell after they have been paid by the surety, I do not think the surety ought to be put in the situation of having to rely upon what they may be disposed to do.

It is very possible that some inconvenience, and in some cases loss, might arise, if the bond could not be enforced against the surety till the estates are sold, for, certainly, the proceedings under the 52d section must be attended with delay. But I do not think we have any thing to do with that consideration; the question is upon the construction of the act, as it is presented to us. Some distinction was raised in the argument as to the meaning of the words "prosecute" and "put in suit," and that, because the word prosecute in the bond was used without any restriction, the bond might be enforced by action immediately; but I think prosecute and put in suit are synonymous in pleading. [436] In a writ the common phraseology is, sued and prosecuted out of the Court, etc.; if the word sued, alone, or prosecuted, alone, was used, it would mean the same thing as in joining the two words; and in the 13th clause the restriction, I think, must be applied as well to the prosecuting the bond as putting it in suit.

3d. The other question is, as to notice or knowledge of the estates and goods; as to which there is more doubt, because there is no such language as notice or knowledge used in the act of parliament; but the construction of the act of parliament must have a reasonable intendment engrafted upon it, arising out of the existing state of things; and I think it can only be intended that the commissioners shall be compellable to seize and sell, for the benefit of the surety, such lands and goods as they know of. It is impossible for them to seize things of which they are ignorant, and it would not be any breach of duty in them not to seize lands of which they had no knowledge. If they were negligent in not taking reasonable means, according to circumstances, to find out the effects, it might furnish some means of proceeding against the commissioners; but as a mere question of construction, whether they were bound, on a condition precedent, to seize that of which they had no knowledge, any acts of negligence or want of attention in that respect could not arise.

I do not think the words "wheresoever the same can be found" apply to this part of the construction; and I think that means, wherever, locally, they can be found.

The collector might have some small interest in [437] public works and undertakings, where there are a great number of proprietors, as to which the commissioners would have no means of information; so, also, an estate may have come to him, as heir at law or devisee of a person who died the day before the bond was put in suit, of which the commissioners know nothing; or he might have a small quantity of goods in some obscure room; and many other cases might be put where knowledge of the fact of having lands or goods would be utterly impossible; and then, if knowledge was not made an accompaniment of the property, a very small amount of effects, under circumstances before stated, would prevent the bond being sued upon.

I do not consider that the question of hardship ought to influence my opinion either on one side or the other; but it may be observed that this construction does not seem to impose any great degree of hardship on the surety, because, if he looked after his own interest, a very little exertion would enable him to make himself at least acquainted with the material parts of the property of the collector; and if he is afraid that the commissioners may not be very anxious to get the information themselves, it would be very easy for the surety to give distinct notice of the property to the commissioners. Not that I mean, as I have before stated, that express notice need be given; for, if they have knowledge by any means whatever, that constitutes notice within the meaning of the word notice, as used in these proceedings.

The result of these remarks on the second and third questions is, that, under the circumstances stated in the [438] second question, there would be a good defence to the action; and that, under the circumstances stated in the third question, there would not be a good defence to the action.

4th. As to the fourth question, the replication to the fifth plea states, that Bigg had no lands within the jurisdiction of the commissioners which they could seize and sell, of which they had notice; and all the goods and chattels of Bigg within the jurisdiction of the commissioners, and of which the plaintiffs had notice, were seized and sold.

The rejoinder to this replication says, that Bigg had divers lands within the jurisdiction of the commissioners which they could and might have seized and sold, and that all the goods and chattels of Bigg which could and might and ought to have been discovered and found by the commissioners, were not seized and sold in pursuance of the directions and powers given to the commissioners by the said act of parliament, in manner and form as the plaintiffs have above, in that behalf, alleged; and of this the defendant puts himself upon the country.

And the finding of the jury on the issue so tendered is, "And as to the issue twelfthly within joined, the jurors say that Bigg had lands or houses to him belonging, of the value of £121, which could and might have been seized and sold by the commissioners in pursuance of and by virtue of the directions and powers given to the commissioners by the said act of parliament; and that Bigg also had goods and chattels to him belonging, of the value of £200, which also they could and might have seized and sold in like manner [439] under and by virtue of the provisions of the said act."

Now, in this part of the finding the issue raised in the rejoinder is found for the defendant. It is very true that the jury also find that the commissioners had not notice of Bigg being possessed of the houses or lands, but they had reasonable grounds for believing that Bigg possessed the said household goods, which might have been seized and sold by them under and by virtue of the provisions of the said act of parliament, and that Bigg absconded; but the other facts found on the special verdict as to this are not put in issue by the rejoinder to the replication to the fifth plea; and the findings as to that do not vary the finding of the issue on the facts alleged, and, therefore, in answer to the fourth question I think the verdict must be entered for the defendant.

5th. To the fifth question, I think the plaintiffs are not entitled to judgment *non obstante veredicto*. The fifth plea states that Bigg had lands and goods of which the commissioners had notice, and which were subject and liable to be seized and sold, and which might have been seized and sold, but which remained unsold by the commissioners. This plea, in my opinion, is a good answer to the action, unless it be impeached and the effect of it taken away by the subsequent pleadings; it confesses the bond, and avoids the effect of it.

The replication to this plea says, that Bigg had no lands which the commissioners could seize and sell, of which they had notice, and that all the goods of Bigg, of which the commissioners had notice, were seized and sold.

[440] The rejoinder says, that Bigg had lands which the commissioners might have seized and sold, and that all the goods of Bigg, which could and might and ought to have been discovered and found by the commissioners, were not seized and sold in pursuance of the directions and powers given to the commissioners by the said act of parliament, in manner and form as the plaintiffs have alleged.

Now, the plea being good, and the replication being also a good answer, a material point in dispute is tending towards an issue; but when the defendant comes to rejoin, he drops all about the notice. Now, as notice is a material point, the rejoinder is bad, because it omits to put in issue a material point, and the rejoinder might be demurred to, but they have not demurred; but they have joined issue upon a part which, taken simply of itself, is not sufficient to decide the merits of the case, and may be treated as not altogether immaterial, (because it is material whether Bigg had lands,) but though material in part it is not material to decide the case, but is rather to be treated as insufficient. The cause is tried upon the issue so tendered and joined, and the verdict, if you are to confine it to the very words of the issue, is found for the defendant; but as the plea itself is a good plea, I do not think the subsequent defects in the pleadings are to invalidate the plea to such an extent as to say, that the plaintiff is entitled to a verdict *non obstante veredicto*. The cases where the plaintiff is entitled to such a benefit are where the plea to the action is insufficient; here the plea is sufficient, but the plaintiffs have not taken care to put that plea, if one may so express it, out of doors.

[441] If the rejoinder could be taken to be a confession of the want of notice, it might be contended that the judgment ought to be entered for the plaintiffs, because, if the defendant has admitted want of notice, then the finding of the jury that Bigg had lands, when coupled with the confession of the defendant that there was no notice, would show that he had no defence. But I do not think it can be taken that the defendant can be taken to have confessed that the commissioners had no notice, for the allegation that Bigg had lands of which the commissioners had notice is one entire allegation, and the notice is not alleged as a substantive thing; and I do not think that the dropping part of an allegation, when the other part by that means becomes immaterial, is to be an admission of what is so dropped.

6th. To the sixth question, I think a court of error cannot award a repleader, for the reasons given by my brothers; if they could award a repleader, I think it would be proper to do so in this case.

7th. To the seventh question, I see nothing to entitle the plaintiff to judgment on the whole record, whatever may be the case as to the other pleadings on the record. I think that as to the seventh question we are confined to the fifth plea, and as I think the fifth plea constitutes a good defence, and, I think, as the plaintiffs had not taken care to get rid of it, but have gone to trial upon an immaterial issue, though the verdict must be entered for the defendant, yet no judgment can be entered upon it for the defendant; and as, for the reasons I have before given, I think the plaintiff is not entitled to a judgment *non obstante veredicto*, I think [442] that the judgment given in the Court below must be reversed.

The case was adjourned till Mr. Baron Gurney could give his opinion. He attended on the same day.

Gurney, B.—My Lords, it appears, by the special verdict to which the first question refers, that A. B. was duly appointed collector of the assessed taxes for the year 1828, and that the plaintiff in error duly entered into a bond, with a condition for payment by A. B., to the receiver general of the taxes, of all the sums collected and received by him, and which came to his hands as collector for the year 1828; but that he did not pay all those sums to the account or service of that year, but a part only, and the residue he paid to the account or service of former years for which he had been collector, for which former years the party in this cause was not surety.

The plain and necessary result from this statement is, that A. B. violated his duty, and that the bond is forfeited. The appointment is for the year 1828. The duty under that appointment is confined to that year. The bond is for the due performance of his duty for that year.

It was his duty to apply the collection of that year to the account and service of that year.

The application of any part of the money collected under the assessments of that year, to cover any deficiency in any former year, is just as much a breach of his duty, and a forfeiture of this bond, as if he had paid the money to any other creditor, or lost it at the gaming table.

[443] The suretiship was for the conduct of the collector in the year 1828, and no other. Neither the collector nor the surety were contemplated in any other character than as collector and surety for that year. The collector for the former year might have been different; the sureties for the former year were different; but these circumstances cannot make any difference in the consideration of this question.

2d and 3d. The second and third questions are, whether this action can be maintained against the surety until the commissioners shall have sold the lands, goods, and chattels of the collector within their jurisdiction; and your Lordships have propounded questions to the judges, founded upon the different suppositions of the commissioners having and not having notice of that fact.

I am of opinion, that if the collector had goods, lands, and chattels within the jurisdiction of the commissioners, they could not put the bond in suit; and I do not think that their right of action is affected by their knowledge or their ignorance.

The statute 43 George 3, c. 99, s. 13, directs the security to be given by the collectors with the two sureties by a joint and several bond; and every such bond given by way of such security shall be prosecuted by the commissioners on any failure or default of the collector, provided, etc.

If, therefore, the collector has lands, tenements, goods, or chattels, I think that the sale of them by the commissioners is a condition precedent.

This proviso holds out to the persons who become sureties for collectors, that they shall not be resorted to till all the means of payment from the property which [444] the collector shall have should have been exhausted; and if that be not fulfilled to the very letter, I think that the surety does not receive the security which is held out to him by this proviso.

I admit that this question of knowledge is not free from difficulty. It may be said, that a fact of which the commissioners are ignorant is the same as a fact that does not exist. The special verdict upon which these questions are founded, however, shows that the ignorance of the commissioners in this instance arose from a want of due diligence, as the jury found that the collector had lands and goods, and that the commissioners had reasonable grounds for believing that he had.

Another observation serves to show that knowledge or ignorance does not enter into this question. If knowledge be necessary, it must be, I apprehend, the knowledge of the two or three commissioners who are the obligees in the bond. The commissioners consist of a large number of persons; it may happen that these two or three persons may be utterly ignorant, whereas 150 others may have entire and perfect knowledge. The act of parliament does not require that the knowledge shall be brought home to the obligees of the bond, nor even to the commissioners, or any of them; and I do not think that that can be superadded. It is the safer and the sounder construction of the act to consider this as an absolute condition precedent.

In discussing this point it has been remarked that the fifty-second section, to which the proviso refers, does not make the proceeding by the commissioners against the collector compulsory; that it merely empowers the com-[445]-missioners to proceed. I have given the fullest consideration to the argument, but it does not appear to me to be satisfactory.

The fifty-second section empowers the commissioners to sell the collector's property.

The thirteenth section, I think, peremptorily requires, that the commissioners shall exercise that power before they resort to the surety.

It may be said that this construction of the statute may materially embarrass the commissioners in prosecuting the sureties of collectors who are defaulters. Undoubtedly it may; but I do not think that violence is to be done to the express words of an act of parliament for the purpose of relieving the commissioners from embarrassment; another act of parliament may be passed, which may be free from ambiguity. These cases of embarrassment, I fear, always arise from neglect of

duty; if commissioners did their duty, collectors would not have the opportunity of committing such enormous embezzlements, and their sureties would escape the ruin with which they are sometimes overwhelmed. In the case of *Peppin v. Cooper* it was not necessary to decide this precise point, as the question there made was, whether the goods of another surety must or must not be first sold; but that argument necessarily brought this proviso under the consideration of the Court, and Lord Tenterden, speaking of the collector, says, "whose lands and goods must be sold before proceedings are had upon the bond against the surety."

4th. The answer to the second and third questions includes the answer to this question, that the issue ought to be found for the defendant.

[446] The view which I have taken of the case renders it almost unnecessary for me to answer the remaining questions.

5th. The answer to the fifth question is included in the answer to the fourth.

6th. In answer to the sixth question, I am of opinion that a repleader cannot be awarded by a court of error. That is laid down by Lord Hale in 2 Saunders 319 a; 170 years have elapsed since, and no instance has occurred from that time to this.

7th. In answer to the seventh question, it is only necessary to say, that I think that the judgment for the plaintiff ought to be reversed.

Lord Chancellor.—Your Lordships, having now heard the opinions of all the learned judges who were present when this case was argued, will perceive that there is a considerable difference of opinion existing among the learned judges, and that the case, therefore, is one of extreme difficulty, and requiring the serious consideration of your Lordships; and after the assistance we have received, I propose to your Lordships to adjourn the further consideration of this case.

Lord Brougham (28th July).—This was an action brought on a bond, in which the present plaintiff in error, the defendant below, was surety for a person of the name of Bigg, who was appointed collector under the 43d George 3, cap. 99, and other acts, which that act consolidated and amended, namely, collector of assessed taxes for the parish of Saint Matthew, Bethnal [447] Green. The action was brought for recovering the sum of £693, which was alleged to be due to the receiver general of the county of Middlesex, in consequence of Bigg not having paid in that sum to the account of the year 1828-29, for which it was received and collected by him, but to the account of the year immediately preceding, for which year Gwynne, the plaintiff in error and defendant below, was not surety.

Many questions arose, both in the Court below and afterwards in the Court of Exchequer Chamber, into which the writ of error passed, which were at last brought by appeal before your Lordships, upon the liability of that surety, and upon the pleadings in the cause. Upon the pleadings in the cause the question did not arise in the Court of Common Pleas, but in the first court of error into which the cause was brought, namely, the Court of Exchequer Chamber. To the action upon the bond various pleas were pleaded, and various issues raised upon the pleadings, to which it is unnecessary that I should in this case call your Lordships' attention; but much that I have now to offer will turn upon the question of pleading, and, therefore, to the state of the pleadings it will be my duty afterwards to direct the attention of your Lordships. Suffice it at present to say, that the issues being joined were tried before Mr. Baron Alderson, when questions were put to the jury, to the number of seven, to which questions they returned answers, and upon that, by consent, a general verdict was entered for the plaintiff in error, with leave to move the Court of Common Pleas, in which the action was brought, to set aside that verdict and enter a [448] verdict for the penalty of the bond; and that Court being moved, it was agreed that a special case should be taken, to be turned, if necessary, into a special verdict, with a view to carry the question elsewhere, supposing that one or other of the parties should not be satisfied with the judgment of that Court, and was first argued before that Court on a special case, which was afterwards turned into a special verdict.

The Court of Common Pleas, on the argument of that case, were pleased to pronounce judgment for the plaintiffs, the commissioners for the collection of assessed taxes in that parish, the present defendants in error, for the sum of £693, which, as

I have already stated, is that respecting which the question had arisen. Upon that being turned into a special verdict, a writ of error was brought into the Court of Exchequer Chamber, and that Court, after very great difference of opinion, however, finally affirmed the judgment of the Court of Common Pleas. The writ of error, which brings it before your Lordships, was then brought by the defendant in the original proceeding, the plaintiff in error, from the judgment of the Court of Exchequer Chamber affirming the judgment of the Court of Common Pleas; and your Lordships, on hearing this case argued, which it was at great length, and with great learning and ability, had the assistance of nine of the learned judges, including several of those judges who had attended the discussion in the Exchequer Chamber, but, I think, none of those learned judges who had pronounced the judgment originally of the Court of Common Pleas. Those very learned judges who attended the argument here differed very materially on some points, in others they concurred; [449] upon almost all, but not in all, they were of the same opinion, with the exception of some points to which I shall presently call the attention of your Lordships. The result is, that it remains for your Lordships to pronounce judgment, and I certainly feel, in the circumstances I have stated, very considerable anxiety in recommending the judgment about to be submitted to your Lordships; though I think your Lordships will perceive, when I shall have gone through the circumstances of this somewhat singular case, which it will be my duty to do, that there will be no doubt whatever what course your Lordships ought to take.

There were several points made in the Court below which have not been so far relied upon here as to require the consideration of your Lordships, and accordingly on them you put no questions to the learned judges. These related chiefly to the issues on the eighth and eleventh pleas, and the question raised on them was, whether the provisions of the act, regarding the previous examination of the collector by the commissioners, and the hastening his payment of the monies collected to the receiver general, were imperative, so as to constitute the proceedings by the commissioners conditions precedent to their proceeding against the surety, or were only directory. That they were only directory all the judges below, both in the Common Pleas and Exchequer Chamber, appear to have agreed, nor can there be any further doubt upon the point.

We therefore come to the questions which properly now remain for consideration, and the first which presents itself need not detain us long, but it must be [450] disposed of before the others, which are mainly in dispute, arise. Was the payment by the collector of £693 (the sum for which the plaintiff has recovered) to the receiver general, not to the account of the year 1828-29, for the service of which year it had come to his hands, but to the account of a former year, during which the defendant was not security, a breach of the condition in the bond? It appears to me very clear, that such payment was not well and truly paying according to the true intent and meaning of the acts. The acts intend and mean, that the money of each year should be carried to the account of that year; but he paid them in discharge of a debt due by him for a former year. The appointment of collector is annual, and I really can see no difference in the construction here and in the case of another person having been collector the former year. Had it been so, and the money been paid to the account of that person's debt, no doubt whatever could have been raised. Here it is paying another debt of the collector himself, and though the public is the creditor in both cases, yet it is the payment of another debt, as much as if it had been owing to another creditor. Accordingly we find all the learned judges are agreed in their opinions upon this point. On this point, too, the judges of the Common Pleas were unanimous.

The next question is one upon which the Court of Common Pleas gave no opinion, and on which all the other judges, with two exceptions, agreed, both those whose assistance we have had and those who dealt with it in the Exchequer Chamber:—"Was the seizure and sale of the collector's lands and goods by the com-[451]-missioners, a condition precedent to their putting the bond in suit against his surety?" The words of the act (the thirteenth section) appear to leave no reasonable doubt on this subject. After pointing out the manner of giving security, it proceeds to enact "that no such bond shall be put in suit against any surety or sureties for any deficiency, other than what shall remain unsatisfied after the sale of the lands and goods of such collector,



in pursuance of the directions and powers given to the respective commissioners by this act."

Now, as this, taken by itself, could really leave no doubt that the bond was only to be sued upon for the balance left unpaid after the collector's lands and goods had been seized and sold, and as the only ground upon which a question can be raised is the reference made to the powers given by the act, which are specified in the fifty-second section, it becomes material to consider that section. It empowers and authorizes, but does not require, the imprisonment of the collector's person, and seizure of his estate, real and personal, "wheresoever the same can be discovered and found;" and then it empowers and requires the sale of the property which may have been seized, if the collector shall not have paid before the next meeting. From whence it is contended, that, as the commissioners have a discretion given them to seize, and are duly required to sell what they have seized, they are only forbidden, by the proviso in the thirteenth section, to sue the surety for more than the balance left unsatisfied by the seizure and sale, in case they shall have elected to seize and to sell under the 52d section. But the reason why the seizure is discretionary, and the sale only imperative, is, to give [452] the collector the opportunity of redeeming after the seizure. The 52d section relates to the proceedings against the collector, the 13th to those against the surety; and the proviso in the latter appears expressly framed for his benefit. Whoever gives bond for the collector must, on reading the 13th section, perceive that he only becomes bound for what remains unsatisfied after the seizure and sale of the collector's property. To hold that the discretion given by the 52d section of proceeding against the collector imports into the 13th a condition, "in case the commissioners shall choose to seize," would be altering the nature of the proviso, rendering it unavailing to the surety, and placing him in the same situation in which the collector himself is under the statute of William the 3d, and in which the surety would have been, had no proviso been introduced into this act in his favour, although it is plainly the intent of the proviso to place him in a better situation than the collector.

The argument used, that the powers given by the 52d section may be exercised in the surety's favour, after he shall have been compelled to pay the debt, and that a mandamus will lie to compel them to seize and sell, does not appear to have any good foundation. The power given by that section is to seize and sell for the collector's debt; the power given is to seize on his default, and sell for what he has left unpaid. If the payment by the surety is his payment, there is no power to seize and sell, for there is no debt; if the payment by the surety is not his payment, then there may be a debt, and there may be a power to seize; but there is more,—there is an obligation to pay over, just as if the debt subsisted; for the words require a payment, into [453] the hands of the receiver general, of such sums as have not been accounted for by the collector. So that if the commissioners are compellable to seize and sell because the surety has paid, they are compellable to pay the whole debt into the receiver general's hands, although the surety shall have paid; and then the surety must look to the receiver, without any words whatever giving him such recourse;—a construction which seems wholly untenable. It, therefore, appears sufficiently plain, that the bond cannot be put in suit against the surety, unless and until the commissioners have exercised the power given them against the principal.

Although, where a statutory enactment is clear, there is no occasion to argue from the consequences of a construction, and where it is ambiguous, such an argument is only admissible if it is connected with the general intention of the act, yet we cannot avoid perceiving here, that, unless the commissioners are obliged to seize the collector's goods before suing the surety, they may, and very likely will, proceed against a solvent surety, rather than incur the trouble of seizing and selling; so that the whole benefit plainly intended for the surety will be lost to him.

The next question has given rise to a much greater diversity of opinion; it is, whether the commissioners are bound, before proceeding against the surety, to seize all the collector's lands and goods, or only those of which they have notice; meaning by notice, as is now on all hands agreed, knowledge, however acquired.

The proviso in the 13th section is clear and express, [454] that the bond shall not be put in suit for any deficiency other than what shall remain unsatisfied after sale of the lands and goods of the collector, in pursuance of the directions and powers of

the act, that is, those given by the 52d section. This sale being, by what has been already shown, a condition precedent, the 13th section must be read as if it provided that the surety shall not be sued until after the lands and goods of the principal shall have been sold, under the powers of the 52d section, which authorizes the seizure and sale of the whole estate, wherever it can be discovered and found. The two sections taken together thus make no exception, and make the sale of all the principal's estate a condition precedent to proceeding against the surety. Have we any right to engraft upon this plain and positive enactment a qualification restricting the condition to such estate only as shall have come to the knowledge of the commissioners? The only words that can be supposed to import any restriction whatever are these: "Wheresoever the same can be discovered and found." But these words only refer to the local situation of the property, and are meant to give a power over the whole, wheresoever situated. They are enabling words,—of enlargement rather than restriction; they import that whatever property can be any where found may be seized. If they are read as they must be to support the argument raised upon them, they must be thus read:—"Wheresoever the property shall be discovered or become known to them," or, rather, "if any such property shall be discovered or become known to them." But how could they seize any which had not become known to them? This is, plainly, an in-[455]-sensible construction, and the words can only refer to the situation; they mean all property, wheresoever found.

It is not to be denied that the condition of notice may sometimes be implied, where the words of an enactment do not specify it; but this cannot be in cases where the party has no exclusive means of knowledge, or no duty to inquire. The surety may know more about the affairs of the collector than the commissioners, but not necessarily so; nor is there any duty cast upon him more than upon them to become acquainted with the collector's property.

The consequences of a construction which does not hold notice to be necessary form, confessedly, the only ground for maintaining the affirmative of the proposition. It is said, and truly said, that if the commissioners cannot proceed against the surety until all the property of the collector is seized, they may not be safe in proceeding while any unknown parcel of goods exists, or in case any estate, real or personal, has, on the eve of the seizure, come to the collector by descent, devise, or bequest. But nothing can be more dangerous than to make such considerations the ground of construing an enactment, quite complete and unambiguous in itself. If we depart from the plain and obvious meaning on account of such views, we, in truth, do not construe the act, but alter it; we add words to it, or vary the words in which its provisions are couched; we supply a defect which the legislature could easily have supplied, and are really making the law, not interpreting it. This becomes peculiarly improper in dealing with a modern statute, because the extreme conciseness of the ancient statutes was the only ground [456] for the sort of legislative interpretation frequently put upon their words, and the prolixity of modern statutes is still more remarkable than the shortness of the old. The only safe rule to go by is to hold, that if the legislature had intended to obviate the consequences apprehended, it would have done so; nothing, confessedly, being more easy than to have added words for confining the condition precedent to the property of which the commissioners had notice.

In considering this point no authorities are to be found, except so far as the *dicta* of Lord Tenterden and Mr. Justice Holroyd, in *Peppin v. Cook*, certainly favour the literal construction rather than the other. But then no case has been cited, and none can be shown, where, in construing a recent statute, requiring all the things of a certain description to be dealt with by or in a particular way, the courts have held themselves called upon to add the words, "and whereof A. had notice or knowledge." Nothing could justify this but the impossibility of making sense of the provision otherwise. Now here it is not contended that the general meaning of the enactment makes the addition necessary; the statute is very sensible without it. Neither is it necessary for enabling the commissioners to act; they may ascertain the property of the collector at the time of appointing him and accepting his security. They may even inform themselves from time to time of any change in that property; but if they should be unable to do so, and inconvenience should hence arise, still this is no ground for adding to the statutory enactment, because the legislature might easily have provided against it.

But supposing we are agreed that the seizure and [457] sale is a condition precedent, and that the want of notice is immaterial; in other words, that the surety has a good defence to the action, on the ground that the plaintiffs, the commissioners, had not seized and sold the collector's property;—although it follows from hence that the judgment must be reversed, because it cannot be given for the plaintiffs, it still does not follow that it must be entered for the defendant, or that, in the state of this record, it can be so entered. We must now, therefore, examine the pleadings, with a view to finding whether there be any issue joined between the parties, upon which judgment can be given. For this purpose the fifth plea, and the issue on the replication to that and the rejoinder, need alone be considered, because, the sixth being similar to the fifth, and the seventh and twelfth referring themselves to the fifth and sixth, the whole questions on the pleadings resolve themselves into the question arising on the fifth plea, and the whole four issues, nine, twelve, thirteen, and sixteen, raise only the same question, namely, that arising out of the pleading upon the fifth plea.

The fifth plea is, that the collector, before action brought, and continually hitherto, had lands and goods within the jurisdiction of the commissioners, of which they had notice, and which might have been seized and sold under the act to satisfy the debt of the collector, but that the same have not been so sold by them;—in substance, that the collector had property of which the commissioners had notice, and that they did not seize and sell it. The replication is, that after the default the collector had, within the jurisdiction of the commissioners, no lands of which they had notice, and no goods of which they had notice, other than a certain [458] parcel known to them, and which they had seized and sold;—in substance, that the collector had no property subject to seizure and sale, of which the commissioners had notice.

The rejoinder is, that after the default the collector had lands which the commissioners might have seized and sold, and that after the default all the goods of the collector at the time of the default, and which might and ought to have been discovered and found by the commissioners within their jurisdiction, were not seized and sold by them, in pursuance of their powers under the act, in manner and form as alleged by the plaintiff, and it concludes to the country;—in substance, that the collector had lands which might have been sold, and that his goods, which might have been sold, were not sold. And this rejoinder says nothing whatever of notice; the *modo et formâ* clearly referring, not to the substantive matter of the plaintiff's allegation, namely, "goods of which the commissioners had notice," but only to the manner in which the plaintiffs had made the allegation.

Then the verdict is, that the collector had lands and goods after the default, and until the commencement of the suit; which lands and goods might have been seized and sold by the commissioners under the act before the commencement of the suit; but that the commissioners had no notice of the collector's lands, but had reasonable grounds for believing that he had goods; and as this does not amount to a finding that they knew of the goods, nor, indeed, even to a finding that they believed he had any, it has been treated as a finding that they had no notice of either lands or goods. I am rather disposed to regard it as negating notice of [459] the lands, and as no finding at all on notice of the goods; but this becomes immaterial, if the notice is immaterial; therefore let it be taken, as it has been taken, to be a finding that they had notice neither of lands nor goods.

We are now to consider what the issue is upon which this verdict is found, and whether there really is any issue at all. The plea affirmed the existence, not of lands and goods absolutely, but of lands and goods of which the commissioners had notice, and which they might have seized and sold. The replication asserts that there were no seizable and saleable lands and goods of which the commissioners had notice. The rejoinder, without mentioning notice at all, asserts that there were seizable and saleable lands, and that goods, seizable and saleable, were not seized and sold; which, though very inartificially expressed, may be taken, after verdict, to assert what it does not, except inferentially, that the collector had goods, as well as land, seizable and saleable. Now, it is plain that here the parties make their averment of and concerning different things, and not of the same thing; the one pleads respecting property in one predicament, the other respecting, not the same, but property in another predicament. The allegations of the two parties, far from being diametrically opposed to one another, as they must be to raise an issue, are not at all inconsistent with each other. If I say, that all the freehold lands of J. S. in the manor of A.

have been sold, and my adversary only says that all the lands of J. S. in the manor of A. have not been sold, he does not negative my assertion. My proposition contained a negative pregnant; indeed the replication would, on the ground, have been demurrable [460] specially. I might have explained or particularized the proposition thus, "all the freeholds have been sold, but all the copyholds remain unsold;" and my adversary might have explained or particularized his proposition in the very same words, so that, instead of one having asserted an affirmative and the other a negative respecting the same matter, which is the character of every issue, both of us would only have been asserting propositions which, far from being opposite, are quite consistent, and might have been identical.

The more this pleading is examined the more plainly it will appear that it raises no issue at all; neither an informal one, which would be cured by the statute after verdict, nor an immaterial one, which could not be so cured;—but no issue whatever; consequently the verdict is a nullity, according to the authorities, *Sandbach v. Turvey*, *Croke*, *James*, and other cases lay this clearly down; and although cases are cited which seem to throw some doubt on the position, it is to be observed that those are rather cases where there was an issue raised, though an informal issue. One of them, too, *Parker v. Taylor*, in *Croke*, *Charles*, is said in another case, *Walsingham v. Coombe*, in *Siderfin*, 289, to have been denied, and another of them, *Waltham v. Aldrick*, in *Croke*, *James*, was decided the very term after *Sandbach v. Turvey*, viz., *Michaelmas*, 17 James 1, and without any reference to the former case, which plainly shows that the two decisions were not regarded as inconsistent. Nothing, indeed, could be more contrary to all principle, nay, to common sense, than to regard a finding upon an issue which had no existence as other than a nullity; the jury must be taken [461] to have found a verdict upon a matter not before them, as much as if they had given a verdict in another cause.

The learned judges have all agreed that the verdict on the fifth plea must be entered for the defendant, but none of them hold that the judgment can be entered for the defendant. Upon different reasons they all arrive at this conclusion, as well those who hold the seizure and sale of all property a condition precedent, as those who hold only a seizure and sale of the property known to the commissioners a condition precedent; and much more the learned judge who alone considers the seizure and sale no condition precedent at all, whether with or without notice. I ought to state, that one of the learned judges only whose assistance your Lordships had, Mr. Baron Parke, took that view of the case, that a seizure and sale was not a condition precedent, with or without notice. He was the only learned judge here who held that proposition; but one learned judge in the Court of Exchequer concurred with him in that opinion, namely, my Lord Abinger. All the other judges, in the Court of Exchequer Chamber as well as here, took a different view. The whole of the learned judges, therefore, whose opinions have been given in answer to the questions put, are agreed, that there can, in no view, be judgment for the defendant upon the issues which these pleadings raise, but that, if judgment be not entered for the plaintiffs, there must be a simple reversal, and they must begin again, should they be so advised. A repleader would have been awarded in the Common Pleas, had the points on the pleadings been made there; but it is agreed, on all hands, that a court of error cannot award a repleader.

[462] The only grounds upon which judgment could be given for the plaintiff are two: either that it may be given *non obstante verdicto*, on an implied confession in the rejoinder, or that, upon matter disclosed in the other parts of the record, it may be given, disregarding the immaterial issue. But all the learned judges hold that judgment *non obstante verdicto* cannot be given on an implied confession in the rejoinder that, if there were lands and goods, the commissioners had no notice of them; and surely the mere dropping all mention of notice,—the merely not re-asserting in the rejoinder the notice which he had asserted in his plea, cannot be taken as a confession of want of notice, entitling the plaintiff to judgment. The case on this point stands thus: the plea is good, even if notice be supposed necessary; the replication meets the plea on this ground, and, therefore, answers it sufficiently; the rejoinder, dropping all mention of notice, is bad, on the supposition that notice is necessary, and is demurrable, but they have not demurred. But then it contains no confession; the mere leaving out notice—the not averring notice does not confess

it. The averment in the replication was not substantive, that the commissioners had notice; but the notice was part of one entire allegation, and the omitting a part, which was essential to its materiality, and so leaving what was least immaterial, cannot be taken as a confession of the thing omitted; therefore, even supposing notice material and necessary, the plaintiffs could not have judgment on this ground.

Even supposing notice necessary, the plaintiffs cannot have judgment on the whole record, if, as all but one of the learned judges held, the seizure and sale be a [463] condition precedent. All are agreed, with the exception of another learned judge, who, agreeing that the seizure and sale form a condition precedent, yet holds that enough appears on the whole record to entitle the plaintiff to judgment. For this opinion there is, confessedly, no direct authority; but what the Court of Common Pleas said in *Goodburne v. Bowman* is relied on to show that, though it is admitted you cannot have recourse to one plea not expressly referred to, in considering the sufficiency or insufficiency of any other plea, yet that all the pleas may be taken into consideration in entering judgment on the whole record. But it does not appear to have been necessary to that case that this should be held; it was, therefore, extra-judicial in that case; and even if it had not been so, there is this difference between the two cases, that there the pleas were held bad out of which the immaterial issues arose, while here a good plea remains in bar of the action, after passing over the immaterial issue, or treating it as a nullity. The judgment of reversal, which may now be given, will, therefore, substantially agree with all the opinions but one of the learned judges, upon the assumption, in which all but another of the learned judges are agreed, that seizure and sale are a condition precedent.

The consequence will be, that the plaintiffs may begin again *de novo*; but if I am right in agreeing with those of the learned judges who hold want of notice to be immaterial, the most carefully conducted pleadings in another suit never can avail the plaintiffs, or entitle them ultimately to a judgment.

Of the questions to which I have directed the attention of your Lordships, it is to be observed, that, though the [464] three first, those upon the merits of the defence, were decided in the Court of Common Pleas, those arising upon the pleadings do not appear to have been there made, and accordingly we have no judgment upon them except that in the Exchequer Chamber, where one only of the three learned judges who have not attended your Lordships has given any opinion on those points. Even of the questions upon the merits, the first appears to have been argued more fully than the other two; a great part of the judgment is upon the points which have never been made, or at least at all relied on here, and a very small portion of it relates to that which has been the subject of discussion before your Lordships.

Lord Chancellor.—My Lords, notwithstanding the complexity of this case, and the difference of opinion amongst the judges upon some points, it does not appear to me that there is much difficulty in deciding upon the course this House ought to adopt, because there are points upon which there is a uniformity of opinion amongst the judges, in which it is, I think, impossible not to concur, as to such part of the case as must regulate that course, if your Lordships agree in opinion with the learned judges upon those points. That the condition of the bond was broken, there is, I conceive, no doubt; in this all the judges concur, and all but one concur in thinking that the appropriation of the property of the collector towards payment of the debt due from him was a condition precedent to calling upon the surety. Whether it was to exhaust the whole of his property, or such part only as came to the knowledge of the commissioners, was the subject of much difference of opinion amongst the judges; but, as the defendant [465] by his fifth plea set up the defence that the property of the collector, of which the commissioners had notice, had not been applied, and as the decision must turn upon the course adopted by the parties upon that plea, it does not appear to me to be very material to consider how far the defendant might have defended himself by pleading and proving that the collector had property unapplied, of which the commissioners had notice.

According to the opinion of all the judges but one, the fifth plea, if established by a verdict, would have amounted to a good defence to the action. Objections were made to the manner in which the plaintiffs' replication to this fifth plea was framed, but in substance the replication tendered an issue upon the defence set up

in the plea, alleging that the collector had property of which the commissioners had notice. The defendant, however, instead of joining issue upon the point so raised by his rejoinder, departed from it altogether. The plaintiffs, instead of taking the proper course to correct this irregular pleading, took issue upon it, and the question is, what, under such circumstances, ought to be the fate of the action? The issue so raised, being, if to be considered as an issue at all, immaterial, cannot, though found for the defendant, be the ground of a judgment for him in the action, and the state of the pleading precludes the plaintiff having a judgment *non obstante veredicto*, for, so far from there being any admission upon the record of his title, there is the fifth plea, which, if true, would constitute a good defence to it. This unfortunate state of the pleadings could not have arisen without blunders on both sides. That there can be no replender in this House appears clear, from the opinion of all the judges, and the authorities to [466] which they refer; and as there can be neither judgment for the plaintiff nor for the defendant, the only course is to reverse, simpliciter, the judgment of the Court below.

Lord Brougham.—The defendant cannot get his costs, though he succeeds; but upon the whole, every thing connected with the rejoinder being considered, I cannot say that that, in my opinion, is to be regretted.

Judgment reversed.

[467] ON A WRIT OF ERROR FROM THE COURT OF EXCHEQUER CHAMBER  
IN IRELAND.

JOHN GALWEY, *Plaintiff in Error*; GODFREY THOMAS BAKER, *Defendant in Error* [15th March 1838 and 28th July 1840].

[Mews' Dig. viii. 1240. S.C. 7 Cl. and F. 379. Discussed in *Pentland v. Somerville*, 1851, 2 Ir. Ch. R. 295; and see *Mount-Cashel v. O'Neill*, 1856, 5 H.L.C. 937; Furlong L. and T., 2nd ed. pp. 682, 688; Land Act, 1860, s. 31.]

Under a demise "reserving all wood and underwood, timber and timber-trees, standing, growing, or being on the demised premises, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and egress to take and carry away the same."—Held, that this clause secured to the owner of the inheritance the benefit of such trees as were upon the premises at the time of the demise, but did not transfer to him the property in trees planted under the provisions of the statutes in force in Ireland \* respecting the planting of trees, the property therein being vested in the lessee.

\* By 5th and 6th Geo. 3 chap. 17. sect. 2. it is enacted, that if any tenant for life or lives by settlement, dower, courtesy, jointure, lease, or any office, civil, military, or ecclesiastical, impeachable of waste, or any tenant for years exceeding twelve years unexpired, shall plant sally, ozier, or willows, the sole property of such shall, during the continuance of the term, vest in the tenant, and he may cut and fell the same under the restrictions herein-after mentioned; and if such tenant shall plant any timber-trees of oak, ash, elm, fir, pine, walnut, chestnut, horse chestnut, quicken or wild ash, alder, poplar, or other timber-trees, such tenant, during the term, shall be entitled to a housebote, ploughbote, cartbote, and carbote of such trees by him planted, and at the expiration of the term, or where such trees shall have attained maturity, which shall first happen, shall be entitled to the said trees. or the value of them, according to the directions herein-after mentioned; any covenant heretofore made, law, or usage to the contrary notwithstanding.

By 23d and 24th Geo. 3. chap. 39, sect. 6 it is enacted, that any tenant may sell his or her right, title, and property in said trees or coppices, or any part of the same, to any person under whom he or she may derive mediately or immediately, and that the person so purchasing shall have all the rights, titles, and properties and privileges therein which are or by this act shall be secured to the said tenant: provided always, that no sale or transfer of the same shall be deemed good in law, unless and until the

[468] John and Edward Galwey, being seised in fee of lands at Lota, and the dwelling house thereon, by indentures of lease and release, dated the 28th and 29th days of October 1789, demised the same unto Sir Richard Kellest and his heirs for the term of three lives, with covenants for perpetual renewal.

The said indenture of release contained a clause in the words following; viz. "Saving and always reserving out of the said demise unto the said John Galwey and Edward Galwey, and to the person or persons who should from time to time be entitled to the reversion in said lands, all mines, minerals, and royalties happening or being thereon, and also all wood and underwood, timber and timber trees, standing, growing, or being thereon, or at any time thereafter to stand or grow thereon, with full and free liberty [469] of ingress and egress to take and carry away the same."

John and Edward Galwey having both died, the reversion in fee of the premises, subject to the demise for lives, became vested in the plaintiff, John Galwey.

The interest of Sir Richard Kellest in part of the demised premises subsequently became vested in William Massey Baker, who planted timber trees thereon, and duly registered the same pursuant to the provisions of the Irish statute of 23d and 24th Geo. 3. chap. 39, and shortly after died; whereupon Godfrey Thomas Baker, the defendant, became seised of part of the premises vested in William Massey Baker, deceased, and of all the estate and interest of Sir Richard Kellest therein.

The defendant Thomas Godfrey Baker having cut down and sold some of the timber trees planted and registered by William Massey Baker, the plaintiff John Galwey, in Hilary term 1835, brought an action of trover against the defendant, in the Court of King's Bench in Ireland, to recover the trees; and the defendant having pleaded the general issue, the action came on to be tried in March 1835, at the assizes for the county of the city of Cork, before Richard Wilson Greene, king's serjeant; when the several facts before mentioned having been proved, the jury, under the direction of the judge, found a verdict for the plaintiff. A bill of exceptions was tendered to the opinion of the judge by the defendant, and upon argument the Court of King's Bench gave judgment for the defendant. The plaintiff brought a writ of error to the Court of Exchequer Chamber in Ireland upon such judgment, but upon argument the judgment of the Court of King's Bench was affirmed.

[470] From the judgment of the Court of Exchequer Chamber this appeal is brought.

The Attorney General and Sir William Follett for the plaintiff in error.

Sir Frederick Pollock and Mr. Thesiger for the defendant in error.

Lord Chancellor.—In this case many cases were referred to in the argument at the bar as to what would have been the effect of the terms of reservation in the lease if the timber acts had never been passed. In the view I take of this case it is not necessary to consider that point. These acts altered the common law as to the title of the lessor and lessee in timber planted by the lessee.

By the 5th and 6th of George the 3d, chap. 17. tenants for lives renewable for ever are made dispunishable for waste in timber trees and wood which they shall hereafter plant. By section 2. any tenant for life who shall plant timber trees shall, at the expiration of the term, or when such trees shall have attained maturity, be entitled to the trees.

same shall be done in writing, and signed by the said tenant, and an attested copy of said writing or instrument lodged with the clerk of the peace, in open court, at some quarter sessions of the peace for the county or county of a city, having been first proved to be a true copy by some credible witness, upon oath, before the justices at said sessions; and an attested copy of the copy of such writing or instrument, signed by the acting clerk of the peace, shall be deemed in all courts to be evidence of the due registry of such writing or instrument; and if the head or principal landlord shall so purchase the said trees or coppices from an under-tenant having a right to sell the same, then from and after the registry of the sale as aforesaid the said trees shall belong to said landlord, notwithstanding any intermediate term that may exist between the term of the said under-tenant and the estate of the said landlord.

By the 23d and 24th George the 3d, chap. 39. passed in 1783, any tenant for life who shall plant timber trees shall be entitled to cut, fell, and dispose of the same at any time during the term, provided the tenant causes such trees to be registered in the form prescribed. By the 6th section the act permits the tenant to sell his right, title, and property in such trees to the person under whom he holds, but no sale or mortgage of the same shall be deemed good in law unless and until the [471] same shall be done in writing and signed by the tenant, and a copy registered with the registry of the trees; and if the head landlord shall so purchase such trees from the tenant, then from and after the registry of the sale the trees shall belong to the said landlord, notwithstanding any intermediate term. By the 16th section it is provided, that nothing therein shall be construed to extend or to relate to any trees planted or to be planted in pursuance of any covenant contained in any lease, nor to invalidate any such covenant.

Such being the state of the law, the lease in question was granted, in 1789, for three lives, with a covenant for perpetual renewal, with this clause: "saving and always reserving out of the said demise, unto the lessor and the owner for the time being of the reversion, all mines, minerals, and royalties happening or being thereon, and also all wood and underwood, timber and timber trees standing, growing, or being thereon, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and egress to take and carry away the same."

It was argued, that, under these statutes, any contract between the lessor and lessee by which the lessee's title to the trees he might afterwards plant should become the property of the landlord would be illegal, as contrary to the policy of the statutes, and therefore void. It is, I think, unnecessary to express any opinion upon this point, but it may be observed that the 6th section of the 23d and 24th of George the 3d carefully guards the tenant in any sale of the trees planted by him to his landlord, and that the 16th section guards against the act operating in cases of trees planted in pursuance of any covenant. Any construction, therefore, which may [472] have the effect of depriving the tenant, and through him the public, of the benefit of the act, would be contrary to the intention and policy of the acts, and ought not to be adopted, without necessity. These two sections, and, indeed, all the provisions of the act, establish this, that trees planted by the tenant under the provisions of the act are the absolute property of the lessee. In this case the trees in question were planted by the lessee, and duly registered in pursuance of the direction of the act, and were cut by the defendant, who holds his interest in the lease. These trees, therefore, are the property of the defendant (the lessee) under the provisions of the act, and the lessor never had any estate or interest in them; unless he can maintain his claim under the clause in the lease, and to do so he must show that the clause is effectual to give to him (the lessor) a title to property which was not and never would, by operation of law, be his. It must, therefore, amount to a transfer to him of property which the tenant might hereafter create and become entitled to; and in considering the terms of the clause, it may be inferred that there must have been some timber trees upon the estate, and that trees, not then existing as such, might grow up on the property, other than such as might be planted by the lessee; all which, as part of the inheritance, would belong to the lessor, subject to the tenant's right to the use and enjoyment of them, and which, without the consent of the lessee, or some express provision for that purpose, the lessor could not cut, or enter upon the estate for the purpose of taking away.

It may also be assumed, that the terms used ought not to be construed so as to transfer the property of the lessee to the lessor, if any reasonable construction can [473] be given to the terms, with reference to any other subject matter upon which they can operate. The clause is a reservation out of the demise,—not a reservation of some new right or interest, but an exception from the demise, and the matters so reserved or excepted are mines, minerals, royalties, woods, and trees then growing thereon; all, therefore, at the time part of the lessee's property. The object of the clause so far was to accept out of the demise, and reserve to the lessor, certain parts of the property of the lessee, and to do so effectually it was necessary also to except trees which might thereafter grow upon the estate, under circumstances which would give him the property in them. To effect this the words "or at any time thereafter to stand or grow thereon" were necessary. Being necessary for that purpose, which



is the general purpose of the rest of the clause, are they to be construed to have the effect, not of excepting or reserving to the lessor that to which he would otherwise have a qualified title, but of assigning and transferring to him that which would be the property of the lessee?

It is also to be observed, that the right is reserved to the lessor of entering upon the land demised, and to take and carry away such trees. If, therefore, the parties intended that this clause should apply to trees to be planted by the tenant under the provisions of the statute, it would have the effect of depriving the tenant of the benefit intended to be secured to him by the statutes, without providing any transfer to the lessor; for it could not have been supposed that the lessee would plant, if the lessor were to be at liberty to enter upon the land demised and cut and carry away the trees so planted; and as the act 5th and 6th George the 3d [474] recites, it is equal to inheritance, whether tenants do not plant, or have a property in what they plant.

It appears to me, therefore, that the true construction of this clause is, that it was intended to exclude the tenant's right and interest in such trees as formed part of the inheritance, and thereby to secure to the owner of the inheritance the full benefit of such trees, and not to transfer to him the property in trees which, being planted under the provisions of the statutes, formed no part of the inheritance which belonged to the lessee. I make no observation upon the point raised at the bar as to the regularity of the proceedings in Ireland, the parties having agreed to waive that question, and to ask the judgment of this House upon the merits. It appears to me, therefore, that the judgment must be given for the defendant in error, and with costs.

Lord Brougham.—I certainly agree with my noble and learned friend in the observations he has addressed to your Lordships in this case. It does not appear to me to be necessary to determine either of the two questions which have been made in this case; first, whether or not after-planted trees can be made the subject of reservation in a demise, this really seems no question at all; secondly, whether or not, the sixteenth section of the 23d and 24th George the 3d having specially excepted from the operation of the act trees planted in pursuance of covenants in a lease, and having also declared these covenants themselves to be valid, notwithstanding the provisions of the act, all clauses expressly reserving the after-planted timber to the reversioner are insufficient for that purpose, as being rendered void by the act? These questions can only [475] arise upon the supposition that the clause in question does contain such a reservation of after-planted trees. The provisions of the act to encourage the planting of timber by tenants, and the sixteenth section of the latter act, show that the reservation must be plain and distinct.

Admitting for the present that after-planted trees may well be reserved, or rather admitting that parties may contract so as to give the reversioner the property in trees planted by the tenant, even in cases where, as here, the lease has a clause of perpetual renewal, still both the policy of the statutes and the relation between the parties in respect of the property show that they must have used clear and unequivocal words to express their intention; and that where these words are easily capable of another sense—a sense consistent with the statutory provisions, and consistent with the probability of the case as arising out of their several interests and the property demised, we should, as the Court below appears to have done, prefer reading the covenant in that sense.

The words on which the plaintiff in error relies are these, “at any time thereafter to stand or grow thereon,” that is, on the premises demised. The question is, whether or not these words must needs mean trees after planted. But, plainly, they do not necessarily extend to such trees, for they may only be intended to reserve trees afterwards growing upon stools of trees already planted, nor is it at all probable that parties would bind themselves in the way supposed by the plaintiff's construction. Why should a person stipulate for property in trees which the stipulation renders it in the highest degree unlikely should ever come *in esse*, by [476] making it in the highest degree unlikely that the other party should ever plant them? And, taking the words of the demise no more strongly against the lessor than the lessee, why should a person bind himself not to plant for profit, or, which comes to the same thing, only to plant for the profit of another?

The clause reserving liberty of ingress and egress to take and carry away the

same, plainly proves nothing; for, first, this may apply to the mines and minerals which are reserved, and, next, it was necessary, on account of the timber growing at the time of the demise. As, therefore, I can see nothing in the clause which makes the construction put upon it by the plaintiff unavoidable, but, on the contrary, incline to think the opposite construction the more reasonable, I can have no doubt that the covenant is insufficient to take the case out of the statutory provisions, and, therefore, that the judgment of the Court below ought to be affirmed.

Judgment of the Court of Exchequer Chamber in Ireland, affirming a judgment in the Court of King's Bench in Ireland for the defendant in error, affirmed, with costs.

[477] FROM THE COURT OF CHANCERY, IRELAND.

PETER DIGGES LA TOUCHE,—*Appellant*; The Right Honourable GEORGE CHARLES Earl of LUCAN,—*Respondent* [4th and 6th August 1840].

[Mews' Dig. ii. 1381, 1382; xiv. 344. S.C. 7 Cl. and F., 772; 2 Dr. and Wal., 271, 432.]

Sir Neal O'Donell being tenant for life of a freehold estate, and of an estate renewable for lives, subject to a head rent (which was in arrear), and having filed a bill to prevent the execution of a judgment in ejectment, brought by the head landlord, for nonpayment of rent, by deeds of 9th and 10th October 1798 conveys his life estate therein to a trustee, upon trust to raise £10,000 by mortgage, for payment of the arrears of rent and other incumbrances, and out of the rents, after payment of other charges, to make provision for himself and the other members of his family. On the 9th March in the same year Lord Lucan transfers certain stock to the credit of the suit, for the purpose of redeeming the estate from the arrears of rent. In the month of June 1826 the trustee under the trust deed, knowing of the advance made by Lord Lucan, writes a letter to Lord Lucan's solicitor, (antedated in February,) stating, that if any party would advance money for the arrears of rent and costs, he would consider such advance as raised by him under the power contained in the trust deeds, and would exercise the power in the best manner he could for securing the advance. [478] During the pendency of negotiations between the trustee and Lord Lucan, for mortgaging the estate for securing the advance under the power contained in the trust deeds, Sir Neal O'Donell dies. Held, that a bill filed by Lord Lucan against the trustee for carrying into execution the trusts of the deeds, and for charging the estates, under the provisions of the deeds, with the payment of his advances, could not be sustained, inasmuch as Lord Lucan, not being a party to the deeds, could not enforce their execution. Held, likewise, that the letter could not make Lord Lucan a *cestuique* trust under the deeds, as it purported only to give him a mortgage of the estates for the life of the tenant for life, whose death prevented the mortgage being effected.

Decree below reversed.

Sir Neal O'Donell, under deeds of the 9th and 10th October 1798, was tenant for life of a certain estate, known by the name of the Newport estate, in the county of Mayo, for a term of three lives renewable for ever, at the yearly rent of £980, and of certain freehold estates situate in the counties of Mayo and Galway, called the Cong and Newport estates.

In Easter term 1825 the head rent being very much in arrear, and the Marquis of Sligo being then entitled to the rent and reversion of the Newport estate, he brought an ejectment for nonpayment of the rent, and judgment was, with the consent of Sir Neal O'Donell, entered up in the ejectment suit.

On the 10th day of November in the same year Sir Neal O'Donell exhibited his bill of complaint in the Court of Chancery of Ireland against the Marquis of Sligo and others, praying that he might be at liberty to redeem the premises upon payment of the rent then due to Lord Sligo.

[479] Sir Neal O'Donell being indebted to Lord Sligo in the arrear of rent, and also to several other persons in large sums of money for interest then due on the incumbrances created by the deed of the 10th of October 1798, and being largely indebted on his own account, in the month of October 1825 gave his solicitor, William Furlong, instructions to prepare a deed, vesting his life interest in the estates in trust for the purpose of raising a sum of money sufficient to discharge the arrear of rent and the other demands to which he was liable, and also to charge the estates with certain annuities for the necessary maintenance and support of himself and family.

In the month of December 1825, or in the beginning of January 1826, while the trust deed was being prepared, several overtures were made to Sir Neal O'Donell on the part of the respondent, then Lord Bingham, who had declared himself a candidate for the representation in parliament of the county of Mayo, at the election which was then about to take place, for his support and influence. At that time Lord Bingham had proposed, on the part of his father, to advance money for the payment of the arrears of rent, and it was proposed by the solicitor of Lord Lucan that Lord Bingham should be appointed joint trustee with the appellant in the trust deed, but in consequence of the opinion of counsel that Lord Bingham should not be a trustee, it was settled that the appellant should be appointed sole trustee under the trust deed; and, accordingly, by indentures of lease and release, dated the 12th and 13th of February 1826, the release being made between the said Sir Neal O'Donell, of the one part, and appellant, of the other part, Sir Neal O'Donell conveyed the Newport estate, then held under [480] the Marquis of Sligo subject to the rent of £980, and the Cong and Newport estates, to the appellant, his heirs and assigns, for the life of Sir Neal O'Donell, upon trust, after payment of the expenses incurred in the performance of the trusts, to raise £10,000 by mortgage of the estates, in order to pay what was due for the arrears of rent, and to pay other incumbrances therein mentioned; and upon trust, out of the rents and profits of the estates, after paying the interest of certain incumbrances, to make some annual payments to Sir Neal O'Donell and the other members of his family.

Prior to the execution of the trust deed, Sir Neal O'Donell furnished Lord Bingham's solicitor with a copy of the draft of the trust deed.

In the latter end of the month of February or beginning of March 1826, Sir Neal O'Donell was offered the loan of £6000 by a Mr. Malachy Ryan, for the purpose of discharging the arrear of rent due to Lord Sligo; but his offer was declined by Sir Neal O'Donell, on an assurance, on the part of Lord Bingham, that he would procure the necessary funds for the payment of the arrear of rent.

On the 9th of March 1826, pursuant to an order for that purpose made in the redemption suit, a sum of £4002 1s. 3d. old government 3½ per cent. stock, being the property of Richard Earl of Lucan, the father of respondent, was transferred to the credit of the cause for the redemption of Sir Neal O'Donell's interest in the Newport estate.

On the 13th June 1826, (shortly previous to the election of Mayo, which took place in that month,) the following letter was signed by the appellant, and sent to the solicitor of Lord Lucan:—

[481]

“23d February 1826.

“Dear Sir,—Sir Neal O'Donell has now executed the deed vesting all his life estate in me, in trust to raise money, in the first place, to pay the rent and costs of the ejectment pending, and, next, to pay the interest of the incumbrances. If you will prevail on any client of yours to advance three or four thousand pounds in time to pay the rent and costs, or even on account of it, I will consider such advance as raised by me under the power given me, and will, whenever you please, exercise that power, by securing such advance in the best manner I am empowered by the deed; it being distinctly understood that in doing so I am not to be in any way personally answerable for either the principal or interest, further than as trustee for the due application of the rents pursuant to the trust deed.—I am, dear sir, yours, very truly,

“PETER DIGGES LA TOUCHE.”

“To Richard Livesay, esq. Mountjoy Square.”

This letter had been prepared and drawn out by Sir Neal O'Donell's and Lord Lucan's solicitors, and had been agreed between them should be antedated.

In the interval which elapsed between the 13th June 1826 and the 1st March

1827, when Sir Neal O'Donell died, several negotiations were carried on between William Furlong, the appellant's solicitor, and Richard Livesay, the solicitor of Lord Lucan, for the purpose of devising some mode of giving Lord Lucan the benefit of the trusts of the deed of the 13th of February 1826, for securing the advances he had made for the payment [482] of the arrears of rent. On such occasion William Furlong explained the nature of the deed, and particularly with reference to the provision thereby made for Sir Neal O'Donell and his family, whereupon Richard Livesay, and respondent, who was present, declared, on the part of Lord Lucan, that they had no idea of interfering with that provision; but that they conceived the income of the estates would, after payment of the interest of prior incumbrances, and the several annuities to Sir Neal O'Donell and his family, be sufficient to allow of instalments of £1000 per annum to be applied in liquidation of the advance made by Lord Lucan; but William Furlong objected to so large an instalment, and it was agreed that said Richard Livesay should get such deed prepared as he conceived the persons entitled to; and, accordingly, in July or August 1826, a draft deed of mortgage of the trust estates for the life of Sir Neal O'Donell was furnished by Richard Livesay to William Furlong, which purported to grant the lands in mortgage to Richard Earl of Lucan for the life of Sir Neal O'Donell, and to declare that appellant should, on or before a certain day to be therein named, cause to be effected a policy of insurance on the life of Sir Neal O'Donell in the amount of said loan, and assign the same to Richard Earl of Lucan, the premium on said insurance to be paid by appellant; and further, that appellant should pay to Lord Lucan the said loan by half-yearly instalments, the first instalment to be paid on the first of November following. The draft deed was afterwards returned by William Furlong to Richard Livesay, and, in consequence of objections made by William Furlong, no deed was executed pursuant to the draft.

[483] In the month of January 1827 a further draft of mortgage was furnished by Livesay to William Furlong, and discussions took place relating to this draft till the time of Sir Neal O'Donell's death. In consequence of his death, and the disagreement of the parties as to the form of the deed, no mortgage deed was ever executed. During the progress of the negotiations, the persons acting on behalf of Lord Lucan were fully aware of the manner in which appellant applied the rents of the trust estates, and no demand was at any time made on the part of Lord Lucan, that appellant should apply any part of the rents in payment of the principal or interest of the said advance.

Several attempts were made to effect an insurance on the life of Sir Neal O'Donell, but without effect, in consequence of his advanced age and state of health.

On the 21st of March 1827 Richard Lord Lucan, since deceased, filed his bill in the Court of Chancery of Ireland against the appellant and other persons interested in the estates, and thereby stated the proceedings by ejectment taken by Lord Sligo for the recovery of the rent due out of the Newport estate, and the proceedings in the Court of Chancery on the part of Sir Neal O'Donell to redeem said estate; and that negotiations were set on foot between Sir Neal O'Donell and appellant, and their agents, to induce Lord Lucan to advance a sum of money for the redemption of the lands under ejectment; and for that purpose it was proposed that the life estate of Sir Neal O'Donell in all his estates, including the estate under ejectment, should be vested in respondent as sole trustee, or jointly with appellant, for the purpose of securing such advance: that appellant objected to respondent being a party to [484] the deed, and prevailed on Sir Neal O'Donell to execute a deed to appellant as sole trustee, not only for the purpose of securing said advances, but for other purposes in no wise connected therewith, and that accordingly the deed of the 13th of February 1826 was executed by and between Sir Neal O'Donell and appellant. The bill further stated the letter of the 23d of February 1826 from the appellant to the agent and solicitor of Lord Lucan. The bill further alleged, that plaintiff being informed by his agent and solicitor, that any sum to be advanced by him on the faith of the letter would be the first charge on the life estates of Sir Neal O'Donell under the trust deed, and would be paid in preference and priority to any other charges created by said deed, plaintiff, on the faith of said letter, and of the representations so made by appellant as to the security of such advance, and for the purpose of redeeming said estates from eviction, on the 13th of March 1826 caused a sum of £4002 1s. 3d. government three and a half per cent. stock, belong-

ing to plaintiff, to be transferred to the credit of the redemption suit in the name of Sir Neal O'Donnell, and that by reason of such transfer said estates were saved from eviction. The bill further alleged, that at the time said transfer was made, and for a long time subsequent thereto, neither plaintiff nor any person on his behalf had seen the deed of trust or any copy thereof, or was acquainted with the provisions thereof, save from the representations so made by appellant, by his said letter of the 23d February 1826, and other the representations of the appellant to the like effect, and of the persons acting for the appellant; and it having been represented to plaintiff's solicitor by the appellant and his solicitor, that the time [485] for the redemption of said lands was too short to enable him to prepare any formal deed or instrument to be executed by appellant to secure the repayment of said advance before same should be actually made, and appellant having engaged to execute all necessary instruments, plaintiff remained perfectly satisfied. The bill further alleged, that after the stock was transferred, the solicitor of plaintiff applied to appellant for a copy of the trust deed, which after some delay was furnished; whereupon negotiations were set on foot to prepare a deed or instrument to give plaintiff the first charge on the rents and profits of the trust estates; and that plaintiff, in compliance with the request of appellant, and as a personal accommodation to him, was willing to forego his strict rights under said deed of trust and said letter, and to give time for the payment of said money; but after sundry drafts of deeds had been prepared, and many fruitless attempts to procure the appellant to execute a deed, appellant refused to execute any deed whatever. The bill further alleged, that the appellant had received a large sum of money, as well for arrears as for the accruing rents of the estates, which ought to have been applied in discharge of the advance made by plaintiff, in priority to all other demands, but which had not been so applied.

And the bill prayed that the trusts of said indenture of the 13th of February 1826 might be decreed to be carried into execution, and that an account might be taken of the sums received, or which, without wilful default, might have been received by the appellant, of the rents, issues, and profits of said trust estates since the execution of the said deed of trust of the 13th day of February 1826, and how the same had been applied [486] and disposed of; and that an account might be taken of the sum advanced by said Richard Earl of Lucan for the redemption of the said lands under ejectment; and that the same, together with legal interest thereon from the time when the same was so advanced, might be decreed to be well charged on the said trust estates so conveyed to the appellant for the life of Sir Neal O'Donnell the younger, in priority to all other charges created by the said trust deed, save the costs and expenses incident to the preparation of the said deed, and the execution of the trusts thereof; and that an account might also be taken of the sums due and owing to all other persons interested under the trusts of said deed; and that Richard Earl of Lucan and such other persons might be paid the amount of their respective demands, according to the order of priority provided by the said deed.

The appellant, by his answer, denied that he was privy to any negotiations for the purpose of inducing the late Lord Lucan to advance said redemption money, and that he was utterly ignorant of any dealings and transactions between plaintiff and Sir Neal O'Donnell, and those acting for them respectively, nor was he apprized of any negotiations or propositions for the loan of said money by the plaintiff until after the transfer of said stock had been made; and said that neither the appellant nor, as he believed, any person on his behalf, ever entered into a contract with the plaintiff, or any person on his behalf, for the loan of the money, or for the transfer of the stock; nor was said stock transferred to the credit of the redemption suit with the knowledge or concurrence of the appellant, nor was there any previous communication or treaty with the appellant on [487] the subject; and the appellant further stated, that he never heard and was not aware that the stock so transferred belonged to Richard Earl of Lucan, or to respondent, until long after the transfer had been effected. The appellant further stated, that the election for the county of Mayo took place in the month of June 1826; and that the appellant was informed, and believed, that Richard Livesay, the father and partner of Edward Livesay, a short time previous to said election informed appellant's solicitor that the stock

which had been transferred was the property of the plaintiff, and that it was apprehended an attempt would be made at the approaching election to charge the respondent with bribery; and that Richard Livesay proposed to the appellant's solicitor that some letter should be written by the appellant to Richard Livesay, acknowledging that the advance of said stock was made to appellant, as a trustee, to protect the trust property from eviction for nonpayment of rent; and the appellant admitted he signed the letter bearing date the 23d day of February 1826, and that said letter was handed to him by Richard Livesay on the 13th of June 1826, and that the appellant, being at the time occupied with other business, subscribed his name thereto, and handed it back to Richard Livesay; and that the appellant did not at the time take notice, nor was he aware, nor did Livesay intimate to him, that said letter was antedated; and appellant stated expressly in his answer, that had he been aware of such fact he would not have signed said letter without correcting the date; and appellant stated that the advance was not and could not in any manner have been influenced by the letter, inasmuch as the letter was not written or agreed to be written until the 13th day of June 1826, [488] long after the advance had been made. The appellant admitted that negotiations were carried on after the transfer of said stock between plaintiff's and appellant's respective solicitors, for the purpose of arranging the form of a deed, but denied it was for the purpose of giving to the plaintiff the first charge on the rents of the trust estates, but for the purpose of securing the repayment of said advance in such manner as should be reasonable with regard to the execution of the trust reposed in him; and the appellant denied that he ever refused to execute a deed to secure the repayment of the advance, provided it was consistent with the trusts of the deed of the 13th of February 1826.

On the 26th May 1836 the cause, being at issue, came on to be heard before the Lord Chancellor of Ireland, when it was decreed that the trusts of the said indenture of the 13th day of February 1826 should be carried into execution; and the plaintiff was thereby decreed entitled to the benefit of said trust deed; and it was referred to the master to take an account of rents and arrears of rent received, or which, without wilful default, might have been received by appellant from the trust estates since the execution of the deed of 13th day of February 1826, and how the same had been applied and disposed of. And it was referred to the master to take an account of the sum advanced by the plaintiff for the redemption of the said lands so under ejectment; and it was thereby decreed that the same, together with legal interest thereon from the time when the same was so advanced, was well charged on the said trust estates so conveyed to appellant, for the life of the said Sir Neal O'Donell the younger, in priority to all other charges created by the said trust deed, save the costs [489] and expences incident to the preparation of the said deed, and the execution of the trusts thereof. And it was further ordered, that said master should take an account of the sums, if any, due and owing to all other persons interested under the trusts of the said deed. And it was further ordered, that all creditors claiming under the said trust deed of 13th February 1826 should be at liberty to come before the said master to prove their respective demands.

On the 16th day of November 1838 the master made his report, pursuant to the decree; and under several decrees dated the 26th May 1836, 15th February 1839, and ultimately by a decree of 10th June 1839, it was declared that the appellant was chargeable with the sum of £5276 8s. 6d., trust funds which had been misapplied by him, and also with the sum of £6589 16s. 1d., arrears of the rent of the trust estates which might have been received by him but for his wilful default, making together the sum of £6866 4s. 7d.; and it was thereby ordered that the appellant should pay within twelve months unto plaintiff, Richard Earl of Lucan, the sum of £6204 8s. 7d., (being the sum advanced by him for the redemption of the lands under ejectment, together with interest for the same,) and should pay interest on the principal sum until paid.

From the decrees of the 26th of May 1836, and 15th of February 1839, and the 10th of June 1839, this appeal is brought.

Mr. Pemberton and Mr. Jacob for the Appellant.—The deed of trust mentions all the charges upon the estates; no express sum is mentioned in respect of the [490] chief rent, as the sum due was not ascertained. The transfer made by Lord

Lucan was not made upon a contract with the trustee; the letter was sent subsequent to the advance of the money; no mortgage was ever agreed upon or executed. The terms of the bill go very far to dispose of this case; it states that the trust deed was prepared and executed without the knowledge of the plaintiff; he was not, therefore, a party to the deed, and there was no contract made with him. In this country the bill would have been met by a demurrer. Lord Lucan advanced the money to obtain Sir Neal O'Donnell's interest at the approaching election for the county of Mayo. The Lord Chancellor decided this case upon the ground that Lord Lucan was the salvager of the estate; how does Lord Lucan become a *cestuique* trust under the deed? How is he entitled to call for the execution of the trust? He says, I have a right to stand in the place of Lord Sligo. But Lord Sligo could not call for an execution of the trust; there is no contract between the trustee and Lord Sligo. It is admitted that the money was to be raised by mortgage under the power; could he, by these means, have been a *cestuique* trust under the deed? *Palk v. Clinton* (12 Vesey, 48) decides that he could not. Lord Lucan cannot say that he was in a better situation than if he had got the mortgage deed. The bill is founded upon a false fact; the money was advanced long before the letter was written, and upon an assurance that he should have Sir Neal O'Donnell's support at the election. He never demanded the rents, and the rents are applied in payment of prior charges. The cases of *Worrall v. Harford* (8 Vesey, 4) and [491] *Garrod v. Lord Lauderdale* (2 Russ. and Mylne, 451) seem to have been forgotten.

Mr. K. Bruce and Mr. Jas. Russell for the Respondent.—It is not put in issue that Lord Lucan had no right to proceed under the trust deed. If it had been put in issue, Lord Lucan might have stated facts which would have enabled him to take advantage of that deed. All persons treated this deed as one which might include Lord Lucan's demand, and it is clear that it was intended to be paid under the trusts of the deed. If this case came within the principle of *Walwyn v. Coutts* (3 Simons, 14), the deed would be revocable. The money applied by Lord Lucan was the means of saving the estate. We are creditors, not volunteers.

Mr. Pemberton in reply.—Has any principle been stated upon which this decree can be sustained? Lord Lucan is not a party to the deed. A volunteer would stand in a better situation than a creditor, though there is a trust deed for the benefit of creditors. The advances could not be made upon the security of the deed, for he says he did not know of it. Supposing he could have claimed under the deed, how could he have insisted upon it, in the manner in which it has been decreed?

Lord Chancellor (6th August).—This case of *La Touche v. Earl of Lucan* is an appeal against an order of the Court of Chancery in Ireland, by which a decree was made against the appellant in these terms:—"It is ordered [492] and decreed, that the trusts of the said indenture of the 13th of February 1826 shall be carried into execution," and the plaintiff is justly decreed entitled to the benefit of the said trust deed; and accordingly it was referred to the master "to take an account of the sums received, or which, without wilful default, might have been received, by the appellant out of the rents, issues, and profits of the said trust estates since the execution of the said deed of trust of the 13th of February 1826, and how the same have been applied and disposed of; and also to take an account of the arrears of rent due out of the said trust premises at the time of the execution of the said trust deed, and what part thereof has been received by the appellant, or, but for his neglect and default, might have been received, out of the said arrears since the execution of the said trust deed, and how the same have been applied and disposed of; and it was referred to the master to take an account of the sum advanced by the plaintiff for the redemption of the said lands so under ejectment; and it was thereby decreed, that the same, together with legal interest thereon from the time when the same was so advanced, was well charged on the said trust estates so conveyed to the appellant for the life of the said Sir Neal O'Donnell the younger, in priority to all other charges created by the said trust deed, save the cost and expenses incident to the preparation of the said deed and the execution of the trusts thereof."

The question in this case arose under a trust deed, by which the tenant for life of certain estates, partly leasehold and partly freehold, conveyed what interest he had in those trust estates to certain trustees or certain trusts. [493] It appears, that as to

the leaseholds Lord Sligo, who was the owner of the fee, and entitled therefore to the head rent, the head rent being in arrear, had proceeded by ejectment to recover the lands liable to this rent; that under the provisions of the act on that subject in Ireland a certain time was allowed to the tenant to pay the arrear of that rent, in order to save the estate from being forfeited to the head landlord; that being pressed, not only by this demand of the head landlord, but being subject to a variety of other deeds, the tenant for life executed a trust deed, by which he conveyed the property to trustees, with a declaration of trust, by which he was to apply the rents in a certain way prescribed, with a power of raising £10,000 by mortgage of the estate, in order to pay what was due of the rent, and to pay the other charges set out in the schedule of the deed. Amongst others there was a provision by which the trustees were authorized to make certain payments to the tenant for life, and the members of his family.

It appears, (though the history of that is not very accurately ascertained by the evidence,) that a sum of money was paid into court in order to meet this demand of Lord Sligo; that appears, no doubt, to have been the money of Lord Lucan, and there is some evidence of some previous communication as to that money being paid into court. The bill, however, alleges that it was paid into court under these circumstances:—"That the principal object which Sir Neal O'Donell had in view in executing the said deed of trust having been to raise, by means thereof, a sum of money sufficient to secure the said estates from eviction, and La Touche having succeeded in procuring himself to be made sole trustee thereunder, he, La Touche, wrote a [494] letter to the plaintiff's law agent and solicitor in this cause, bearing date the 23d day of February 1826, thereby stating that Sir Neal O'Donell the younger had executed a deed vesting all his life interest in him the said La Touche, meaning thereby the said recited indenture, in trust." It then says that the said letter was "duly subscribed with the proper name and handwriting of the said La Touche; that having been informed by the plaintiff's agent and solicitor of the contents of the said letter, and being assured by him that any sum to be advanced by the plaintiff, in pursuance of the said letter, would be the first charge upon the life estate of the said Sir Neal O'Donell the younger under the trust deed, and would be paid to the plaintiff in preference and priority to any of the charges created by the said deed as therein contained, and having been willing and desirous to serve Sir Neal O'Donell the younger by advancing a sufficient sum of money to prevent the eviction of his estates, the plaintiff accordingly authorized such advance to be made, and that a sum of money which the plaintiff then had vested in old government 3½ per cent. stock should be applied to that purpose."

The allegation, therefore, is, that upon the faith and credit of that letter the advance was made. The advance, I think, was made in March, the letter certainly bears date in February; but it is beyond all question established by the case of both parties that the letter was actually received in the month of June following. Those, therefore, who gave instructions for the filing of this bill have, in that respect, put a case upon record which they must have been aware could not be sup-[495]-ported by the facts when they came to be proved by evidence.

There is some evidence, as I have said, of some negotiation or promise held out as to the mode in which this money was to be secured, but Lord Lucan was no party to the trust deed. Lord Sligo was no party to the trust deed. The deed was a deed executed by the owner of the property, for the purpose of disposing of this property in the way which was considered most beneficial to him, to relieve the estate from the pressing demand for the head rent, and the other incumbrances which affected it, reserving to himself certain provisions out of the estate. Now, the bill, stating the trust deed, and stating this letter, prays that the trusts of the deed may be carried into effect,—“that the trusts of the said indenture may be carried into execution, and an account be taken of the sums received, or which, without wilful default, might have been received;” precisely, in fact, in the terms of the decree which was afterwards pronounced.

Two questions, therefore, arise upon these pleadings: first, whether there was any right on the part of the plaintiff to call for an execution of the trusts of that deed independently of the letter; and secondly, whether that letter gave him any title to the decree which has been pronounced? Now, it does not seem, so far as I can ascertain, that there was brought very distinctly, if at all, before the consideration of the Lord



Chancellor for Ireland, (for I see no reference to it in his Lordship's judgment,) that train of decisions which has now established the law of this country beyond all question; namely, that where a party creates a trust for the purpose of paying his debts, the creditors do not thereby [496] become *cestuique* trusts, nor become invested with any power of calling upon the Court to execute those trusts. That doctrine, laid down by Lord Brougham in the case of *Garrod v. Lord Lauderdale*, in which he reviewed all the authorities, appears to have been acted upon ever since, and has been considered as established by *Wallwyn v. Coutts*; not that it was new law, but that case brought it directly into operation, and it is now an established principle of the court of equity.

Then, how does this case differ from those cases? A party having merely a demand of the owner of the estate cannot be considered, upon the authority of those decisions, as having any right to call for the assistance of a court of equity to enforce the execution of trusts voluntarily created for payment of the owner's debts; neither did the plaintiff in this case gain any such right by paying the money which was applied to the discharge of Lord Sligo's demand for rent as head landlord. In the first place Lord Sligo had no equitable right; he had the legal right which the law gives him of recovering by ejectment; but Lord Sligo had no more right to come in as a creditor, and ask for the execution of that trust deed, than any other creditor; he was, as between himself and the author of that deed, only a creditor, independently of any other right which his station as landlord gave him against the estate. But, even if Lord Sligo had had those rights, the present Lord Lucan does not connect himself with Lord Sligo. There is no assignment of the interest of Lord Sligo, and if, for the accommodation of the tenant for life of the estate, who was pressed by the ejectment at the suit of Lord Sligo, Lord Lucan advanced the money by which the claim of Lord Sligo was satisfied, that would not have given him [497] any claim, even if Lord Sligo had any; but Lord Sligo not having any, it is not very material to consider that question. Then, how does this letter give him any title? The history of the letter is, that it was written in the month of June, after the money was paid into court, which was paid in the month of March; and it was a promise or undertaking by the trustee that he would give the best security he could under that trust deed. That cannot make him a *cestuique* trust under the trust deed. If the letter gave him any title at all, it would be to have that carried into effect which that letter undertook; that is, to give him the best security he could under the trust. Now, if we look to that trust deed, we shall find that the only security it could give him would be the raising £10,000 by the mortgage of the estate, and it appears that negotiations went on for that purpose. It was never the intention of the parties, as manifested by the evidence, to deprive the family of the benefit of those payments which they were in the habit of receiving. On the contrary, those intentions were expressly disclaimed, and what the parties intended is manifested by the drafts that were prepared for the purpose of carrying the contract into effect. They, in fact, contracted for the only security they could contract for, namely, such security as the trustee could give them by virtue of the trust which was charged upon the estate.

The negotiations went on, and objections were made to the several deeds that were proposed for that purpose, till an event happened which prevented the possibility of that which was intended, namely, the death of the tenant for life out of whose estate the charge was to be paid. The result, therefore, is neither more [498] nor less than this: the negotiation by the parties having control over an uncertain fund, depending on the life of another, for creating a charge upon that property, was extended until the period when the dropping of the life prevented its being carried into effect. But to carry a contract for that purpose into effect was not either the object of the suit or the purport of the decree. If that had been the right claimed, it is not necessary to consider what might have been the result of such a suit. The Court has granted relief upon the supposition that the effect of the letter was to make the plaintiff a *cestuique* trust, not for the purpose of doing that which was contracted, namely, obtaining the benefit of that charge, but a *cestuique* trust from the commencement, so as to call upon the trustee for the repayment, not only of those sums of money which he had paid before the right accrued, but those which he had paid with the knowledge of all the parties, including the party who now makes the payments a ground of complaint.

I presume this decree was pronounced, owing to the authorities in this country not having been called to the attention of the Court of Chancery in Ireland. When we see what the decree is, and refer to the authorities to which I have before adverted, it is, in my opinion, clearly not consistent with those authorities, and consequently it cannot stand. It is unnecessary to consider the subsequent part of the case, which would be only material in the event of this House being of a different opinion upon that point. The result appears to be, that the decree, as made, is inconsistent with the principles established by the decisions to which I have referred.

[499] Mr. Knight Bruce.—Will your Lordships permit me to call your attention to the costs subsequently to the decree? Your Lordships are aware that the parties proceeded in the office under the decree, without appealing. I suppose your Lordships do not mean to include any costs after the first hearing.

Lord Chancellor.—No, I think not. The decree to be dismissed with costs, up to the hearing.

Decree reversed, and bill dismissed with costs, up to the hearing.

#### [500] ON A WRIT OF ERROR FROM THE COURT OF KING'S BENCH.\*

JOHN DOE, on the Demise of JOHN BIRTWHISTLE,—*Plaintiff in Error*; AGNES VARDILL,—*Defendant in Error* [2d July 1839, 20th July and 10th August 1840].

[Mews' Dig. vii. 604; viii. 231, 259, 260. See note to S.C. 2 Cl. and F. 571.]

*Statute of Merton—Heir by descent—Legitimation per subsequens matrimonium.*

—A child born in Scotland of unmarried parents domiciled in that country, and who afterwards intermarry in Scotland, though by the laws of Scotland capable of inheriting lands in that country, is not capable of inheriting lands in England.

In 1823 a bill was filed in the Court of Chancery by Birtwhistle, the plaintiff in error, against Vardill, defendant in error, for an account of rents of certain lands situate in the county of York, alleged to belong to the plaintiff in error, upon which the defendant in error had entered as guardian in socage to the defendant in error. Upon a motion for a receiver, Lord Eldon directed an ejectment to be brought; in 1825 the eject-[501]-ment was tried before Bayley, J., at York, and the jury, by a special verdict, found (amongst other things,) that Alexander Birtwhistle in 1790 went from England to Scotland, where he was domiciled, and continued there till his death in 1810; that he cohabited with Mary Purdie, who was domiciled in Scotland for the same period; that John Birtwhistle, plaintiff in error, was the only son of Alexander Birtwhistle and Mary Purdie; that he was born in Scotland in 1799; that in 1805 Alexander Birtwhistle and Mary Purdie were married in Scotland; that plaintiff, John Birtwhistle, was, by the law of Scotland, legitimate, and held lands in Scotland as heir to Alexander Birtwhistle. The Court of King's Bench held that John Birtwhistle was not capable of inheriting lands in England as heir of his father; and in 1830 the judges, upon a writ of error to the House of Lords, approved of that judgment. See 9 Bligh, N. S. 32.

On 2d July 1839 it was re-argued by one counsel on a side, in the presence of the judges, on a question proposed to the judges, and stated in the opinion given by Tindal, C. J.

The Attorney General for the Plaintiff.—The verdict of the jury has ascertained that the status and character of legitimate son of the party last seised in certain lands in England belong to the plaintiff in error; he is therefore, as the heir of that party, entitled to take by descent the land in dispute, but he is met by the plea, that inasmuch as he was not born at a time when his parents actually were in a state of lawful wedlock, his legitimacy as a general right, however undoubted, will not confer on him the requisite title to [502] the lands. The plaintiff in error, on the other hand, maintains, that he is fairly within the rule of law, and that as the marriage of his

\* The reporter was favoured with the argument in this case by Mr. Robinson.

parents is held *præsumptione juris* to have taken place at the time when the copula or consent was interposed, so he is as much to be held as born in lawful wedlock as one born after actual celebration *in facie ecclesiae*.

The judgment of the King's Bench is erroneous, inasmuch as it was pronounced without argument; the judges conceiving that the question before them was, whether the law of domicile or the *lex rei sitæ* should prevail, and, holding that the latter must necessarily rule, decided in favour of the defendant in error; but no dispute exists as to the prevalence and application of the latter rule, the only question being whether that rule does not clearly embrace the case of the plaintiff in error. The opinions of the judges delivered by Chief Baron Alexander equally misrepresent the nature of the question.

It is admitted that the rule of the law of England must be supported in so far as regards succession to the land; but then it becomes a question *publici juris*, whether the heir claiming possesses those attributes which are requisite to entitle him to take by descent. Now, the effect of the marriage of his parents in Scotland, although it occurred in point of time subsequent to his birth, was, that it conferred legitimacy on him, not only from the period of the marriage downwards, but from the birth; or rather it placed the parents in the situation of married parents from the time of the antecedent copula, to which the marriage is held in law to draw back. This not only makes him a legitimate child from [503] his birth downwards in Scotland, but all the world over (*Stair's Instit. Law of Scotland*, b. iii. tit. 3, sec. 42; *Erskine's Instit.* b. i. tit. 6, sec. 52; *King v. Inhabitants of Brampton*, 10 East, 282). It is accordingly a well settled rule in England that a marriage good in Scotland shall be recognized in the former country; that the rights which flow from such a contract shall be equally recognized in England as if the marriage had been within the realm of England. Thus the right to dower has been fully sanctioned by the case of *Ilderton v. Ilderton* (2 Hy. Black, 145), and *Crompton and Bearcroft* therein mentioned. Since these decisions have been acted on the rights of parties taking benefit from a foreign marriage have uniformly been recognized to the fullest extent in England *ex comitate gentium*. The departure from the rule as settled by those cases would, in the present instance, cause a *conflictus legum* which does not arise if the consistent principles hitherto acted on be followed up.

The opinions of the judges fully adopt the legitimacy of the plaintiff in error, but deny the effect sought to be given to it; they therefore cause this inconsistency, that he must be held legitimate to the effect of succeeding *in mobilibus*, but cannot as heir take land by descent; that he might inherit a Scotch title or estate, but be denied the same privilege in England, although it is settled law that his widow would be entitled to dower of land in England. To find for the defendant in error would be to make a retrograde movement in the law, which, acting on the received comity of nations, has all but sanctioned the right and title of the plaintiff in error [504] to take by descent land of which his father died last seised (*Co. Litt.* 7 b. *Sheddun v. Patrick*, 1st July 1803, *Fac. Coll.*; affirmed, 3d March 1808. *Strathmore Peerage*, 4 Wilson and Shaw, App. p. 89; 2 Jac. and Walk. 547. *Ross v. Rose*, 4 Wilson and Shaw, 289. *Warrender v. Warrender*, 9 Bligh, 89; 2 Shaw and M'Lean, 154).

Mr. Dampier for Defendant in Error.—The question decided by the Court of King's Bench is one purely of English municipal law; it affects not the *jus gentium*; and the determination of it requires no aid from those foreign principles of law which are sought to be imported into its discussion. There are ample materials and decisions in the law of England for enabling this House to decide who is the heir entitled to take land by descent in England, and that too without raising any conflict with the laws of other countries.

This question is not new to the law; but may be held to have been authoritatively settled centuries since. The discussions anterior to the statute of Merton show, on the one hand, that the ecclesiastical courts, acting on the principles of the civil law, were cognizant of the rule as to the legitimation *per subsequens matrimonium*, but that the attempts to introduce that as part of the municipal law of England failed; accordingly the King's courts never gave effect to it, and the statute of Merton put a period to the controversy.

Accordingly there is no instance of any foreign subject of the King of England seeking at any time to establish his right by descent to land in England by virtue of

a subsequent marriage of his parents; and the absence of such cases is important in deciding a question now revived at this distance of time.

[505] The rule itself is clear and express; viz., that the party must be the heir born *ex justis nuptiis* of his parents.

It is in vain to hold that that rule has been complied with in the case of a child born not *ex justis nuptiis*, but out of lawful wedlock; the admitted fact being that no marriage took place till after the child was in existence. It meets not this difficulty to say, that in England a child is born *ex justis nuptiis* though the marriage only takes place the day before his birth. Still the answer is obvious, that the requisites of a rigid and inflexible rule have been complied with, by the undoubted fact of the birth in such a case being subsequent to the actual marriage.

The defendant in error is not bound to go into the inquiry as to the rights of *antenati* in Scotland, and to what extent these have been sanctioned in England. One thing is evident, that the authorities are by no means agreed as to the origin and precise operation of the rule as to legitimation by subsequent marriage; and the very term "subsequent marriage" implies that it is not a correct view of the effect of it, to represent it as a marriage virtually occurring anterior to the birth.

But, without questioning the foreign law, it is sufficient to say that the law of England does not recognize *ex comitate* the rules of other countries, so far as these do not interfere with positive existing rules in the law of real property in England. Accordingly the cases of *Ilderton v. Ilderton* [2 H. Bl. 145], and *Crompton v. Bearcroft*, holding them to recognize Scotch marriages as good in this country, and as authorizing the widow's right to dower, may stand well with the law as settled by the King's [506] Bench in this case; for these cases interfere with no fixed positive rule of English law; the argument *ab inconvenienti* can have no weight. There are, no doubt, many rights which the plaintiff in error may enjoy in England as the legitimate son of his father; but from these must be excepted the right to take by descent land of which the parent died seised and intestate (*Costumier de Normand.* 27 b. note; *Regiam Majestatem*, b. ii. p. 51; *Kames's Equity*, b. iii. c. 8, p. 497; *Glanv.* b. vii. c. 15; *Fleta*, l. vi. c. 38; *Bract.* c. 5, p. 416; *Britton*, 12 mo. ed. p. 417; 1 *Reeves*, 464; 3 *Coleridge's Blackstone*, 336; 2 *Roper, Husband and Wife*, 445 note; *Co. Litt.* 33 a.; *Selden. Diss. ad Flet.* c. 9, sec. 2; *Staunford, de Prerog. Reg.* p. 39; *Calvin's Case*, 7 *Coke*, 1 b.; *Vaughan*, p. 281; *Story's Conflict of Laws*, sec. 181; 1 *Hag.* 226; 2 *Hag.* 58, 106, 385; 2 *Doct. and Stud.* c. 35; *Co. Litt.* sec. 400).

Lord Chancellor.—Your Lordships have had the advantage of having had this case (raising certainly a very important question) argued with the utmost learning and ability; and it will be for your Lordships now to consider in what way the question is to be submitted to the learned Judges, in order to call their attention to the point to be decided. Upon looking at the question put to the learned Judges in 1830, it seems to me very accurately to state the facts of the case necessary to be submitted to the learned Judges, and it does not appear to me that it can be done better by putting it in other words. That question was in these words: "A. went from England to Scotland, and resided and was domiciled there, and so continued for many years till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and [507] M. were married in Scotland according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child takes place in Scotland, such child born in Scotland before the marriage is equally legitimate with children born after the marriage, for the purpose of taking land, and for every other purpose. A. died seised of real estate in England, and intestate. Is B. entitled to such property as the heir of A.?" That, therefore, is the question I shall propose to your Lordships to submit to the learned Judges upon this occasion.

Lord Brougham.—I entirely agree with my noble and learned friend that the question of 1830 is much better than any other which can be put; it varies the point upon the facts stated in the special verdict; that verdict did unfortunately not find particularly in every respect what the law of Scotland is upon this subject, conse-

quently the argument of the learned counsel for the plaintiff in error *pro tanto* is damnified. It would have been better if it had been put as the learned counsel, Mr. Murray, stated it, whose evidence was believed by the judge and the jury, namely, that the marriage is supposed to have been antecedent to the birth by fiction; but the legitimacy, as contradistinguished from legitimation, is sufficiently put for the purpose of the argument, and with the assistance of the authorities it can leave very little doubt upon the minds of the learned Judges. Yet I cannot help expressing my regret at the length of time during which this suit has been pending. It was tried at York as long ago as 1825, and I very well recollect the trial. The delay of [508] fourteen years certainly is a very great misfortune; it has been owing in part to the changes in the custody of the Great Seal. In 1830 the appeal was certainly prosecuted, but it was not decided; and it was not till 1835 that we were aware of it being still depending. If I had ever known, whilst I held the Great Seal, that it was undetermined, I should have called the attention of the House to it, and then there would have only been the delay from 1825 to 1830. It was not noticed until another case brought it to your Lordships' knowledge that it was not disposed of. Some laches too, probably, may be imputed to the parties. If they had reminded the House of it, no doubt the cause would have been heard; but I suppose there is something in the state of the property that did not make it very necessary, else they would have taken some means of obtaining an earlier judgment. I am desirous that the attention of the learned Judges should be directed to that, which, moved by the anxiety I felt upon the subject, I stated as the opinion I entertained in 1835, and to the arguments I then delivered. They have been printed, and will be furnished to the learned Judges. I do not know that they throw any great light upon the question, but they state the points, and refer to the authorities as well as to the principles. I entirely agree that this is a question of very great importance, and of very considerable difficulty. I quite agree with the Attorney General that it is of peculiar importance as affecting the law of Scotland, the question being, whether the *lex loci domicilii*, the *lex loci contractus et nativitatis*, or the *lex loci rei sitae* should prevail in this case. From the time of Stair downwards,—from the time indeed when the distinction between real property and [509] personal arose,—the law governing the one being the *lex loci rei sitae*, and the law governing the other being the *lex loci domicilii et contractus*. I feel great anxiety that this case should be well considered, for another reason; I mean out of regard for the credit of our English courts. I concur very much in the statement of the Attorney General, that if what has been laid down in this case be law, the bounds of that law are very narrow. If it is law any where it prevails assuredly only as the law within the bounds of Westminster Hall. I know wherever I go in Europe it is boldly denied to be the law. I know the opinion of Dr. Storey and other American jurists also is against us; and I do not think I could overstate the degree in which all those jurists dissent from the judgment in *Doe v. Vardill*. Moreover, if there is any reason to be given for the judgment, that reason is not in any one place. A considerable argument against it is to be gathered from the total diversity of the grounds upon which the judgment has at different times been maintained. It is first vested on one ground in the Court of King's Bench; then upon another and very different ground at the bar; here, in 1830, again, upon a third ground, which I think must be admitted on all hands to be untenable, the ground stated by Lord Chief Baron Alexander in giving the opinion of the judges to this House; and, lastly, upon a different ground from all the three former, by the counsel to day at your bar. And if the judges are to give their opinions upon some fifth ground, the discrepancy may support the judgment better in their minds than it will support the judgment or give weight to it in the eyes of any other person; for assuredly a decision supported upon so many different grounds will be likely to [510] sink low in the estimation of those who come to a calm consideration of its merits. I cannot help feeling the greatest regret that these questions should be raised here so frequently as they have lately been. Dispose of this as you may, we shall have no end to such cases, unless we adopt the only satisfactory mode that can be devised for settling such controversies and doubts, namely, by some legislative measure to relieve the law of this country from the opprobrium which now rests upon it in the eyes of all mankind. That there should be a set of questions incalculably important, perhaps the most important, to the interest and feelings of individuals which can ever

arise in courts of justice, and that these questions should be left surrounded with doubt, and incapable of decision for want of some statutory enactment regarding these subject matters, is truly lamentable, and not a little opprobrious to our jurisprudence. Can any thing be more opprobrious to the law of a civilized country than that it should be extremely difficult to tell in this country whether a man is married or not? nay, what is worse, whether a woman is married or a concubine? that it should be still more difficult to tell whether a person, the issue of an unquestioned marriage, is a bastard or legitimate, and that, owing to the conflict of law or the discrepancy of the law, it should be declared in one part of the country that a man is a bastard and in another that he is legitimate,—in one part that a woman is married, and in another that she is a concubine,—in one part that divorce has taken place, dissolving a prior marriage, and if that person afterwards crosses the Tweed, and intermarries with another woman, he is deemed not to be in the honourable and comfortable state of wedlock, but in a state of felony, and having [511] committed bigamy he may be transported to Botany Bay, which actually has happened; and still more, that if the same party had intermarried again in Scotland he would be held to be in the honourable state of matrimony, and not of felony; but if he had English estates the question would arise, though the children were legitimate in Scotland, their birth-place, yet the law of the country where the property is situated declared them bastards, nay, that in only one court of England they were treated as bastards, and in all other courts acknowledged to be legitimate. There are peers sitting in this House affected by this question, the issue of noble families, their parents having been married in Scotland after previous divorces, they themselves being of the most spotless character and of the highest honour, possessing the most magnificent estates and the highest titles. It is just that question which is raised here, and which was assumed to be so clear at the bar,—though I interrupted the counsel to show it was any thing but clear,—that the current of decisions set in the opposite direction, and that the law would, if taken to be as so mis-stated, make these parties bastards who are now going about as legitimate children. It is a very horrid state of things, affecting the feelings and the character as well as the property of individuals, that there should be this uncertain state of the law. It is still worse to think, that all the learning and skill in Westminster Hall, if you were to consult it, and all the Scotch law in the Parliament House of Edinburgh, would not make you sure of getting two opinions to agree upon such questions as these. I hope this state of things will be put an end to. It never can be done satisfactorily without an act of parliament. You might say that a mar-[512]-riage should be good or bad in Scotland. If bad, of course the issue should be bastards all the world over. You might say that a divorce in Scotland was good and valid, provided it was not fictitiously obtained, and in fraud of the law of England. Some wise, wholesome, and really salutary provision of that kind is absolutely necessary. I have agreed all along with what has been said upon the law of England and Scotland, thinking the law of Scotland respecting the marriage contract exceedingly objectionable compared to ours. If a divorce is obtained there by parties *bona fide*, it might be made good universally. If it is done *in fraudem legis Anglicanae*, whereby it is also in fraud of the rights of others, you might enact that it should be void universally, and then a man would know whether he was married or not, and a woman whether she was a concubine or a matron, and the child whether he was a bastard or legitimate. If the judges decide the present question or any of those questions of status, one way, ever so satisfactorily, it does not follow that they will be settled. The difficulty just now suggested will arise, and you will have another series of doubts and difficulties which will not be removed, because they cannot be anticipated. I would remind your Lordships more particularly of one point. We all say that marriage is governed by the law of the country; that is, the canon upon the subject; it depends upon the *lex loci contractus*; that is to say, a marriage good by that law in the country where celebrated is also good all the world over. A divorce takes place. We do not go so far as to say,—though, generally speaking, the rule of law is, *unumquodque dissolvitur eodem modo quo colligatum est*,—yet we do not go so far as to say that an English marriage [513] may be validly dissolved by a Scotch divorce, though English parties may contract a Scotch marriage in Scotland which shall be good all the world over; we do not say, that the same law which is applicable to the

constitution of the contract applies also to its dissolution. But there is a conflict, and a real conflict of laws. The Scotch lawyers say that the Scotch divorce is good to dissolve an English marriage, and that a man so divorced may enter into marriage again, but this divorce by our English decisions is null if he comes to England. The Scotch Courts maintain the efficiency of divorce, and consequently the validity of the second marriage, and they will maintain this to the end of time. All the Scotch lawyers and judges, without any exception, say that the second marriage is good in Scotland. I do say, that this conflict of law seems to involve an absurdity, which no judicial decisions can reconcile. It is self-repugnant, and nothing but an act of the legislature can reconcile it upon sound principles. A man comes here with his Scotch wife, and with issue born in Scotland; that Scotch wife is held to be a concubine for aught I know in England. The decisions go at all events to this extent, that the English law does not, as regards an English marriage, acknowledge the validity of the Scotch divorce. Here then a party may come, and after a Scotch divorce he may intermarry in England, and then there are two wives each claiming this husband. This is the conclusion either way; it is the conclusion from the well-established and well-known principle of allowing the *lex loci contractus*,—the law of the country where the marriage was contracted,—to prevail universally, and yet not allowing the law of the [514] country where the divorce is had to regulate the dissolution of the contract.

One word more before closing these observations. Being moved by the considerations to which I have adverted, I introduced a bill into Parliament in 1835 to cure the evil, and terminate so anomalous a state of things. I have been strongly urged to introduce it again. I own I had rather not do so pending this discussion, because I should hardly be able to accomplish my purpose without prejudicing this question, and I would therefore rather wait till it shall be decided. Now what is the real origin of all this embarrassment? a great deal arises from a country possessing one system of law being connected with a country possessing a different system, like Scotland and England, and these countries being contiguous. But much the greater part of the inconvenience has arisen from another source, and it shows the danger of departing from sound, solid, and uniform principles. If you had held originally that a marriage celebrated in Scotland, not *bona fide* by parties really resident there, but by parties who could not be duly married here, and who went to Scotland *in fraudem legis Anglicanae*, to escape the provisions of the English marriage act, was a bad marriage in England,—if you had held, as you ought to have done by that opinion generally, and declared it was a bad marriage, and that you would not allow parties who could afford to go to Scotland for the purpose of evading the marriage act, and who were really the only people contemplated by that act, to escape its provisions by this Scotch journey,—if, instead of holding that to be a good proceeding, and giving it effect, you had said, as you have done in most other cases, “This is done in [515] *fraudem legis*, and shall not prevail,” then, nine parts in ten of the difficulties we now labour under would not have arisen. Lord Mansfield always held those marriages to be void in England. Instead of following his opinion, when *Crompton v. Bearcroft* came into Doctors Commons, it was decided in favour of the Scotch marriage. I have often lamented that we have no account of that important case, except in a passage of Mr. Justice Buller’s *Nisi Prius*. I applied to my late excellent and most learned friend Dr. Swabey, and he gave me a few notes, which showed how the case had arisen, namely, by letters of request from Lincoln, but threw little or no light upon the subject. The case does not seem to have undergone a thorough investigation; nevertheless it may have done so when it came to the delegates, a Court certainly of the highest authority. There, a judgment was pronounced in favour of the marriage, but on what argument or by what judges I know not. Then came *Ilderton v. Ilderton*, which first brought the question before a court of common law. If you look into that case, as reported in 2 H. Blackstone [145], you will find that the case of *Crompton v. Bearcroft* is cited. It was a writ of dower, to which *ne unques accouple* was pleaded, and there was a replication by the demandant of a marriage in Scotland, to which the tenant demurred. This demurrer was upon two grounds; the first denied the validity of a Scotch marriage in an English suit, and this ground was given up as an untenable point. The party never dreamt of arguing it, but confined the argument to another point, Whether there ought not to have been a place for the

venue, and whether the replication ought not to have concluded with an appeal to the bishop's certificate, instead of con-[516]-cluding to the country. The question upon the marriage was then abandoned, and the judgment makes no mention of it. Ever since that time the point has been held to be clear, that a Scotch marriage, however plainly and grossly *in fraudem legis Anglicanæ*, was a valid marriage. Now the evil arose originally from your having decided that; you went wrong in so deciding, as many of us think; but having once gone wrong, when other kindred questions arose, as upon the validity of Scotch divorces, you ought either to have re-traced your steps, so as to get right again, or you should have continued acting upon the same principles; there was no middle course; either come back from your error in *Ilderton v. Ilderton* [1 H. Bl. 145] and *Crompton v. Bearcroft*, or go on upon the same principle; either hold that the going to Scotland in fraud of the English law ought not to avail in any way, or hold that the Scotch proceeding, however fraudulent, does avail; and if it makes the contract valid, that it also validates the dissolution of the contract. But instead of following up your error you chose to hold the marriage good, but the dissolution of the marriage bad; and see what interminable confusion you have thus got into. Now in Lolly's case the judges had an opportunity of retracting *Ilderton v. Ilderton* and *Crompton v. Bearcroft*, or they might have said, the cases have ruled that the marriage is good, then so must the divorce be. But instead of that they maintained the validity of a Scotch marriage, though in fraud of the English law, and yet they held that a Scotch divorce in the same circumstances is utterly invalid; and hence arise all the difficulties and disagreements by which we are now surrounded. I am sure this is a good reason why judges in deciding important questions should adopt the course, [517] when they have gone wrong, of at once, in an open and manly way, retracing their steps, rather than persist in their error; but if they do persist in their error they ought to do it out and out, though to the inconvenience of parties, and not, by way of saving their own consistency, impose on the people what is probably the most miserable of all inconveniences, that of vague and uncertain jurisprudence. Instead of having it uncertain, and subjecting people to this annoyance, it may be made at least intelligible by being made consistent, and though the principle were originally wrong, it may be made to tally with itself. At present it is inconsistent with itself; the principles are in one direction upon one ground, and in another direction upon another. I do hope that the result of this inquiry which has taken place will be the settlement of the law, and I cannot speak too highly of the ability with which the argument has been conducted. I entirely agree with my noble and learned friend, that it is impossible to say too much upon that subject; and the question having been thoroughly argued is ripe now for decision. I hope that when it is fully considered, we shall have the assistance of the learned Judges in giving our opinions. We shall give our opinions with all due deference to their authority, and all the disposition possible to avail ourselves of their useful aid, but without losing the regard that we conscientiously owe to our own opinions; not forgetting certainly the impression which may be made upon us by the opinion of the learned Judges, but coming to a full, calm, and deliberate consideration of a question of such paramount importance. When the law as it now stands has been thus settled, then ultimate steps may be taken, which [518] I apprehend will alone be satisfactory to the people of both countries; I mean the final settlement of the law by an act of parliament, declaratory in some respects, and enacting in other respects; thus laying down what principles of law shall be fitting to be established for the two countries. I have felt it my duty to trouble your Lordships with these observations in the presence of the learned Judges and the parties, and I hope they may tend to the furtherance of justice in this case.

Lord Wynford.—My Lords, I believe I am the only peer now present who was in the House at the time the question was put to the learned Judges upon the former occasion. That question was drawn up by Lord Lyndhurst, and submitted to the Judges. I approved of it then, and I approve of it now; I do not think any question can be put that will more effectually elicit the opinions of the learned Judges. I have a strong opinion upon this subject, which I have not hesitated to express upon other occasions; but if it should so happen that all the learned Judges agree in their opinion, it would be highly improper in me not to give way to them, as the Judges know I have upon several occasions; but if there is a difference of opinion



among them, I shall take the liberty of stating my view of the question; at present all I shall say is, that I do not object to the question proposed to be submitted to the learned Judges. I wish my noble and learned friend to accomplish his object of reconciling the laws of Scotland and England in similar cases to this, but I am afraid that he will find very great difficulties in his way. I cannot help thinking that it might be better settled by different decisions as the matters arise; rather than by an act of par-[519]-liament. I do not think that the legislature is well adapted to take up and settle a very difficult question like this. However, we shall, I hope, have an opportunity of fully considering the various points, as we always have in this place, particularly when assisted by the learned Judges, when cases come judicially before us. With respect to the question,—considering the circumstances which my noble friend has alluded to,—the way in which it affects different families in both countries, having large estates and high houses,—it is of the utmost importance it should be settled, and that it should be decided as soon as possible when the Judges have matured their opinion. It is of deep importance, when that matured opinion is come to, that an early period should be fixed for the consideration of the question. It must not be supposed that this is the only case which has stood over for a great length of time. The next case which stands for hearing, I am sorry to say, is a case that was before me in the Court of King's Bench when a judge of that court, now nearly twenty years ago. It was afterwards argued in this House, and judgment given, five or six years ago. I hope some mode will be adopted, when points of very great importance arise, of bringing them forward, so that the parties may obtain justice as soon as possible.

Tindal, C. J. (20th July).—My Lords, the facts of the case upon which your Lordships propose a question to Her Majesty's Judges are these: A. went from England to Scotland, and resided and was domiciled there, and so continued for many years till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by [520] her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child take place in Scotland, such child, born in Scotland before the marriage, is equally legitimate with children born after the marriage for the purpose of taking land and for every other purpose. A. died seised of real estate in England, and intestate. And your Lordships found this question upon the foregoing state of facts; viz., "Is B. entitled to such property as the heir of A.?" And in answer to the question so proposed to us, I have the honour to state to your Lordships that it is the opinion of all the Judges who heard the argument (Tindal, C. J.; Vaughan, J.; Parke, B.; Bosanquet, J.; Patteson, J.; Gurney, B.; Williams, J.; Coleridge, J.; Coltman, J.; Maule, B.) that B. is not entitled to such property as the heir of A. We have, indeed, reason to lament that we have been deprived of the assistance of one of our learned brethren who heard this case argued at your Lordships' bar, the late Mr. Justice Vaughan; but as he had expressed a concurrent opinion upon the case at a meeting held immediately after the argument, I feel myself justified in adding the authority of his name to that of the other judges.

My Lords, the grounds and foundation upon which our opinion rests are briefly these: That we hold it to be a rule or maxim of the law of England with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, [521] as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding in the descent of land in England the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent, being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy upon the supposed ground of the comity of nations. My Lords, to understand the nature and force of this rule of our law, "that the heir must be a person born in actual matrimony in order to enable

him to take land in England by descent," and to perceive at the same time the positive and inflexible quality of this rule, and how closely it is annexed to the land itself, it will be necessary to consider the earlier authorities in which that rule is laid down and discussed, both before and subsequently to the statute of Merton, and more particularly the legal construction and operation of that statute.

If we take the definition of heir which Lord Coke adopts from the ancient text writers, and which is borrowed originally from the Roman law (Co. Litt. 7 b.), viz., that he is "*ex justis nuptiis procreatus*," the very description points at a marriage celebrated according to the rules, requisites, and ritual of the civil or Roman law. "*Operae pretium est scire quid sint justae nuptiae*," says Huber (lib. 23. tit. 2. de ritu nuptuum). He adds, "*in promptu est Justiniani responsio: sunt eae quae secundum precepta legum contrahuntur*." But to [522] refer to the "*Mirror of Justices*," perhaps the very earliest of our text books, it is there laid down, in p. 70, as an admitted principle, "that the common law only taketh him to be as son whom the marriage proveth to be so." Glanville, who wrote in the reign of Henry the Second, (probably about half a century before the passing of the statute of Merton,) in book 7. chap. 13. states, that "neither a bastard, nor any person not born in lawful wedlock, can be, in the legal sense of the term, an heir; but if any one claims an inheritance in the character of heir, and the other party object to him that he cannot be heir because he was not born in lawful wedlock, then indeed the plea shall cease in the king's court, and the archbishop or bishop of the place shall be commanded to inquire concerning such marriage, and to make known his decision either to the king or his justices." He then, in chapter 14. gives the form of the writ, which will be found not unimportant to the present inquiry; (viz.)

"The king to the archbishop, health:

"W. appearing before me in my court has demanded against R., his brother, certain land, and in which the said R. has no right, as W. says, because he is a bastard born before the marriage of their mother; and since it does not belong to my court to inquire concerning bastardy, I send these unto you, commanding you that you do in the court christian that which belongs to you; and when the suit is brought to its proper end before you, inform me by your letter what has been done before you concerning it.

"Witness, etc."

Your Lordships will observe the form of this writ, how precisely it puts the objection against the heir's [523] title upon the very rule of the English law, "that he was born before the marriage of his mother;" by which it is necessarily implied that the marriage of the parents had subsequently taken place. Now, if the question had been put generally on the fact whether any marriage had taken place, or upon the legality of such marriage as had taken place, to such a question of general bastardy. as it is called, the bishop would have found no difficulty in answering, for the answer to that question would have been purely and exclusively determinable by the spiritual law. But as the canon law, on the one hand, held the subsequent marriage of the parents made the ante-natus legitimate, and as the common law of England, on the other hand, held that such ante-natus was not legitimate for the purpose of inheriting land in England, if the question had gone in the general form the answer of the bishop would have certified such ante-natus to have been legitimate. The law, therefore, framed the question in the precise form contained in the writ, namely, a question of special bastardy, proving thereby how closely, and with how much jealousy, the law adhered to the rule of descent before pointed out. Now the question so framed did obviously place the bishop in extreme difficulty in making answer thereto; a difficulty which was very much increased by the constitution of Pope Alexander the Third, which had been issued very recently before the time when Glanville wrote, viz., in the sixth of King Henry the Second; by which constitution (in part set out by Lord Coke, 2d Institute, 96) it was ordained "that children born before solemnization of matrimony, where matrimony followed, should be as legitimate to inherit unto their ancestors as those that are born after matrimony;" [524] and it is upon the subject of this constitution that Glanville is commenting in his 15th chapter, when he says. "Upon this subject it hath been made a question, whether, if any one was begotten or born before the father married the mother, such son is the lawful heir if the father afterwards married his mother. Although, indeed, the canons and the Roman laws

consider such son as the lawful heir, yet according to the law and custom of this realm, he shall in no measure be supported as heir in his claim upon the inheritance, nor can he demand the inheritance by the law of the realm. But yet if a question should arise whether such son was begotten or born before marriage, or after, it should, as we have observed, be discussed before the ecclesiastical judge, and of his decision he shall inform the king or his justices; and thus, according to the judgment of the court christian concerning the marriage, namely, whether the demandant was born or begotten before marriage contracted or after, the king's court shall supply that which is necessary in adjudging or refusing the inheritance, respecting which the dispute is, so that by its decision the demandant shall either obtain such inheritance or lose his claim."

The bishops being placed in the difficulty of this *conflictus legum*, by reason of the precise form of the king's writ, at length, at the parliament holden at Merton in the twentieth of Henry the Third, the statute was framed which will be found to have a strong and direct application to the present question. That statute has not upon the original roll the title prefixed thereto, upon which observations were made at your Lordships' bar, that it showed the intention of the law to have [525] been no more than to declare the personal status of those who are described in such statute. In the edition of the statutes published under the commission from the crown there is no other than the general title, "Provisiones de Merton;" and no more argument can justly be built upon the title prefixed in some editions of the statutes than upon the marginal notes against its different sections. That statute or provision of Merton runs thus; viz.,

"To the king's writ of bastardy, whether any one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered, that they would not nor could not make answer to that writ, because it was directly against the common order of the church; and all the bishops instanted the lords that they would consent that all such as were born afore matrimony should be legitimate as well as they that be born after matrimony, as to the succession to inheritance, forasmuch as the church accepteth such as legitimate; and all the earls and barons with one voice answered, that they would not change the laws of the realm which hitherto had been used and approved."

It is manifest from Bracton, who lived and wrote in the time of Henry the Third, that shortly after the statute of Merton this question of special bastardy ceased to be sent to the bishop, and became the subject of inquiry and determination in the king's courts. In book 5. c. 19. after stating the circumstances attending the statute of Merton, and also a subsequent council holden in the same year before the king, the archbishop, the bishops, earls, and barons, whose names [526] he gives, it is ordered, that the words in which the writ shall go to the bishop shall be, whether such a one was born before espousals or marriage, or after, and that the ordinary shall write back to our lord the king in the same words, without any evasion or subtilty; and he then states it was further ordered at that council, that for the reasons before given and of such common consent it may be in the election of our lord the king whether he will demand that inquisition to be taken before the ordinary or in his own court, because when the exception is properly taken, the answer ought not to be obscure; and accordingly it will be found by reference to the year books, that from the time of Edward the Third the distinction became settled, that general bastardy shall be tried by the ordinary, special bastardy shall be tried *per pais*. (See the various authorities collected in Viner's Abridgment, title Trial, Bastardy.)

My Lords, the extent of the dominions of the crown at the time of the passing of the statute of Merton demands particular attention. Normandy, Aquitaine, and Anjou were then under the allegiance of the king of England, and had been so at least from the commencement of the reign of Henry the First. Many of the nobles and other subjects of the king had large possessions both in England and in the countries beyond sea. Those born in Normandy, Aquitaine, or Anjou, (as also in subsequent periods of our history, those born in Guienne, Gascony, Calais, or Tournay, whilst under the actual dominion of the crown,) were natural-born subjects, and could inherit land in England. (Calvin's case, 7th Coke, 20 b.) Many of the very persons who attended at the coronation of Henry [527] the Third, the occasion on which the parliament met at Merton and the statute was passed, both bishops and earls and barons are known from history, and would so appear from their very names and

titles, to have been of foreign lineage if not of foreign birth, and were, at all events, well acquainted with the rule of law which was then so strongly contested, yet notwithstanding the rule of the civil and the canon law prevailed both in Normandy, Aquitaine, and Anjou, by which the subsequent marriage makes the antenatus legitimate for all purposes and to all intents; and, notwithstanding the precise question then under discussion was whether this rule should govern the descent of land locally situate in England, or whether the old law and custom of England should still continue as to such land, under which the ante-natus was incapable to take land by descent, there is not the slightest allusion to any exception in the rule itself as to those born in the foreign dominions of the crown, but the language of the rule is in its terms general and universal as to the succession to land in England. The question is, whether, after the declaration made by that statute, one of the king's subjects, born in Normandy, or Aquitaine, or Anjou, under the circumstances supposed by your Lordships, could have inherited land in England. It is not so much a parallel case with the present,—it is the very case itself, and it seems impossible to contend that such would have been held to be the law. In the first place, there is no other form of any writ to the bishop than the old form given in Glanville and Bracton, which raises the express point whether the claimant was born or not before espousals and matrimony of his father and mother. And if the question was brought before a [528] jury, as afterwards became the course of proceeding, then there was no other than that precise issue which could be raised upon the record. Further, if the question was sent to the bishop, it must have been sent to the bishop of the diocese where the action was brought, that is, where the land was situate, and not to the bishop of the diocese where the party whose legitimacy is disputed was born, (see the Book of Assize 35, pl. 7,) which case seems not obscurely to indicate, that if the birth had been in France the trial would be still before the English bishop; for Skipwith, a judge of the Common Pleas, is made to say there, “you may carry your proofs before him in what place you please in England or from France.” Again, the contest above adverted to was a contest between the antient law and custom of England on the one hand, and the canon law on the other, which should prevail as to the hereditary succession to land in England. The canon and civil law being acknowledged and prevailing in England in all other respects, with the single exception of its application to the descent of land, the same canon and civil law prevailing in the foreign dominions of the crown generally, and without any exception, there seems, therefore, no reasonable or probable ground for the surmise of any intention in the law makers of that day, that, with the general refusal and repudiation of this rule of the civil and canon law as to the hereditary succession to land in England, there should be a tacit exception in favour of a claimant born beyond the seas. Again, the law and custom would rather seem to be one which applies to the land itself, and not to the person only of the claimant. According to an observation of Bracton, in the place above cited, when discussing the [529] very point of the exception on the ground of bastardy, he says, “that every kingdom hath its own customs, differing from those of others, for there may be one custom in the kingdom of England, and another in the kingdom of France, as to successions.” And it would be singular indeed, if any such exception existed, that neither Bracton, who wrote with so much diffuseness on this very question, at the time of this notable refusal of parliament to alter the law, nor the author of Fleta, nor any of the other early writers, should have left the slightest vestige of or allusion to such exception in the rule.

On the contrary, the observation of Lord Coke, 2 Inst., 98. although not made in any case in a court of law, proves in a manner which leaves no doubt what would have been the opinion of that great lawyer upon the point now under discussion, if it had arisen in his time. “Some have written,” he says, “that William the conqueror, being born out of matrimony, Robert his reputed father did afterwards marry Arlot his mother, and that thereby he had right by the civil and canon law; but that is *contra legem Angliæ*, as here it appeareth.” This is, in effect, saying, that although born in Normandy, and legitimated in Normandy by the subsequent marriage of his father and mother there, so that he could inherit land in Normandy, yet as to land in England he could not take it by descent, for the same would be the law of descent of a kingdom, and of the land within it. This is the very case now put to the Judges by your Lordships. It, therefore, appears to be the just conclusion from these premises, that the rule of descent to English land is, [530] that the heir must be born after actual mar-

riage of his father and mother, in order to enable him to inherit; and that this is a rule of a positive, inflexible nature, applying to and inherent in the land itself which is the subject of descent, of the same nature and character as that rule which prohibited the descent of land to any but those who were of the whole blood of the last taker, or like the customs of gavelkind or borough English, which cause the land to descend in the one case to all the sons together, and in the other to the younger son alone.

And if such be, as it appears to us to be, the rule of law which governs the descent of land in England, without any exception either express or implied therein on the score of the place of birth of the claimant, it remains to consider whether by any doctrine of international law, or by the comity of nations, that rule is to be let in by which B. being held to be legitimate in his own country for all purposes must be considered as the heir at law in England.

The broad proposition contended for on the part of the plaintiff in error is, that legitimacy is a personal status to be determined by the law of the country which gives the party birth, and that when the law of that country has once pronounced him to be legitimate, he is by the comity of international law to be considered as legitimate in every other country also, and for every purpose; and it is then contended, that as by the Scotch law there is a *presumptio juris et de jure*, that under the circumstances supposed, the parents of B. were actually married to each other before the birth of B., so such presumption of the Scotch law by [531] which his legitimacy is effected must also be adopted and received to the same extent in the English Courts of Justice.

Now, there can be no doubt but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom:

But it does not therefore follow, that with the adoption of the marriage contract the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated.

That the marriage in question was not celebrated in fact until after the birth of B. is to be assumed from the form of the question. Indeed, except on that supposition, there would be no question at all. Does it follow then, that because the Scotch hold a marriage celebrated between the parents after the birth of a child to be conclusive proof of an actual marriage celebrated before, a foreign country which adopts the marriage as complete and binding as a contract of marriage must also adopt this consequence? No authority has been cited from any jurist or writer on the subject of the law of nations to that effect; nothing beyond the general proposition, that a party legitimate in one country is to be held legitimate all over the world. Indeed the ground upon which this conclusion of B.'s legitimacy is made by the Scotch law is not stated to us, and we have no right to assume any fact not contained in the question which your Lordships have proposed to us. We may however observe, that, in the [532] course of the argument at your Lordships' bar, the ground has been variously stated upon which the laws of different countries have arrived at the same conclusion. It was asserted, that, by the law of Scotland, the subsequent marriage is not to be taken to be the marriage itself, but only evidence, though conclusive in its nature, of the marriage prior to the birth of B.,—that the canon law rests the legitimacy of the son born before such marriage upon a ground totally different, viz., that, having been born illegitimate, he is made legitimate—*legitimus*— by the subsequent marriage, by a positive rule of law, on account of the repentance of his parents; whereas by the Scotch law a marriage previous to his birth is conclusively presumed, so that he always was legitimate, and his parents had nothing to repent of. Pothier, on the other hand, (*Contrat de Marr.* Part V. ch. 2. art. 2.,) when he speaks of the effect of a subsequent marriage in legitimating children born before it, disclaims the authority of the canon law, nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the custom of Troyes: "Les enfans nés hors mariage de soluto et solutâ, puis que le père et la mère s'espousent, l'un l'autre succèdent et viennent à partage avec les autres enfans, si aucuns y a;" and then adds, "that it is a common right received throughout that kingdom."

Now, it could never be contended by any jurist that the law of England, with respect to the succession of land in England, would be bound to adopt a positive law of succession like that which holds in France, the distinction being so well known

between laws that relate to personal status and personal contracts, and those [533] which relate to real and immoveable property, for which it is unnecessary to make reference to any other authority than that of Dr. Story, in his admirable Commentaries on the Conflict of Laws (see sections 430. *et seq.*, where all the authorities are brought together); and if such positive law is not upon any principle to be introduced to control the English law of descent, what ground is there for the introduction into the English law of descent, not only of the contract of marriage observed in another country, which is admitted to be adopted, but also of a fiction with respect to the time of the marriage, that is, in effect, of a rule of evidence which the foreign country thinks it right to hold?

But admitting for the sake of argument, and we are not called upon to give our opinion on that point, that B., legitimate in Scotland, is to be taken to be legitimate all over the world, the question still recurs, whether, for the purpose of constituting an heir to land in England, something more is not necessary to be proved on his part than such legitimacy? And if we are right in the grounds on which we have rested the first point, one other step is necessary, namely, to prove that he was born after an actual marriage between his parents; and if this be so, then, upon the distinction admitted by all the writers on international law, the *lex loci rei sitae* must prevail, not the law of the place of birth.

My Lords, in the course of the discussion some stress appears to have been placed on the argument, that if B. had died before A. the intestate, leaving a child, such child might have inherited to A., tracing through his legitimate parent; and then it was asked, if the child might inherit, why might not the parent himself inherit? But the answer to that supposed case appears [534] to be, that if the parent be not capable of inheriting himself, he has no heritable blood which he can transmit to his child, so that the child could not under the assumed facts have inherited, and the question, therefore, becomes in truth the same with that before us. The case supposed would be governed by the old acknowledged rule of descent,—"Qui doit inheriter al père doit inheriter al fitz."

My Lords, the two decided cases that have been relied upon in the course of argument, that of *Sheddon v. Patrick*, and that of the *Strathmore Peerage*, do not, upon consideration, create any real difficulty. Those cases decide no more than that no one can inherit without having the personal status of legitimacy, a point upon which all agree; but they are of no force to establish the main point in dispute in this case, viz., that such personal status is sufficient of itself to enable the claimant to succeed as heir to land in England.

Upon the whole, in reporting to your Lordships, as the opinion of the Judges, "that B. is not entitled to the real property as the heir of A.," I am bound at the same time to state, that, although they agree in the result, they are not to be considered as responsible for all the grounds and reasons on which I have endeavoured to support and explain such opinion.

Lord Chancellor.—The subject upon which your Lordships have had the opinion of the Judges is of so much importance, and the learning contained in that able opinion is of such a description, as, in my opinion, to require further consideration. I shall, therefore, propose to your Lordships that the further consideration of the case be postponed.

[535] Lord Brougham.—I perfectly agree in opinion with my noble and learned friend. It is quite impossible to express more strongly than I desire to do the obligations which I think your Lordships and the bar are under to the learned Judges for the very able, elaborate, and lucid opinion they have given.

It is perhaps enough to say, respecting this opinion of the learned Judges, that in a case which has undergone argument in every form for somewhere about twelve years past, both in the sister kingdom and here,—first in the different courts of Westminster Hall, and next at your Lordships' bar,—upon which the learned Judges in the courts below, upon former occasions, in deciding the question submitted to them, and the learned Judges here, in assisting your Lordships, have given their opinions, and discussed the points,—nevertheless, at the eleventh hour as it were, and at the very end of this long-continued discussion, very great new light, if I may express it, has been thrown upon the question by the reasonings of the learned

Judges, and very important additions have been made by the arguments to-day to those arguments and that learning which had been brought to bear upon that question in its former shape, in your Lordships' House, in Westminster Hall, and in the courts of Scotland.

Under these circumstances it is not for me to say that the opinion, or rather the leaning of opinion, which it is well known to your Lordships I formerly expressed, is not materially altered by the quite new form in which the argument is now placed. I am by no means prepared to state that I shall not, on reconsidering the reasons of the learned Judges now submitted, find a sufficient answer to the difficulties which formerly [536] pressed upon me, which I very fully stated to your Lordships, I think, in the year 1835.

Upon these grounds I entirely agree in thinking that the further consideration of this case ought to be postponed. I ought to add, that in the whole of the first part of the reasoning of the learned Judges I was prepared to agree. What I have doubted is the latter part of the reasoning. One thing has struck me, that, supposing your Lordships shall ultimately be of opinion that you ought to decide in favour of the defendant in error, and to affirm the judgment of the Court below, it will be absolutely necessary that the legislature should interfere, in order to allay the evils which will arise out of the conflict of law, respecting the personal status in the two parts of the kingdom.

Lord Brougham (10th August).—This was an ejectment brought to recover lands situated in Yorkshire; and a verdict being taken, subject to a special case for the opinion of the Court of King's Bench, (from which the record came,) with leave to either party to turn it into a special verdict, it came before this House by writ of error, and was twice argued; first in 1830, when the Judges attended and gave their opinion through the Chief Baron (Sir William Alexander); and again in 1838, when your Lordships also had the assistance of the Judges, who have now given their opinion, through the Chief Justice of the Common Pleas. The question raised by the special verdict, and argued upon these several occasions, is this, whether a person born in Scotland of parents domiciled there and married there, but after his birth, and who, by the law of Scotland, [537] is legitimate in consequence of that subsequent marriage, can take real estate in England as heir. The Court below held, that he could not, and the Judges have all agreed in this opinion.

When, in 1835, I took the liberty of calling the attention of your Lordships to this question, I pointed out what appeared to me to have been material defects in the argument, both below and here, on the part of the defendant in error,—that is, in support of the judgment below. The learned and elaborate opinion last given by the Judges has made very valuable additions to the clear and able, though more succinct statement, given upon the former occasion. It is now for your Lordships finally to dispose of the case; and I deem it my duty to offer a few remarks upon the subject, on account of its great importance, and more especially of the bearing which the principles connected with it, and about to be recognized in your decision, must almost unavoidably leave upon other questions.

While I willingly acknowledge the great value of the assistance which we have received from the learned Judges upon this occasion, I feel convinced that there are several matters which still remain to be considered, and some difficulties to be got over, before we can with perfect confidence rely upon the conclusion at which they have arrived. But I shall rest satisfied with referring generally to the scope of the argument which I submitted to your Lordships upon the former occasion, 1835, and with observing that a considerable portion of it is left untouched by the present argument of the learned Judges; and that I, on the other hand, should find it not difficult to reach a conclusion the opposite of theirs, while I yet admitted a very large portion of [538] their positions. In the observations which I am about to offer upon their argument, I purposely abstain from any thing more than thus generally referring to its scope, as contrasted with that of the opposite reasoning. What I wish further now to state relates to the detail of their statement, and must be taken as independent of any general answer to it, for which I refer to what I before submitted to your Lordships.

The authorities cited by the learned Judges, especially in the earlier part of their

opinion, do not seem conclusive; as, for example, Lord Coke's definition of heir, *ex justis nuptiis procreatus*, and the text in the Mirror, "that the law only taketh him to be a son whom the marriage proveth to be so." These and other authorities only prove the dependence on and connexion of legitimacy with marriage, or of inheritable quality with marriage, which in no part of the argument ever could have been denied. The text in Glanville seems at first to take the distinction between legitimacy generally or absolutely, and legitimacy by being born in lawful wedlock, as connected with right to inherit; for it says, "neither a bastard, nor any person not born in lawful wedlock, can be an heir." But in a subsequent chapter the writ is given, and that sets forth the denial by the demandant of the tenant's right, because he is a bastard, born before marriage of the parents, which seems to indicate that the marriage was required to precede the birth, only in order to negative the bastardy. The writ indeed adds, "that it does not belong to the temporal court to inquire concerning bastardy, wherefore it is sent to the court christian."

It is said that the law frames the writ for the purpose [539] of preventing the court christian from answering the question according to the canon or civil law. Nevertheless, the bishops were not compelled by the exigency of the writ to confine themselves to the question, whether the party was born before or since the marriage, because the bastardy is introduced in terms, as well as the birth and marriage.

A council, however, was held soon after the parliament of Merton, and at that council it was directed that the writ should merely require the ordinary to examine the date of the birth, and, whether before or after marriage, to prevent, as is said "any evasion or subtilty" on the part of the ecclesiastical authorities.

The argument of the learned Judges upon the statute of Merton is deserving of great attention; nor can I at all go along with those who have contended, both in the Court below and here, that it is not a statute, but a refusal to make a statute. Such was the contention of the learned Chief Justice in the able argument which he held, when at the bar in the King's Bench, against the decision. This statute is only different from other statutes, inasmuch as it is in substance declaratory, and in form somewhat different from that of declaratory acts in modern times. It is a distinct declaration of what the law had ever been before the statute, and a refusal to alter it. But it is to be observed, that the bishops, in calling for the alteration, put their demand expressly on the ground, that *ante-nati* are legitimate by the canon law; and it is in consequence of their legitimacy that the bishops claim the recognition of their right to inherit. The barons only affirm that such *ante-nati* had no right of inheritance by the common law, without saying whether, by the common law, they [540] were legitimate or not,—though assuredly the common law is understood to be declared by the statute against their legitimacy universally and in all respects, as well as with respect to feudal inheritance. But I agree that it somewhat aids the views taken by the learned Judges, when we find that special bastardy ceased, from the time of the statute, to be tried by the bishop, and has ever since been tried *per pais*.

It may be remarked, that the proceeding appears, from the Grand Coustumier, c. 27., to have been a writ of bastardy general, directed to the ordinary; but the description of bastards there given is worthy of attention:—"Tous ceulx sont bastards qui sont engendres hors mariage;" and then immediately it goes on to say, "mais ceulx qui furent engendres devant le mariage, si le pere espouse depuis la mere, ils sont tenus legitimes." So that, apparently, though born *de facto* out of wedlock, they were, in contemplation of law, born within wedlock. It may be further observed, that Littleton, section 188., in treating of villenage, gives, as the reason why a bastard is *quasi nullius filius*, that he cannot be heir to any "pur ceo que il ne poit enheriter à nulluy."

The learned Judges object to the observations made at the bar upon the title prefixed to the chapter in question of the statute, namely, that this title showed the enactment only was intended to be a declaration of the personal status. "This title," say the learned Judges, "is not to be found in the original statute;" and they refer to the edition published by the Record Commission, where *Provisiones de Merton* is the only heading of the act; and they add "that no more argument can justly be built upon the title prefixed [541] in some editions, than upon the marginal notes against the different sections." If, however, the learned counsel at your Lord-



ships' bar were led into any error in this matter, they had very high example in going astray, no less than that of the Court below, whence this writ of error is brought, and where, when the cause was first decided, one of the learned Judges (5 Barnewall and Cresswell, 453.) argued in support of the decision now under revision, on the ground of the heading or title. "We have no occasion," (says Mr. Justice Bayley,) "in order to answer the question, who is hæres?—we have no occasion to go beyond the statute, in order to answer that question; the title of it is, 'He is a bastard who is born before the marriage of his parents,' not restricting it to those born in England." For myself, I consider the assistance to be equally slender which the one argument and the other derives from this title, even supposing it to have been the one given by the legislature to the chapter of the act, which it appears not to have been; indeed, it could not have been, for no titles at all were put on statutes till the 11th Henry 7., as is said by Treby, Chief Justice, in *Chance v. Adams*; Hardwicke, 324.

I am inclined to regard, as the most important part of the argument of the learned Judges, their observations on the state of the crown dominions at the making of the statute. This point had been made in the Court below, but without much explanation, and not much dwelt upon. The Lord Chief Justice (Abbott) takes it, though only in general terms, yet quite intelligibly (5 Barnewall and Cresswell, 452). The learned Judges here have very carefully explained the argument, and [542] illustrated it by important remarks; they have contended that an *ante-natus* within the king's legiance, but born in Normandy, (which, by the way, had, for above thirty years before the statute, ceased to be English *de facto*, though it was not formally ceded till twenty-five years after,) Aquitaine, and other provinces where the civil law prevailed, could not have inherited lands in England under the statute,—chiefly because no exception is there made *per expressum* of such persons, although the connexion of the countries would naturally call the attention of the legislature to the case, and because no tacit or implied exception can be supposed in favour of the canon law for Norman subjects of the crown, when the express words of the act refuse to adopt the same canon law for English subjects of the crown. The silence of contemporary writers, as Bracton, and the author of Fleta, is very justly referred to in aid of the same conclusion. The other reasoning of the learned Judges on the passage of Bracton, and which, as well as the reference to the customs of gavelkind and borough English, was urged below, seems there to have met with a sufficient answer in the argument at the bar;—that those authorities apply to English parties, and those customs to the rule of succession, none of which matters are disputed; so that the authorities may well stand with the opposite argument. No doubt, if the fact of being born within lawful wedlock be as much a necessary quality to the character of heir by the custom of England, as the fact of being youngest heir is to being heir by the custom of borough English manors,—if that fact, of being born within lawful wedlock, can only be judged of according to the English law, and admits of as little dispute as the fact [543] of being eldest or youngest child,—there is, and there must be, an end of the question; but unless these things are so, the cases put have no useful application to the one in hand.

So of the proposition repeatedly affirmed below, and now largely stated by the learned Judges here, that the law or custom is something inherent in the land, a quality of the land itself, as it were, and not of the claimant. This of course would, in one sense, decide the question, but then it would beg it also. In any other sense it leaves the question untouched, for the dispute would still arise, what description of person is that to which the descendible quality of the land carries it?

The argument drawn by the learned Judges from the observation of Lord Coke, in the 2d Institute, 98, on the title of William the Conqueror, had been used in the Court below; 5 Barnewall and Cresswell, 448. The passage is not very clear. But when Lord Coke says, that some held William the Conqueror to have had right by the civil and canon law, in consequence of the subsequent marriage of his parents, he is, I presume, supposed to mean right to the crown of England as nearest maternal relation to Edward the Confessor, which he certainly was, being grandson of his maternal uncle Richard of Normandy. That this could give him no right to the exclusion of the male branch represented by Edgar Atheling, the Confessor's great-nephew, and who, being grandson of his elder brother Edmund Ironsides, had indeed

a title paramount, that of the Confessor himself, is quite clear. And although the Conqueror appears to have called himself *rex hereditarius* in some charters, historians and antiquaries are agreed that [544] this could only mean heir under the supposed will of the Confessor; for the only dispute as to his title that has ever been raised is, whether he took by the sword or as conqueror by purchase, (Spelman's Glossary, *vide* Conquestor), under the supposed will or gift of the Confessor, about the existence of which much controversy has always been held. As to his taking as heir by inheritance, no person has ever asserted his title; and if he took under the Confessor's gift or will, his legitimacy was really of as little importance as it was to the other and more secure title which he derived from his sword. If, indeed, Lord Coke, or rather those whom he refers to, for any reason supposed the male branch to be extinct, then we can understand the passage, always supposing that a mother's relatives could succeed; and in that case the passage might bear upon the argument; or it may bear upon it if we suppose Lord Coke puts the case hypothetically, or refers to some who did consider the male branch settled in Hungary extinct. Still this seems not very intelligible; for it is believed that Edward the Confessor had called them over as his end approached,—that his nephew Edward, the outlaw or exile, came back, and died here; but, wherever he died, it is quite certain that he left Edgar Atheling, his son, who was notoriously in England at the conquest, and was made to join in some proceedings to confirm William's title, and afterwards was engaged in an unsuccessful rebellion against him. The passage, therefore, is really not very easily explained, nor is any light thrown on it by the reference to the authorities cited: William of Malmesbury, B. III.; Ingulphus, lib. VI. cap. 19.; and the Grand Coustumier, cap. 27. The first of these, at the place referred to, [545] only says, that William's father married his mother,—*aliquandiu justac uxoris loco habuit* (scil. Arlottam); and the second reference (to Ingulphus) seems erroneous, for there are no books and chapters in Ingulphus, at least in any editions which we now have, or which are known ever to have existed; but all that he says of William (who was his patron, and of whom he writes largely, and in praise and defence,) is, that the Confessor, aware of Edgar's weakness, turned his thoughts towards William, taking into consideration "*cognationem suam*," an expression which he repeats afterwards. The text of the Grand Coustumier (which is the third reference) merely gives the law of bastardy and legitimation generally; nor can I see any reference to William's case in the Commentaries; though I will not undertake to say there may not be some such reference. In the text cited by Lord Coke there is certainly none, and in the Commentary I can find none; but the difficulties do not end here, because, even if Edgar were set aside for imbecility, still the Conqueror was not next heir, for he was only the Confessor's cousin-german by the mother once removed (Welch nephew, as we say, or nephew *a la mode de Bretagne*, as the French have it; and this accounts for some writers calling the Confessor cousin and some uncle to the Conqueror); whereas Edgar's sister, afterwards married to Malcolm in Scotland, was his great niece by his elder brother. And, moreover, we have now been all along supposing that the connexion of William with the Confessor, through the mother of the latter only, made no difference; whereas, suppose the whole paternal relations had been extinguished, it is difficult to see how upon any feudal principle any person could [546] inherit who was not of the blood of the English royal family. William's only connexion with England was, that his aunt had been married to an English king; consequently it seems quite impossible to understand how he ever could be considered as having right, even on the supposition that the lawful course of succession was by nomination and selection from among the whole members of a given royal family. Subject to these observations, we may perhaps consider this passage in Lord Coke as some kind of indication of his opinion, always supposing the passage to be correct. But there can be little doubt that these observations make it exceedingly uncertain whether Lord Coke ever wrote it as we now have it,—in a work too, be it observed, which was not published in his lifetime. If there were no such uncertainty hanging over the passage its importance to the argument would be undeniable; it would amount to neither more nor less than Lord Coke's opinion upon the case at bar. But it is probable that some such considerations as those to which I have been adverting, operated in preventing any attention

being paid to this authority in the Court below, where it was cited, but occasioned no remark, either at the bar or from the bench.

The learned Judges refer to the illustration drawn from a person supposed to claim through the ante-natus, he having predeceased his father; and they hold this to be disposed of by the opinion given on the principal case or question, inasmuch as, if incapable of inheriting himself, he could not transmit heritable blood to his issue; and, generally speaking, no doubt it would be so, although contrary to Lord Coke's supposed opinion as to issue of aliens inheriting to each other collaterally, it [547] has been decided that a brother may succeed to a brother, the only connexion of the two being through an alien father who had no inheritable blood, (*Collingwood v. Pace*, 1 Levinz, 59,) where the opinion generally ascribed, and, among others, by Blackstone, to Lord Coke, is denied by the majority of the Judges to be his, and by none of them affirmed to be so. But a nearer case to the present may be put, where, by the law of the country, as in Scotland and on the Continent, legitimation *per subsequens matrimonium* is admitted, it seems that the authorities are agreed in holding that if the ante-natus dies before the marriage of his parents, leaving lawful issue, the issue shall take as heir to his grandfather, though he must claim through a person who lived and died illegitimate.

Nor is this case of one who never could himself be heir, transmitting inheritable blood to his issue, confined to those countries and that law of legitimation. We have an example in our own law in the case of bastard eigne, and it is worth while to consider how this is treated, though I know not that it materially impeaches the general conclusion to which the argument of the learned Judges leads them, unless by showing how entirely the law proceeds upon the supposition that it is his bastardy, and his bastardy only, which excludes the ante-natus from succession.

Littleton, in sections 399 and 400, says, that the issue of the bastard eigne who, having entered, died seised, shall have the land, by reason of a colour to enter as heir to his father; "for by the law of holy church he is mulier, albeit by the law of the land he is bastard."

[548] Lord Coke, in commenting upon the words of Littleton, that in such a case the mulier puisne is "without remedy," says, that the descent from the bastard eigne not only takes away the entry, like other descents which leave the party to his action, but makes the issue of the bastard become lawful heir, adding that even if the mulier be within age he is barred, because the bastard's issue is become in judgment of law lawful heir. "For the law," says he, "doth prefer legitimation before the privilege of infancy." Collateral heirs too are barred as well as the mulier, and the bastard becoming a monk professed, which is a civil death, has the same effect; his issue succeeds during the natural life of the bastard, and the legitimate heir is barred. In the 2d Institute, Lord Coke, as a confirmation of the doctrine, gives the record of a judgment in the 18th Edward the First, showing that the mulier cannot have an assize of mort d'ancestor, and upon the ground that the bastard eigne has entered as heir; and the reason assigned by Lord Coke is that the bastard is accounted of the blood with the mulier puisne. (2d Institute, 97.) But in Coke, Littleton, 244 b, he puts the case which has been referred to from the law of Scotland and the Continent, of the bastard eigne dying in his father's lifetime, and, leaving issue, this son enters as heir to the grandfather, and dies seised; the mulier is barred. "The descent," says Lord Coke, "binds him." Now this cannot be from the laches of the mulier during the bastard's life, for, by the supposition, nothing had been done by the bastard to make the mulier claim, nor could he claim, for the grandfather was still alive. The laches was in the grandson's life; so that here the reason given [549] for the law fails, viz., that it is unjust to treat a person all his life as legitimate, and bastardize him after his death; for here the ante-natus never was treated as legitimate at all; he lived and died a bastard, yet his issue claiming through him who had no inheritable blood, entered as heir to the common ancestor, and, by dying seised, barred the lawful issue. Although, however, this consideration somewhat contradicts the answer given by the learned Judges to the argument at the bar, it yet furnishes another answer to that argument, by showing that if it proves any thing, it proves too much, since, in the case of bastard eigne, there is no question whatever of his right being excluded in the common case, (of English marriage, birth,

and domicile,) unless where there has been an entry and dying seised without counter-claim.

The short observation made by the learned Judges on the cases of *Sheddan v. Patrick* [see p. 504], and of the *Strathmore Peerage* [see p. 504], appears hardly to be satisfactory. "These cases," it is said, "only decide that no one can inherit without the personal status of legitimacy, and do not show what is alone in dispute, that such personal status is sufficient ground for claiming English real estate as heir." It appears that these cases establish somewhat more than the first of those positions, and, although they do not decide the second, they appear to give it much countenance. They show that the quality, whatever it is, that must be possessed by a claimant, in order that he may take land or honours in Scotland, is given to or withholden from him according to the law, not of Scotland, where the [550] real estate lies, but of the country where his birth and his father's marriage and domicile were. Whether that quality be called legitimacy, or any thing else, is not material; nor is it material whether the quality is required in relation to the property by some positive statutory enactment of the country where it lies, or only by the common law of that country, or by some statute (like that of Merton) which declares what the common law always has been. The land in Scotland is impressed with a particular quality, that of being descendible to the ante-nati where the parents have intermarried; it is of such a nature as not to descend upon the mulier puise, but upon the bastard eigne; while, in England, it is of such a nature as to descend to the mulier, and not to the bastard. The one quality is as firmly fixed in the soil of Scotland, as the other is in that of England. Then what have the Courts, and what has this House, decided in those celebrated cases? That notwithstanding the inherent descendible quality, and notwithstanding the general rule of the *lex loci rei sitae*, so much relied on by the learned Judges, both below and here, through their whole argument, the law of the country where the property is must bend to the law of the domicile, marriage, and birth; and because the latter law excludes ante-nati from legitimacy, they shall be excluded from the succession to which the former law calls them. The Scotch common law says, "Let the land go to the ante-natus, such is its descendible quality." The English common law says, "Let the land not go to the ante-natus." The question, and the only question, is, have we a right to look beyond the fact, or to ask any but one question, namely, [551] whether a person is ante-natus or post-natus, whether his parents were married or not at his birth? Are we bound by the simple fact, or may we look to the view taken of it by the law of the foreign country to which the claimant and his parents belonged? The decided cases say, in the instance of Scotland, that we may and must look to the foreign law; that the subsequent marriage is immaterial for succession in Scotland, if it is immaterial for legitimation in the claimant's country; and the question is, whether, according to the principle of these decisions, it is possible to exclude all reference to the foreign law, where the same kind of question arises as to English succession? It is very possible that the principle of the cases may be inapplicable; this may, possibly, be proved by argument, but it can hardly be said to have been proved by the only remark made on these cases in the statement of the learned Judges; and this scanty discussion of those cases is the more to be lamented, because, in deciding the present question, the Court below expressly referred to this House as the place where *Sheddan v. Patrick* and the *Strathmore Peerage* would meet with ample attention as to their bearing upon this argument.

The learned Judges have given no opinion upon the question, whether or not a person legitimated by subsequent marriage in a country where that law prevails is, therefore, legitimate all the world over; nor, perhaps, was it incumbent on them to argue this for the purpose of answering the question put to them by the House. They contend that the statute, or rather the common law recognized and declared by the statute, requires something beyond mere legitimacy to make an [552] heir to English real estate. They agree with the Court below that legitimacy alone is not sufficient; it must be, as was there said, (5 Barn. and Cress. 454,) legitimacy *sub modo*, legitimacy and being born in wedlock. Consequently they appear plainly to admit that a person may be legitimate for all other purposes, and yet incapable of taking land by descent; that we ought not to say "a man's eldest lawful son is his heir at law" but his eldest lawful son, if born in lawful wedlock.

In another case, *Munro v. Munro*, (1 Robinson's Appeal Cases, 492,) which has

been decided to-day, we held here, as it had been held in the Court below, that a party is entitled to take real estate by descent as legitimate according to the law of the country where it lies, who is bastard by the law established in the country of the birth and marriage. In the courts which administer the law, (the law of England in the case put,) would the party be considered as bastard or as legitimate, where any right unconnected with real property was claimed? If bastard, then the same person is legitimate in one country and not in another; bastard where born, and legitimate where the parents are domiciled; though some of the Judges, with whom we agreed in that case, held this to be a solecism in law, considering it clear that the status must be everywhere the same. If legitimate, then it follows that the question of personal status depends on the law of foreign countries, and that the law is imported into England as to the consequences of the marriage contract, although the *lex loci contractus* alone regulates the constitution of that contract.

[553] But, which way soever we may hold as to these questions, the principles of the two decided cases referred to are quite consistent with that of the last-mentioned case decided to-day. They are not so easily reconciled to the judgment at present before your Lordships.

Having stated what occurs to me upon the arguments of the learned Judges, again expressing my high sense of the service which they have rendered by the great attention bestowed upon the subject, I rest satisfied with intimating my opinion upon the difficulties which still beset the question, and the anomalies likely to arise from the future application of the principles countenanced in the decision; and though I shall not move your Lordships to give judgment for the defendant in error, if my noble and learned friends move, I shall offer no opposition.

Lord Chancellor.—I was not in your Lordships' House when this case was first argued, but I was present at the argument when the learned Judges were present, and I gave my attention to the opinion expressed by the Lord Chief Justice, and I entirely concur in that opinion. I am extremely satisfied with the ground upon which they put it; because they put the question on a ground which avoids the difficulty which seems to surround the question, of interfering with those general principles peculiar to the law of England, and which seem at first sight to interfere with the decisions to which the Courts have come. Under these circumstances, as my noble and learned friend does not move the judgment for the defendant [554] in error, I move, that judgment be entered for the defendant in error.

Ordered, That the said Judgment given in the said Court of King's Bench be and the same is hereby affirmed; and that the record be remitted, to the end such proceeding may be had thereupon, as if no such writ of error had been brought into this House.

#### [555] FROM THE COURT OF CHANCERY.

The Right Honourable CHARLES PHILIP Earl of Hardwicke,—*Appellant*;  
Sir CHARLES EURWICKE DOUGLAS,—*Respondent* [30th July and 10th August 1840].

[*Moss*' Dig. xv. 400. S.C. 7 Cl. and F. 795; and, in Court below, *sub nom. Douglas v. Leake*, 5 L.J. Ch. 25. Cited in *Lee v. Delane*, 1850, 4 De G. and S. 5.]

Mr. Charles Yorke by his will, after giving several legacies, gives the residue of his estate to trustees, in trust to pay the income to his wife for life, and after her death to transfer the residue to Sir Charles Douglas. By a codicil, after giving specific and pecuniary legacies, there is the following clause:—"All the rest and residue of my property not herein-before (or by my will or any other codicil) disposed of, I give and bequeath to my nephew Charles Philip Yorke, and to Sir Charles Eurwicke Douglas, Knight, their executors, administrators, and assigns, after the death of my wife, equally to be divided between

them.”—Held, that the residue of the testator’s property passed under the residuary clause of the codicil, and revoked the gift of the residue bequeathed by the will;—Lord Lyndhurst and Lord Brougham concurring; the Lord Chancellor *dissentiente*, and being of opinion that nothing passed under the residuary clause of the codicil, the whole of the residuary property being disposed of by the will.

The Right Honourable Charles Philip Yorke, by his will dated the 19th of April 1827, which was attested by three witnesses, after bequeathing to his wife the sum of £500, to be paid to her within six calendar months next after his decease, and the use of either his house in Bruton Street, London, or at Bon-[556]-ningtons in Hertfordshire, together with the furniture belonging to it, for her life, directed that the whole of the sum of £12,000, in pursuance of a power given him for charging his brother Lord Hardwicke’s estates with that sum, should be raised and paid to his executors as soon as conveniently might be after the decease and failure of male issue of Lord Hardwicke, and that it should be considered as part of his general personal estate. The will then proceeds as follows :

“ And I give and bequeath the said sum of £12,000 so herein-before charged by me upon the estates of the said Philip Earl of Hardwicke as aforesaid, and also all my leasehold estates in Bruton Street and at Bonningtons aforesaid, or elsewhere; and all my monies, securities for money, stock in the public or government funds or annuities, household goods, furniture, plate, linen, china, pictures, prints, books, goods, chattels, and other personal estate and effects, whatsoever and wheresoever; and all my estate, right, title, and interest therein and thereto respectively; but subject nevertheless and without prejudice to the bequests herein-before contained and made unto or in favour of my said wife Harriet Yorke for her life and otherwise as aforesaid; and also subject to the payment of my just debts, and funeral and testamentary expenses, and such legacies as I may hereafter give or bequeath by any codicil or codicils to this my will, unto my said dear wife Harriet Yorke, and my excellent friends the aforesaid Charles William Manningham, Sir Edward Hyde East, William Martin Leake, and Thomas Atkinson, and their executors, administrators, and assigns, upon the trusts, and to and for the intents and purposes herein-after [557] expressed and declared of and concerning the same; that is to say, upon trust that they the said Harriet Yorke, Charles William Manningham, Sir Edward Hyde East, William Martin Leake, and Thomas Atkinson, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall forthwith, or as soon after my decease as they, she, or he shall think proper or expedient, make sale and dispose of such parts of my said leasehold and residuary personal estates and effects respectively as are or shall be in their nature saleable; and collect, get in, and receive such parts thereof as are not or shall not be in their nature saleable; and do and shall lay out and invest the monies to arise from such sale or sales, and so to be collected and received as aforesaid, in their, her, or his names or name, in some or one of the public stocks or funds, or in or upon real or government securities in England, (with full power to alter, vary, and transpose such stocks, funds, and securities, or any other stocks, funds, or securities, subject to the trusts of this my will, from time to time, at their, his, or her discretion,) and do and shall stand and be possessed of and interested in the said stocks, funds, and securities; and also of and in all such part and parts of my said residuary personal estate and effects as shall consist of stocks, funds, or securities at my death, and every of them respectively, upon the trusts, for the intents and purposes, and under and subject to the provisoes and declarations herein-after declared or expressed of and concerning the same, that is to say, upon trust during the life of my said wife Harriet Yorke, to receive and pay to her, the said Harriet Yorke, or permit and [558] suffer her to retain and keep, to and for her own use and benefit, all the dividends, interest, and annual proceeds of or to arise from the said several stocks, funds, and securities, trust monies and premises, and every of them, and every part thereof respectively, when and as such dividends, interest, and annual proceeds shall from time to time become due and payable; and from and after the decease of my said wife Harriet Yorke, upon trust to assign, transfer, and pay all the said stocks, funds, and securities, trust monies and premises, and every of them, and every part thereof respectively,

unto my natural son Charles Eurwicke Douglas, (wishing him to use the name of Eurwicke only,) his executors, administrators, and assigns, for his and their own absolute use and benefit, in case he the said Charles Eurwicke Douglas shall be living at my death, and shall then have attained, or shall afterwards live to attain, the age of twenty-five years, or be married, with the previous consent of my said wife Harriet Yorke, during her life, or after her decease, with the consent of the said Charles William Manningham, Sir Edward Hyde East, William Martin Leake, and Thomas Atkinson, or the survivors or survivor of them, his executors or administrators."

The testator then proceeded to dispose of his residuary property, in case the respondent had died in his lifetime, or under the age of twenty-five, without having been married with consent, to (the appellant) his nephew Charles Philip Yorke, in case he should be living at his death, with divers contingent limitations over in case of his death; and appointed Mrs. Yorke executrix, and the other trustees executors, of his will.

[559] By deed poll, dated the 3d May 1827, subject to a power of revocation therein contained, after reciting that he had transferred into the names of trustees £4655 7s. Od. new 4 per cent. annuities, £500 4 per cent. annuities, £3529 8s. 3d. 3 per cent. reduced annuities, £1600 3 per cent. annuities, and £40 long annuities, it was declared that they should stand possessed of the same, upon trust to pay the dividends to the testator for life, and after his decease to transfer the same to the respondent in case he should attain the age of twenty-five, or be married with consent.

By deed poll, endorsed on the last-mentioned deed poll, dated the 30th November 1832, the testator, after reciting that the £40 long annuities had been sold, and the proceeds invested in £1142 17s. 2d. reduced 3½ per cent. annuities in the names of the trustees, and that he had since invested £664 17s. 7d. 3½ per cent. annuities in the names of the trustees, with the intention that the same should be held upon the same trusts as the bank annuities within mentioned, but that no declaration of the trusts thereof in writing had been made, revoked the trusts of the within-written deed poll declared concerning all the stocks and funds then vested in the names of the trustees, and declared that the trustees should stand possessed thereof in trust for the testator, his executors, administrators, and assigns.

By a settlement, dated the 22d of December 1832, made in contemplation of a marriage, which was afterwards had, between the respondent and Mary Ann Des Vœux, the testator vested in the names of trustees the several sums of £5320 4s. 7d. new 3½ per cent. annuities, £1600 3 per cent. consolidated annuities, £3529 8s. 3d. 3 per cent. annuities, £500 4 per cent. [560] annuities, and £1142 17s. 2d. 3½ per cent. annuities; and covenanted, that his heirs or executors should, after the decease of himself and Mrs. Yorke, pay to the trustees of the settlement £10,000, upon trust that they should stand possessed of the several stocks and £10,000, for the benefit of the husband and wife for their lives, and after their decease for the benefit of the issue of the marriage. Miss Des Vœux's fortune was £7000, and was put, into settlement.

On the 1st of May 1883, Mr. Yorke made a codicil to his will, attested by three witnesses, which had been prepared by his solicitors, whereby he not only confirmed the charge of £12,000, mentioned in his will, upon the property specified in his will; but likewise charged all his brother's estates which he had power to charge with the payment of that sum, and directed that it should not be raised during Mrs. Yorke's life, provided interest at the rate of 4 per cent. was punctually paid. He directed that £5000, part of the charge of £12,000, should be paid, after the death of Mrs. Yorke, to the trustees named in the respondent's marriage settlement, in part satisfaction of his covenant for payment of £10,000; and directed that the remainder should be paid out of his general personal estate; that £2000 should be paid to Thomas Atkinson and the respondent, upon certain trusts; and that £5000, residue of the sum of £12,000, should not be raised if any son or grandson of his late brother, Sir Joseph Sydney Yorke, should be entitled in possession to the estates charged therewith, and that they should be altogether discharged from the payment of that portion; and that if the £12,000 had been raised during Mrs. Yorke's lifetime, or after her decease, then he [561] directed, that in the event of such son or grandson of Sir Joseph Sydney Yorke being so entitled as aforesaid, that the said sum of £5000 should be applied by his trustees towards the discharge of any incumbrances affecting the same

estates, or in the purchase of other property, to be settled in the same manner as the estates charged; and he "ratified and confirmed his said will in every other respect whatsoever."

On the following day Mr. Yorke made another codicil to his will, dated 2d May 1833, which commences as follows:—"This is a codicil of specific and pecuniary legacies, to be also added to my will." By this codicil he desires that his body may be opened, or that a surgeon should be employed to perform such short and decisive operation upon it as might ensure his being really dead, and that for his trouble he should be paid £10 upon the spot; and desires that he may be buried at Wimpole, as near as may be to his dear and lamented brother Sir Joseph Sydney Yorke. He added the name of Sir Charles Eurwicke Douglas to the number of his executors, and bequeathed to such of them as should act the sum of £20 for mourning. To several relations he gave pecuniary legacies, to be paid to such of them as should be living at Mrs. Yorke's death; amongst the number is a legacy of £100 to the appellant. The testator then bequeathed several small annuities to different persons, to be paid half-yearly; the first payment to be made on the first usual quarter-day that might happen after his decease; and directs, that as they should respectively cease, they should fall into and become part of his personal estate and its residue. After bequeathing certain gilt plate given to him by his constituents, and gilt candlesticks which he had [562] added to it, and certain silver inkstands and candlesticks which came to him as secretary-at-war, and pictures of Lord Chancellors Hardwicke and Somers and of Sir J. S. Yorke, and crayon drawings by his mother, and his maps, plans, and charts, with his Egyptian and hieroglyphical engravings, drawing books, and tracts, and all his classical and other books relating to ancient literature, (except duplicates, which he gave to Sir. C. E. Douglas,) upon trust, for the possessor of Wimpole of his name and blood, to be used and enjoyed in the nature of heir-looms, and after desiring his wife, after his decease, to dispose of the diamonds, jewels, and trinkets which came from his family, after her decease to the future wife of the appellant, or to his niece, or to one or more of the wives of his nephews, as she might prefer, and after giving an antique ring, which belonged to his grandfather Johnson, to his eldest nephew, and a broad gold ring with a motto to Sir E. H. East, and that with a scarabaeus and title of Thothmos of Egyptian pebble to W. M. Leake, and mourning rings to various other persons, and to servants who had lived three years with him two years wages and mourning, he gives all his swords and other arms to Sir C. E. Douglas, together with his gold watch, chain, and seals, and the sum of £100, to be paid to him as soon as convenient after his decease. Then follows the following clause: "All the rest and residue of my property, not herein-before (or by my will or any other codicil) disposed of, I give and bequeath to my nephew Charles Philip Yorke, and to Sir Charles Eurwicke Douglas, Knight, their executors, administrators, and assigns, after the death of my said dear wife, equally to be divided between them; and I leave it at the option of [563] Sir Charles Eurwicke Douglas to assume or not the name of Eurwicke singly, or to bear it as at present, without alteration. Signed by me, C. P. YORKE. May 21. 1833."

On the 13th March 1834, the testator, Mr. Yorke, died without issue, leaving his brother the Earl of Hardwicke, since deceased, and his nephew (the appellant) next heir presumptive to the earldom, and to the estates upon which the sum of £12,000 was charged.

Shortly after Mr. Yorke's death, William Martin Leake, Thomas Atkinson, and the respondent duly proved his will and codicils, with the usual power to the other executors likewise to prove them, when they should think fit; and the personal estate was ascertained to be of considerable amount and value, greatly exceeding what was necessary to pay and satisfy his debts, funeral and testamentary expenses, and the legacies and annuities which he had bequeathed.

On the 4th of July 1834 the respondent filed his bill in the Court of Chancery against William Martin Leake, Thomas Atkinson, Harriet Yorke, and the appellant, stating that he, the respondent, was entitled to the whole residuary personal estate after Mrs. Yorke's decease; and praying that the usual accounts might be taken, "and that the clear residue of the testator's personal estate and effects might be ascertained, and might be invested and secured upon the trusts of the said will, and



that the rights and interests of the respondent, and of all other parties, in or to the same, might be ascertained and declared."

To this bill the several defendants appeared, and put in their answers. The appellant, in his answer, insisted [564] that he "was entitled to an equal share of the testator's residuary estate with the respondent, on the decease of Mrs. Yorke, under and by virtue of the second codicil."

The cause being at issue, and having come on to be heard on the 16th of November 1835 before the Master of the Rolls, on the 19th of November 1835 his Honour declared, "That, according to the true construction of the will of the Right Honourable Charles Philip Yorke, the testator in the pleadings of this cause named, and of the codicils thereto, dated respectively the first and second days of May 1833, the plaintiff" (respondent) "was entitled to the clear residue of the said testator's personal estate, subject to the life interest therein of the defendant, Harriet Yorke; and ordered that the plaintiff's bill should stand dismissed out of court, as against the defendant, Charles Philip Earl of Hardwicke," (the appellant,) with costs. The costs of the appellant, and all parties to the suit, to be paid out of the testator's personal estate.

Against this decree the Earl of Hardwicke, the present appellant, has brought this appeal.

*Mr. Pemberton for the Appellant.*—The question is, who is entitled to the residue? Between the date of the will and codicils several events had happened; Sir C. Douglas had attained twenty-five, had married with the consent of Mr. Yorke, who had made upon his marriage an irrevocable settlement, and Sir Joseph Yorke had died, all which circumstances might have induced the testator to have made a different disposition by his codicil from what he had made by his will. The [565] effect of the first codicil is to take £7000 out of the residuary clause, and to make his nephew share equally with Sir C. Douglas, in respect of the £12,000; by the second codicil he has given an equal share of the residue to his nephew. He gives by his codicil to the possessor of Wimpole several specific articles, which, under the will, would have gone to Sir C. Douglas; the predominating consideration in his mind was to benefit the name and blood to which he belonged. What would be the use of giving Sir C. Douglas £100 legacy, if he intended that he should remain residuary legatee under the will? By his will he wishes him to take the name of Eurwicke; by the codicil he leaves it to his own option, no longer considering him as his representative. If the residuary clause in the codicil does not take effect, it is a clause which is totally inoperative.

*Mr. Wigram for the Respondent.*—No inference ought to be drawn, from slight circumstances, to control the express words of a will. By the will all the specific articles were directed to be sold; they were not given specifically to Sir C. Douglas. Sir C. Douglas's wife's family might have objected to the change of name. By the second codicil he adds the name of Sir C. Douglas as an executor; by the first codicil Sir C. Douglas is deprived of £7000, the reason for which may be on account of the wife's fortune amounting to that sum. If he intended a greater benefit to his nephew, why did he not discharge the estates from the whole of the £12,000? Whenever he intends to make a serious disposition of his property he calls in his solicitor; then is it not probable that, if he intended to alter the whole residuary bequest, he should have called in his solicitor [566] to make the second codicil? The gift of £100 to the nephew, after the death of Mrs. Yorke, is not consistent with giving him half the residue. He says, this is a codicil of specific and pecuniary legacies; the residue is not a specific bequest or pecuniary legacy. It is doing great violence to the words of the codicil if you do not give effect to the words, "not herein-before disposed of by my will."

*Mr. Pemberton in reply.*—It is agreed, if the residue passes under the will, that the residuary clause in the codicil is inoperative. The two codicils are to be considered as one instrument confirming his will, except as to the residue, which he divides. In construing an instrument you must give an interpretation to every clause. A revocation may be express or implied; express, where there is a direct revocation; implied, where a subsequent codicil makes a gift inconsistent with the gift made by the will; and it is not a revocation of the whole of the residuary property given by the will, but only of the moiety.

Lord Brougham (10th August).—The question in this appeal arises upon the construction of the will and codicils of the late Mr. Yorke, brother of the half blood of the late Earl of Hardwicke, uncle of the whole blood of the present Earl the appellant, and putative father of the respondent, and it turns mainly upon the concluding paragraph or clause of the second codicil.

The case appears to stand thus: there are legacies in the will, and there is a gift of the residue. There are legacies in the codicil, and there is then the clause in [567] question. "All the rest and residue of my property, not herein-before (or by my will or any other codicil) disposed of, I give and bequeath to my nephew Charles Philip Yorke, and to Sir Charles Eurwicke Douglas, Knight, their executors, administrators, and assigns, after the death of my said dear wife, equally to be divided between them. I leave it at the option of Sir Charles Eurwicke Douglas to assume or not the name of Eurwicke singly, or to bear it as at present without alteration."

It is certain that the testator had the will before him when the codicils were made, particularly that he had it before him when the second codicil was made, when he wrote it, which he did himself. It is more particularly clear that when he added the clause in question he had before him the gift of the residue in the will, for he makes an alteration in one portion of the residuary clause in the will, videlicet, a direction respecting the name to be borne by the respondent.

Then take the terms of the clause "all the rest and residue of my property;" thus far all is plain. The question is, whether these residuary words are altered by what follows, "not herein-before disposed of;" this too would still raise no doubt, because by "herein-before" he means "in the second codicil," as seems plain from the words which come immediately after, "or by my will or any other codicil;" but it makes no difference if the two codicils are taken as one, and then "herein-before" means both the codicils together, and has no reference to the will. Now, neither in the one codicil nor the other is there any thing like a residuary gift before the clause in question, therefore there can no doubt be raised as to the sense of the words "all the [568] rest and residue of my property," by the qualification "not herein-before disposed of," and, consequently, up to this point all is plain enough. But he adds "or by my will," and the question is whether these words do not qualify the preceding ones, or except from the gift the residue given by the will; if they do they wholly annul the words and destroy the gift. The testator had the residuary gift in the will before him, therefore to support this construction it must be contended that being aware of having given the residue in the will, he says, in the codicil, "all the residue other than the residue already given," or "all the residue over the residue already given," which is not a sensible construction. If we read it "all the residue other than or over the legacies given," it is only tautology, but a very usual tautology. If we take the clause as a gift with an exception, "all the residue of my property, except what I have given in my will," we must read the exception so as not to destroy the gift, or suppose it is not a gift with an exception, but only a qualification in a description of the thing given. Still it is more reasonable, and more according to all just rules of construction, to give such a sense to the qualification as shall not make the whole a nullity.

The one construction makes the testator give "all the residue of his property, over the particular legacies given in the will and codicils," which is a sensible construction, and leaves something for the words to act upon. The other construction makes him give all the residue over the legacies, and over all the residue, that is, all that remains after the legacies, and after what remains over these legacies, which is not a sensible construction, and leaves nothing whatever; and it is mate-[569]-rial to observe that this is not a mere mistake of the testator, or an eventual defeat of his intention. It is not that he may have supposed he was giving something by the words when he had nothing to give, but the construction assumes him to have intended this absurdity, for he had the former residuary clause before him; and, therefore, if he meant by the reference to the will a reference to that clause, so as to qualify by such reference the residuary gift now made, he must have known that he was making an exception or qualification which left nothing to give, and must have been aware of the absurd construction. It seems very difficult to suppose that he would frame a clause of this kind.

The clause is framed with sufficient care, and indicates that he was aware of giving something material by it. He gives the thing, whatever it is, with reference to the time of it vesting in possession, namely, after the death of his wife, to whom he had before given it for her life, and he gives it to the parties, their executors, administrators, and assigns, to be equally divided between them.

It seems a less strained construction to take the words in the parenthesis, as they have now been taken, than in the sense put on them below, and it seems a less violence to the instrument to hold, that the testator, having before him the residuary gift in the will, altered it in the manner supposed, than to hold that he made a gift to the parties in equal moieties of what amounted to nothing, and could not possibly amount to anything. The alteration which the construction now put on the clause supposes, is in the persons who are to take an interest in the residue expectant upon the determination of the life interest given to the wife. By the will the residue, after [570] the wife's life interest, had been given to one of the parties; the codicil gives it to both equally.

I abstain from entering into any of the other arguments connected with the case, and from one or two observations which might be made in support of the view now taken, for this reason: the substance of what has been now stated was reduced into writing, and agreed to by Lord Lyndhurst and myself, and we both deemed that it led to the conclusion at which, after considerable doubt, we have arrived. It was the conclusion to which we were inclined at the first hearing. The doubts occurred afterwards, but we now consider them to be removed. In these circumstances, as Lord Lyndhurst is absent, I prefer only stating the argument which he has seen, and in which he concurs, although there has been no difference of opinion between us upon any of the other less important matters, yet those not having been reduced to writing, and considered by us in that shape, I have thought it better to omit them.

The consequence of this is, that in concurrence with my noble and learned friend, who is unavoidably prevented attending to-day, I would move your Lordships to reverse the decree below, and to make a declaration, different from that which was made below, as to the true meaning of the will and codicil, by substituting for that a declaration that the true meaning of the codicil is, that the appellant and respondent should take it equally divided; and to reverse the part of the decree which dismisses the appellant from the suit. The accounts must of course go on; in fact that is not appealed from. The only part appealed from is the declaration.

[571] Lord Chancellor.—My Lord Lyndhurst and my noble and learned friend having come to a conclusion upon these testamentary papers in favour of the present appellant,—as the opinion which I have formed differs from that at which they have arrived in their superior judgment,—I think it right, as it involves a question of principle, to state to your Lordships the ground on which I originally formed an opinion in favour of the respondent, and on which I still consider that that is the sound construction of these testamentary papers.

I think it is much more probable that the conclusion to which my noble and learned friend has come is consistent with what the testator intended. I think the great probability is, that having by his will given the residue to Sir Charles Douglas,—what he intended to do by his codicil was, instead of giving the whole residue to him, to divide it between him and another object of his bounty,—the difficulty is how far we are justified in coming to a conclusion which shall give effect to that probable intention; and I must say, I find no words in this codicil which can lead to such a conclusion. It is more from the situation of the parties, and the probability of the case, that I infer that that probably was the intention of the testator, than from any thing I find in the testamentary papers; but if the words do not bear it, it is contrary to all rule to speculate upon the intention, for the ground of the conclusion ought not to be found in any thing but the expressions which are used.

Now what actually is the state of the testamentary disposition? He gives the residue by the will to trustees, in trust to pay the income to his (the testator's) wife [572] for her life, and after her death to transfer the residue to Sir Charles Douglas; in the event of Sir Charles Douglas dying under a certain age to go over,—that, however, is immaterial, because he attained that age; then by his codicil he gives various descriptions of property to different persons, money legacies to some,

and specific articles to others ; and then comes this clause :—" All the rest and residue of my property, not herein-before (or by my will or any other codicil) disposed of, I give and bequeath to my nephew Charles Philip Yorke and to Sir Charles Eurwicke Douglas, Knight, their executors, administrators, and assigns, after the death of my said dear wife, equally to be divided between them." In construing these words the obvious course is to look back to the will, to see what property there is not, by that or by any other codicil, given ; because to that subject matter the testator has by this codicil confined himself. Now if you look back you will find there is no property that is not included in the will, because there is a clause in the will which carries with it all the property. The result is, undoubtedly, therefore, that if the construction to be naturally put upon this residuary clause in the codicil be adopted, there are two residuary clauses, not a very uncommon thing to be found in a will. It frequently happens that there is found such a residuary clause, and that for greater caution, and to avoid the possibility of not having included some things, you find words which, though altogether of a general residuary kind, are not intended to apply to an antecedent gift. Then there is no ambiguity in these words ; they become useless if the residuary clause in the will is to take effect ; these fail, not from any ambiguity in the expressions used, but because the subject matter is disposed of by the residuary clause in the will.

It is not, according to my impression of the rules upon which the Courts have acted, consistent with the principles of construction, to set aside the effect of clear and unambiguous words, because there is reason to suppose that they do not produce the effect which the testator intended they should produce. If there be an ambiguity, then, of course, it is the duty of all Courts to put that construction upon the words which seems best to carry the intention into effect, but if there be no ambiguity, however unfortunate it may be that the intention of the testator shall fail, there is no right in any court of justice to say those words shall not have their plain and unambiguous meaning. Taking this clause by itself, there can be no difficulty in coming to a conclusion, because what he gives is what is not given by any codicil or will. Under these circumstances, what appeared to me before appears to me still, that, however probable it may be that putting this construction upon the words may effect the intention of the testator, the words are of that character and description that they do not open the door to carry out any intention which is not to be found in the words so used.

There is also considerable difficulty in supposing the testator to have intended to have revoked the former clause, because the residue, by the will, was given to trustees upon trust ; and what he might have intended to do, and, I think, very probably did intend to do, was to say, that that interest which Sir Charles Douglas would have taken under the will, I intend to give equally between him and Sir Charles Yorke, that would be the object which the testator must be presumed to have [574] had, if the construction which my noble and learned friends put upon this clause, in order to carry out the supposed intention of the testator, is to prevail. Certainly the words employed do not, in my opinion, indicate any such intention ; if one were to take the trouble of seeing how he would have expressed that intention which is now contended for, and what would be the way of carrying it into effect, meaning to revoke what he had given to any individual, and then intended for that individual and another, he would naturally have revoked that disposition, and have given all the rest and residue of his property, which rest and residue had been given to trustees, the ultimate trust being in favour of Sir Charles Douglas, to the trustees, for the benefit of those he then meant to favour. Under these circumstances, I certainly have not been able to see that the expressions used are so flexible, and so capable of being adapted to the intention supposed to be entertained by the testator, as to justify the construction which my noble and learned friends have thought themselves at liberty to adopt, but which, if adopted, would very likely carry his intentions into effect.

Decree reversed, and cause remitted, with declaration.

[575] FROM THE COURT OF CHANCERY, IRELAND.

GEORGE JACKSON,—*Appellant*; ROBERT JACKSON, ELIZABETH MAUNSELL,  
and MARIA MAUNSELL,—*Respondents* [4th June and 11th August 1840].

[Mews' Dig. i. 356. S.C. 7 Cl. and F. 977.]

A father being tenant for life of a certain estate held upon lives, with power of appointment amongst one or more of his children, by deed of the 14th January 1804, appoints to his son, in tail male. By deed of the 18th January 1804, the father and son, in consideration of £1600, to be applied in paying interest of debts upon the estates, and of fines due for the renewal of the lives on the estates, demise part of the estate for the lives therein named, and for lives which might afterwards be added. By lease and release of the 10th and 11th December 1807, in consideration of the debts paid by the father for the son, the son reconveys to the father the estate which had been appointed to the son.—Held, that from the circumstances of the two first deeds being executed nearly at the same time, of the father's debts being provided for out of the estate, and of the son restoring the estate to the father, there was so much doubt as to the validity of the appointment, notwithstanding a recital in one of the deeds, that the father had paid the debts of the son, as to make it necessary to inquire into the validity of the appointment.—Decree reversed, and inquiry directed.

[576] By a settlement dated 22d June 1780, made previously to a marriage afterwards had between William Marcus Jackson and Jane Devereux, after reciting that William Jackson was seised of and entitled to two several freehold interests, the one in the lands of Moylish, and the other in the lands of Clonlara, both in the north liberties of the city of Limerick, by virtue of two several leases for lives thereof respectively, with covenants for perpetual renewal, he conveyed the same unto trustees, their heirs and assigns, upon trust for William Marcus Jackson for life, and after his decease (charged with a jointure of £50 for Jane Devereux) to the use of all and every or such one or more of the children of the said William Marcus Jackson by the said Jane Devereux, and for such estate or estates in tail male, and in such parts, shares, and proportions, manner or form, as William Marcus Jackson should, by deed or will, appoint; and in default of appointment, or as to such parts whereof no appointment should be made, to the use of the first son of the said William Marcus Jackson by the said Jane Devereux, and of the heirs male of the body of such first son, with remainder to the use of the second and all and every other the son and sons of the said William Marcus Jackson by the said Jane Devereux, severally and successively, in tail male, with several remainders over.

There was issue of the marriage four sons, William Devereux Jackson (since deceased) the eldest son, George Jackson (the appellant) the second son, the respondent Robert Jackson the third son, and Thomas Jackson (since deceased) the fourth son, and no other issue.

William Marcus Jackson, in pursuance of the power [577] given him by the settlement, by a deed poll dated the 14th January 1804, appointed the lands of Moylish with the appurtenances, to William Devereux Jackson, and to the heirs male of his body.

By indenture of lease dated the 18th January 1804, and made between William Marcus Jackson and William Devereux Jackson of the one part, and Nicholas Mahon, gent., of the other part, in consideration of £1600 paid by Nicholas Mahon to William Marcus Jackson and William Devereux Jackson, they the said William Marcus Jackson and William Devereux Jackson did demise unto the said Nicholas Mahon, his heirs and assigns, part of the lands of Moylish, as therein particularly described; to hold the same unto Nicholas Mahon, his heirs and assigns, for the lives of the several persons therein named, as *cestuisque vies*, and the survivor of them, and for the lives and life of such other person or persons as should for ever thereafter be added to that demise, pursuant to the covenant for perpetual renewal therein contained, at the yearly rent of £110, payable half-yearly, as therein mentioned.

And in the said indenture is contained a covenant by the said William Marcus Jackson and William Devereux Jackson, for themselves, their heirs and assigns, with the said Nicholas Mahon, his heirs and assigns, for the perpetual renewal of the said lease, at the costs and charges of Nicholas Mahon, on payment or tender of a peppercorn for every new life to be added. And it was by the said indenture agreed, that so much of the said sum of £1600 as should be sufficient should be laid out and applied by the said William Marcus Jackson and William Devereux Jackson, first, towards paying off, satisfying, and discharging all the debts by specialty [578] judgment, or otherwise, affecting the estate of the said William Marcus Jackson; secondly, towards defraying the costs and expenses of renewing the lease for three lives, which he the said William Marcus Jackson held of the said lands of Moylish from the Earl of Shelbourne, with covenant for perpetual renewal, and out of which the interest demised by the indenture now under statement was derived, and paying such renewal fines as were then due and to be paid to the Earl of Shelbourne by the said William Marcus Jackson, his heirs and assigns, pursuant to his covenants with the said Earl of Shelbourne, on his inserting and adding lives in the place and stead of such as had not yet been supplied, so as to enable the said William Marcus Jackson and William Devereux Jackson, their heirs and assigns, to grant to the said Nicholas Mahon, his heirs and assigns, the estate and interest so intended to be demised to him. And after reciting that a fine had been levied by William Marcus Jackson and William Devereux Jackson, unto the said Nicholas Mahon and his heirs, of part of the lands of Moylish, then in his possession, for the purpose of obviating all doubts as to the estates which William Marcus Jackson and Wm. Devereux Jackson might have taken in the said lands under the settlement of 22d June 1780, and for barring all estates tail under the settlement, it was declared that the fine should enure for the purposes of the demise thereby intended to be granted. And by the said indenture of lease the said Nicholas Mahon covenanted with the said William Marcus Jackson, his heirs and assigns, that he the said Nicholas Mahon would at all times thereafter advance and pay all such sum and sums of money as should be necessary to procure renewals from the said Earl of [579] Shelbourne, under the covenant for perpetual renewal contained in the said lease by which the said lands were held as aforesaid; it being the intent and meaning of the parties, that the said fines so thereafter to be paid to the said Earl of Shelbourne, his heirs and assigns, should at all times be paid by the said Nicholas Mahon, his heirs and assigns, and no part thereof by the said William Marcus Jackson and William Devereux Jackson, their heirs and assigns.

By an indenture dated the 12th April 1806, and made between the said William Marcus Jackson of the first part, the said William Devereux Jackson of the second part, the said William Holland and Edward Jones of the third part, and Henry Wilson and John Jackson, Esquires, of the fourth part, the said William Marcus Jackson did, by virtue of the said indenture of settlement of the 22d June 1780, appoint the town and lands of Clonlara, with their appurtenances, to the said William Devereux Jackson, and to the heirs male of his body, subject, however, to the life estate of the said William Marcus Jackson. And by the said indenture the said William Marcus Jackson and William Devereux Jackson did bar all entails of the said William Devereux Jackson in the lands of Clonlara.

By an indenture of lease dated the 12th April 1806, and made between the said William Marcus Jackson and William Devereux Jackson of the one part, and John Young, Esq., of the other part, for the considerations therein mentioned, William Marcus Jackson and William Devereux Jackson demised unto the said John Young part of the lands of Clonlara, containing 37 A. 2 R. 35 P., Irish plantation measure, as therein particularly described, for the lives of the three persons [580] therein named, and for the term of thirty-one years from the decease of the survivor of them, at the yearly rent of £3 8s. 3d. per acre.

By another indenture of lease, also dated the 12th April 1806, and made between the said William Marcus Jackson and William Devereux Jackson of the one part, and Samuel Young, Gent., of the other part, for the considerations therein mentioned, William Marcus Jackson and William Devereux Jackson demised unto Samuel Young other part of the lands of Clonlara, containing 37 A. 2 R. 35 P., Irish plantation measure, as therein particularly described, for the lives of the three

several persons therein named, and for the term of thirty-one years from the decease of the survivor of them, at the yearly rent of £3 8s. 3d. an acre.

By indentures of lease and release, dated the 10th and 11th December 1807, the release being made between the said William Devereux Jackson, Henry Wilson, and John Jackson, Esquires, of the one part, and the said William Marcus Jackson of the other part, after reciting the several deeds before mentioned, and that it being found convenient by the said William Marcus Jackson, and also by the said William Devereux Jackson, not only for the purpose of family settlements, but under certain agreements for leases of the said lands of Moylish and Clonlara, entered into and since concluded by the said William Marcus Jackson and William Devereux Jackson to certain of the tenants of the said lands, who for greater safety were advised that the entails in the said several lands should be barred by means of the aforesaid deeds, and also for the purpose of enabling the said William Marcus Jackson to pay off several debts and engagements incurred by the said Wil-[581]-liam Devereux Jackson, and the said William Marcus Jackson, reposing the fullest confidence in his said son the said William Devereux Jackson, did, for the purposes aforesaid, convey in the manner as in the said several deeds was expressed the said lands, It was witnessed that the said William Devereux Jackson, in consideration of the said several debts by the said William Marcus Jackson for him paid, and of 5s., and in discharge of the trusts and confidence so as above reposed in him by the said William Devereux Jackson, did, in due form of law, convey and assure unto the said William Marcus Jackson, and to his heirs and assigns, all the said lands of Moylish and Clonlara, with the appurtenances, and all the right, title, and interest of him the said William Devereux Jackson therein or thereto.

In the year 1815 William Devereux Jackson died intestate, and without issue, whereupon the appellant became the eldest son of the said William Marcus Jackson.

The said lands of Clonlara were afterwards sold and disposed of by William Marcus Jackson.

William Marcus Jackson, by his will, dated the 20th October 1821, (duly attested by three witnesses,) gave, devised, and bequeathed all his estate and interest in and to the said lands of Moylish unto his said wife Jane Jackson, and to Edward Gloster, therein named, in trust that his wife should have and receive during her life an annuity of £50 in addition to the jointure settled upon her by his marriage settlement, the said annuity to be paid to his wife out of that part of the said lands of Moylish tenanted by one Nicholas Mahon, on the 1st May and 1st November [582] in every year during her life, in equal portions, the first half-yearly payment thereof to be made on such of the said days as should first happen after his decease; and upon further trust that his said trustees should, after payment of the said annuity, yearly receive out of the said lands of Moylish the sum of £100 by two half-yearly payments, on the days aforesaid, and place the same out at interest, until the sum of £550 should be made up, to be applied in the manner therein mentioned; and that when that sum should be made up the said testator declared that the said sum of £100 should go to increase the jointure of his said wife, and should be paid to her at the same times as the said sum of £50 a year was therein-before made payable. And as to the residue of the rents of the said lands of Moylish, after the said sums of £50 and £100, annually, in trust to pay the same to the appellant during the life of his (the said testator's) said wife; but on her death, and on the sum of £550 being raised out of the rents of the said lands of Moylish as aforesaid, the said testator declared that the said Edward Gloster, his heirs and assigns, should stand seised of the said lands of Moylish to the use of testator's sons, the appellant, and the respondent Robert Jackson, during their natural lives respectively, to be held by them as tenants in common, and not as joint tenants, with remainder to the legitimate issue of the appellant, and the respondent Robert Jackson, in such manner and form, shares and proportions, as the appellant, and the respondent Robert Jackson, should by deed or will, duly executed, direct or appoint; and in failure of legitimate issue in either of his (the said testator's) said sons, he devised his share so dying without legitimate issue to the other [583] of them, his heirs and assigns, for ever. And as to the said sum of £550, when the same should be raised out of the rents of the said lands of Moylish, and as to a certain sum of £450 which the said testator stated the said Edward Gloster owed him, he the said testator gave and bequeathed

the said two sums, making together £1000, to his grand-daughters, the respondents Elizabeth Maunsell and Maria Maunsell, daughters of William Maunsell, Esquire, share and share alike, the same to be paid to them at their respective ages of twenty-one years or days of marriage, whichever should first happen, provided such marriage should take place with the consent therein mentioned, the interest to be paid to his said wife, and applied as she should please towards their education and maintenance in the meantime. And the said testator expressly devised the said sum of £1000 to his said grand-daughters in payment and full discharge of any sum or sums of money claimed to be due by him the said testator to their father the said William Maunsell, either by bill, bond, note, book account, or in any manner ; ; and the said testator declared that should the said William Maunsell not deliver up the said bonds, notes, and other securities cancelled, to his (the said testator's) executors, or should the said William Maunsell demand any of the said sums of money, or any part thereof, then he (the said testator) devised the said sum of £1000 to his residuary legatee. And as to all the rest, residue, and remainder of his real, freehold, and personal estate and property, of every kind and nature whatsoever, which he should die seised and possessed of or in any manner entitled to, and not therein-before disposed of, the testator gave, devised, and bequeathed such residue to his wife, her [584] heirs, executors, administrators, and assigns, as his residuary legatee.

In November 1822 William Marcus Jackson died, leaving the appellant, and the respondent Robert Jackson, his only children, him surviving.

On the 21st January 1824 a bill was filed by Jane Jackson, the widow of the testator, against George Jackson (the appellant), for establishing the will of William Marcus Jackson.

The appellant appeared and put in his answer to the said bill, and issue having been joined therein, and the said cause having been set down for hearing, the said bill was, by the decree of the Court, dated the 21st June 1836, dismissed with costs, and which costs were ultimately paid to the appellant.

In 1833 Jane Jackson died.

On the 21st January 1836 the respondent Robert Jackson filed his bill in the Court of Chancery in Ireland, against the appellant, and the respondents Elizabeth Maunsell and Maria Maunsell, charging, amongst other things, that the deed of January 1804 was a fair execution of the power given to the said William Marcus Jackson by the deed of 1780, and that the deed of 11th December 1807 was untinctured by any fraud, and was not executed in consideration of the previous appointment or any corrupt agreement; and praying that the will of William Marcus Jackson might be declared well proved, and that the same might be established, and the trusts thereof carried into execution by the decree of the said Court; and that the respondent Robert Jackson might be declared to be entitled to an estate in quasi tail in one moiety of the said lands of Moylish, under the construction of the said will, and [585] might be put into possession thereof accordingly; and that an account might be taken of the rents and profits received by the appellant out of the said lands since the death of the respondent Robert Jackson's mother, and that the said respondent Robert Jackson might be declared entitled to one moiety thereof, and that the appellant might be decreed to pay the same to the said respondent Robert Jackson, by a short day, to be named for that purpose; or if the said Court should be of opinion that the said deeds of the 14th January 1804 and the 11th December 1807 were void, then that the said will of the said William Marcus Jackson, deceased, of the 20th October 1821, might be deemed and taken to be a valid execution of the power of appointment contained in the said deed of the 22d June 1780, and that the respondent's rights might be decreed thereunder.

The appellant by his answer insisted that the said deed of appointment of the 14th January 1804 was not made in *bona fide* execution of the said power of appointment given by the said marriage settlement of 1780, but that the same was made to enable the said William Marcus Jackson to derive benefit therefrom to himself, and also to enable him to have executed the several leases herein-before mentioned, on which he, William Marcus Jackson, also received fines, and that the said deed of appointment was fraudulent and void in equity for the reasons aforesaid, and that the said deed of 1807 was executed in consideration of a corrupt agreement between William Marcus



Jackson and William Devereux Jackson, and insisted that in the event of the said deeds being declared void the said will of William Marcus Jackson, in the said bill mentioned, was [586] not a good and valid execution of the power of appointment given him by the deed of 1780.

On the 1st May 1838 the cause came on to be heard before the Lord Chancellor of Ireland. On the 3d May 1838 his Lordship, by his decree, established the will of the testator William Marcus Jackson, and declared that the respondent Robert Jackson was entitled to an estate *quasi* in tail in one moiety of the lands of Moylish from the decease of Jane Jackson, and that the respondents Elizabeth Maunsell and Maria Maunsell were entitled to the legacies bequeathed by the will, if the amount of the rents of the lands of Moylish received by the appellant during the life of Jane Jackson was sufficient for that purpose.

From this decree the appellant George Jackson appealed.

Mr. Pemberton and Mr. Wakefield for the Appellant.—The consideration for the appointment by the father in favour of the son was fraudulent. The appointment was made in consideration of the father's debts, amounting to £1600, being paid. It is not proved that the son received any benefit from this transaction; but if he had, the transaction would have been fraudulent. The will cannot be considered as a good execution of the power; certain sums are given to grandchildren; annuities are given, and the appointment to the son is in tail, not in tail male. It has been said that a cross bill ought to have been filed, but the whole transaction has been put in issue upon the record, and no objection was taken in the Court below.

[587] Mr. Knight Bruce and Mr. Eade for the Respondents.—The deed of the 14th January 1804 is a good appointment, and there is no evidence to connect that deed with the subsequent deed of the 18th January 1804. The estate could not be sold without paying off the incumbrances on the estate. It has been assumed that the payment of these debts was for the benefit of the father, whereas it was for the benefit of the purchaser. It is too much to say, at the instance of the defendant, that the deed ought to be set aside thirty-six years after its execution, when all the parties to the transaction are dead. It appears by the deed of 1807 that the father had paid off the debts of the son; the father might buy the estate of the son. The levying of the fine was unnecessary; the estate was barred by a conveyance. If the son had filed a bill against the father to invalidate the appointment in reasonable time it might have been relieved against; but if the appointment is bad under the deed, the will executing the power is good; it is only void for the excess.

Lord Chancellor (11th August).—This is a case from the Court of Chancery in Ireland, which, on examination of the pleadings, it appears has come before your Lordships under very peculiar circumstances. The suit is by a party claiming under the will of the father, a will in which the father has assumed the right of disposing of certain lands stated to be situated in a place called Moylish. The answer to this claim is, that that estate was not the estate of the father, at least not an estate over which the father had a right to exercise the power of disposition by will, it being stated that he derived his [588] title under a settlement by which the father was tenant for life, with the power of appointing to his children in tail male.

The father, it appears, appointed in favour of his eldest son, and upon the face of that instrument there is nothing to impeach it. But other instruments are stated which certainly throw very great doubt upon the propriety of that transaction, because by another deed, of the 18th January 1804, the father and son joined together in granting a lease for three lives, renewable for ever, in consideration of £1600, that £1600 being in the very terms of the deed to be applied in relieving the estate from certain debts of the father.

The deed of the 11th December 1807 increases those doubts; for it speaks of the conveyance to the son having been upon trust and confidence, and it is as a conveyance back to the father of the estate which had been so apparently appointed to the son. It also speaks of fines, by which the estate tail was barred; but as to those fines, under what circumstances or for what purpose they were levied is only to be inferred from what is stated in that deed.

Now the decree assumes that this estate was the absolute property of the father, and directs that one moiety of the estate shall be held by the respondent, assuming that the

title under the father's will was good. It also directs that the defendant shall account for a moiety of the rents from the death of the father, although his title did not accrue till the death of the mother in 1833.

Now the only ground upon which that can be explained is, that the will directed a sum of £100 a year to accumulate until £550 should be realized, that sum [589] when realized to go to make up a sum of £1000 left to certain children of the testator. I presume, although it is very indistinctly stated upon the pleadings and in the decree, that the object of that part of the decree was to relieve the estate of the plaintiff from that burden of any portion of the £550. Now if that was the object of the decree, it is not in the shape and form in which it ought to be to carry out that object; because if it was only for the purpose of relieving the estate of the plaintiff from that burden of £550, or any portion of it, the first inquiry would have been, what portion of that £550 remained unpaid, and whether the income received by the defendant (always supposing the decree to be right upon the merits) between the interval of the death of the father and the death of the mother had or had not been sufficient for the purpose of meeting and providing for that charge; because if that charge had been provided for, and it had been ascertained that a sufficient amount of rent had been received for that purpose,—if, for instance, the rents had amounted to ten times that sum,—the mere fact of the defendant having received property equal to that sum would not have been a sufficient ground for the decree. That, however, I refer to only incidentally; because it does not appear to me a matter which can justify the shape which the decree has assumed.

But, on the merits of the case, I think the decree cannot be supported in its present form. The decree assumes that all these objections to the title of the father are of no avail. It decrees at once, upon the state of information then before the Court, that all these transactions and appointments were valid, and that the father had, by means of the appointment, and the title he got [590] from the son in whose favour the appointment was made, a valid title, and therefore decrees in favour of the plaintiff claiming under the will.

Now, without expressing any final opinion (because I do not think the case is as yet ripe for it) as to the effect of all these transactions, it is quite obvious that there is ample ground for suspicion. In the first place, these two deeds coming together almost at the same moment, the appointment in favour of the son, and the deed by which £1600 was raised by fine upon that very estate, to be applied in satisfying the debts which were charged on the estate, which were the debts of the father, would of itself raise a strong suspicion that it was not an appointment by the father, honestly and fairly exercising the power which the settlement gave him, but that he was influenced in making the appointment by the benefit which he expected and contracted to receive for himself. But the deed of 1807 makes the case much stronger, because we there find the son restoring the estate to the father. It is true that that deed states the father to have paid various debts of the son; that may or may not be true. It may be, that the object of all this was to raise money to pay the son's debts; it may be that there was no intention to commit any fraud by this appointment. But whether the recital was true or not the Court has no means of judging, for there is no evidence in the cause; there is nothing before the Court to enable it to form any opinion as to the validity of these transactions but what appears upon the face of the instruments themselves.

Under these circumstances, we are left entirely in the dark whether any title was obtained independently [591] of this appointment, for it appears that the son was tenant in tail under the appointment. One argument was, that supposing the appointment was entirely out of the question, the father and the son together had, by means of the estate, independently of the appointment, the means of procuring an absolute dominion over the property. But under what circumstances all these transactions took place is without any proof, except so far as they are stated in those deeds to which I have referred. Therefore, under these circumstances, and with the facts appearing upon these deeds, I think it was too much for the Court to assume that the title of the father was good, and therefore that, as it respected the parties claiming under the will, it was property of which the father had an absolute power of disposing. I am equally of opinion that it is not a case in which it is competent to the Court to come to any determination in favour of the defendant, but that the defendant

has merely thrown suspicion upon the title of the plaintiff, by that which appeared upon the deeds produced. It might be that the statement in the deed of 1807 would be established; namely, that the whole object of this was to pay the debts of the son; whether it was or not does not appear; but this ought not to be left to conjecture, but the facts ought to be ascertained before the Court proceeds to act upon the deed. I apprehend the duty of a court of equity to be, when it finds itself in a situation not to be able either to decide in favour of the plaintiff or in favour of the defendant, and so to adjudicate as to the title, to enter into a course of investigation, by which the real facts of the case may be ascertained, before it comes to any final adjudication upon the merits. What I propose, [592] therefore, to your Lordships is, to reverse this decree, and to declare that before any adjudication upon the plaintiff's title under the will, there should be an inquiry before the Master what title the testator had at the time of his death in the lands of Moylish, and how the same was derived, and particularly whether the appointment of those lands in favour of the son William Devereux Jackson was a good and valid appointment, with liberty to state special circumstances; and in order to avoid the expense and delay of another reference at a future stage of the cause, I would propose that there should be an inquiry whether the £550, or any and what part thereof, is or was due at the time of the death of the testator, and what is now due in respect thereof; and whether the rents received by George Jackson during the lifetime of Jane the widow were sufficient to pay the same. These inquiries, it is true, would not arise until the question of title had been decided, but I think it would be expedient, in order to save time, that the Master should at the same time pursue that inquiry.

Decree reversed, and cause remitted to the Court of Chancery in Ireland.

[593]

#### FROM THE COURT OF CHANCERY, IRELAND.

JOSEPH HENRY M'CAN,—*Appellant*; CATHERINE O'FERRALL by GERALD O'FERRALL her next Friend, GERALD O'FERRALL, ARTHUR O'FERRALL, and JOHN O'FERRALL junior, SARAH O'FERRALL, and JOHN O'FERRALL, *Respondents*.

CATHERINE O'FERRALL by GERALD O'FERRALL her eldest Son and next Friend, GERALD O'FERRALL, ARTHUR O'FERRALL, and JOHN O'FERRALL the younger,—*Appellants*; JOSEPH HENRY M'CAN, JOHN O'FERRALL, JOHN DODD, and SARAH O'FERRALL,—*Respondents* [7th, 10th, and 13th April 1840, and 27th April 1841].

[See S.C. 8 Cl. and F. 30, and note thereto.]

#### ON APPEAL AND CROSS-APPEAL.

A. Forbes, having equally divided his property amongst his wife and children, directed that £400 a year should be paid to his wife, for the maintenance of herself and children, during her widowhood, but upon her second marriage £60 a year, and that his children should be maintained out of his estate. The widow having married Ross M'Can concealed her marriage, and received the [594] £400 a year, and having been appointed receiver in 1792 passed an account before the Master under the name of Margaret Forbes, wherein the £400 per annum was allowed. Margaret Forbes died; and Ross M'Can, as administrator of her and A. Forbes, passed an account in 1795 before the Master, and, being appointed guardian of the children and receiver of the property of the testator, agreed with the children, who had all attained twenty-one, to refer the accounts of their father's estate to arbitration. During the pendency of the arbitration, Catherine, one of the daughters of the testator, by articles in contemplation of a marriage which afterwards took place between herself and John O'Ferrall, agreed that £1000 of her fortune should be paid to John O'Ferrall, and that the interest of the residue should be paid to them during their lives, and after the death of the survivor amongst their children, as they should appoint, and in default equally amongst the children. The

award was afterwards made, Catherine Forbes, under her maiden name, having consented to enlarge the time; and several accounts were passed before the Master by Ross M'Can, as receiver of the testator's estate, and the proceedings carried on under the name of Catherine Forbes.—Held, that the accounts which were passed in 1792 and 1795 were fraudulent, to the extent of the difference between the £400 and £60, although an allowance ought to be made for the maintenance of the children out of the estate of the testator; that the award and accounts passed by Ross M'Can were invalid against Catherine O'Ferrall and her children, Ross M'Can having a knowledge of the marriage of Catherine Forbes at the time the award was made and the accounts passed; and that Ross M'Can, as receiver and representative of A. Forbes and Margaret his widow, having paid to John O'Ferrall various sums in respect of which he ought to have accounted to the Court, was primarily liable, yet that the representative of John O'Ferrall ought to be kept before the Court in case of a deficiency of assets of Ross M'Can to satisfy the demands under the articles.

[595] The Reverend Arthur Forbes, of Drumconragh, in the county Meath, by will dated 17th of July 1783, after giving certain legacies to his four children, gave to his wife Margaret Forbes and her children the sum of four hundred pounds yearly for her and her children's maintenance and education whilst she continued unmarried; but in case she married again in lieu thereof £60 a year; and directed his executors to pay such sum as his nephew and other relations should think necessary for the education and maintenance of his children; and after making certain specific bequests bequeathed the residue of his substance to be equally divided between his wife and children, and appointed his wife Margaret, and his niece Priscilla, executrixes of his will.

On the 24th of July 1783 Arthur Forbes died, leaving Margaret Forbes his widow, Arthur Forbes, Catherine Forbes, Priscilla Forbes, and John Forbes, who died an infant prior to the year 1790, his only children.

On the 24th February 1790, after a protracted litigation, Margaret Forbes obtained probate of the will.

On the 13th March 1790, on the petition of Margaret Forbes, Charles Walker, one of the masters of the Court, was appointed guardian of the estate of the children, and on the 17th July in the same year Margaret Forbes was appointed guardian of the persons of the children of the testator, and Thomas Walker, one of the masters of the Court, was appointed guardian of their estates, in the place of Charles Walker, deceased.

On the 7th June 1791, on the petition of Thomas Walker, Margaret Forbes was appointed receiver of [596] the estates of her children. In the month of June 1791 Margaret Forbes intermarried with Ross M'Can, and on the 26th June 1792 passed her account as receiver under the name of Margaret Forbes, concealing the fact of her second marriage. On the 7th November 1794 Margaret M'Can died intestate, and in February 1795 Ross M'Can obtained letters of administration to the estate of his wife, and to the goods of A. Forbes, unadministered, during the minority of his children.

On the 4th December 1795 Ross M'Can, as administrator of Margaret Forbes and of Arthur Forbes, passed an account of the estate of the minors from the death of their father, without alluding to the account passed by Margaret Forbes.

In the two accounts passed in 1792 and 1795 credit was given for the £400 a year paid to Margaret Forbes up to the time of her death.

By orders of the 8th of January and 31st March 1796 Ross M'Can was appointed receiver of the estates, and guardian of the persons of the minors, upon entering into the usual security to account.

On the 25th March 1796 the Court of Chancery ordered that £80 a year should be allowed to Ross M'Can for the maintenance and education of each of the minors, to commence from the 17th July 1795.

On the 17th January 1798 Catherine Forbes, and, prior to 1802, Arthur Forbes and Priscilla Forbes, attained the age of twenty-one.

On the 4th March 1802 a deed of submission was signed and sealed by them and Ross M'Can, whereby all matters in difference between them and Ross M'Can were referred to Arthur Browne, the prime serjeant, and [597] Gerald O'Ferrall, and which was made a rule of court the 12th May 1802.

By marriage articles, dated the 22d day of May 1802, in contemplation of a marriage which was had on the day of the date of the articles, and made and executed by and between John O'Ferrall of the first part, Catherine Forbes of the second part, and Gerald O'Ferrall, one of the arbitrators, of the third part, whereby, after reciting that Catherine Forbes had then in the hands of Ross M'Can £5000 or thereabouts, it was agreed, after the marriage, that it should be lawful for Gerald O'Ferrall to call in and receive from Ross M'Can all such sums of money and securities for money as Catherine Forbes was then entitled to, upon trust to pay to John O'Ferrall the sum of £1000 for his advancement in his profession, and to place the remainder at interest in such manner as John O'Ferrall and Catherine Forbes (notwithstanding her coverture) should direct, and that the interest thereof should be paid to John O'Ferrall during their joint lives and the life of the survivor of them, and after the decease of the survivor in such shares and proportions as he or she, by deed or will, should think fit, amongst the issue of the marriage, and in default of appointment amongst the children equally, and if but one child to such one child.

On the 25th June 1802, the time for making the award having then expired, an order was made by the Court of Chancery, expressed to be upon the consent of Catherine Forbes, under her maiden name, for enlarging the time for making the award until the 26th of June 1802.

[598] On the 26th of June 1802 the arbitrators made their award, whereby they awarded that Ross M'Can should pay to Catherine O'Ferrall, Arthur Forbes, and Priscilla Forbes, the sums therein mentioned.

Ross M'Can's account of Catherine Forbes's fortune, upon which the award was founded, was made up to the 7th January 1802.

In December 1803 Matthew O'Connor intermarried with Priscilla Forbes.

On the 6th September 1802 an order was made that Ross M'Can should account for the fortunes of the minors.

On the 9th November 1802 Catherine O'Ferrall, in the name of Catherine Forbes, together with Arthur Forbes and Priscilla Forbes, signed and gave a power of attorney to Ross M'Can, enabling him to receive out of Court certain securities which had been lodged by him in the Bank of Ireland, and, on a petition presented by him for that purpose, and supported by his affidavit, by an order of the 4th October 1803 it was ordered, that Ross M'Can should account before the master, as administrator of Arthur Forbes and Margaret Forbes, and as guardian and receiver of the fortunes of the late minors respectively, and the master was ordered to inquire when they respectively attained twenty-one, and what was due to them respectively, and why Ross M'Can had not duly accounted before; but neither of the orders to make him account were ever prosecuted.

In 1806, 1810, and 1814 Ross M'Can passed accounts before the master as receiver, and the proceedings were carried on under the name of Catherine Forbes. [599] The account of 1806 was adopted, as it appears by the report, and affidavit of Ross M'Can, upon the alleged consent and approval of Catherine Forbes and the other children, and the account of 1810, as appears by an affidavit of Ross M'Can, upon the consent of John O'Ferrall, Matthew O'Connor, and Arthur Forbes. The account of 1814 was passed, and Ross M'Can's recognizance was vacated, upon an undertaking from him in a letter to John O'Ferrall that the account then taken should not be binding.

Between the 18th September 1802 and the 8th November 1806, by an account sent by Ross M'Can to John O'Ferrall, and which was admitted by John O'Ferrall to be correct, Ross M'Can paid to John O'Ferrall himself, and to Catherine his wife, for her use, the sum of £8004 16s. 6½d., on account of her fortune. Amongst the items in this account was a payment to John O'Ferrall of £1000, ordered by the Court of Chancery on the 19th July 1806 to be paid to Catherine O'Ferrall, upon a petition presented by her under the name of Catherine Forbes, and supported by an affidavit of Ross M'Can; and for this payment Catherine O'Ferrall had signed to the receipt the name of Catherine Forbes.

In 1819 John O'Ferrall and Catherine his wife filed their bill of complaint against Ross M'Can, for an account of the assets of the testator Arthur Forbes; and Arthur Forbes, his son, having died pending the suit, the suit was revived against Ross M'Can, as administrator of Arthur Forbes the son; and Ross M'Can having also died in

February 1828, the same was again revived against Joseph Henry M'Can, as [600] the personal representative of Ross M'Can, and was dismissed in 1832, upon Joseph Henry M'Can undertaking within a month to give security in a sum of £8000 to abide any decree to be made on a bill to be filed in relation to the assets of the testator Arthur Forbes, on behalf of Catherine O'Ferrall and her children.

Ross M'Can, in his answer to the bill, denied that he had any knowledge of the marriage of John O'Ferrall with Catherine O'Ferrall until September 1802, or that he knew of the existence of the articles of settlement until 1811; but Priscilla O'Connor proved his knowledge of the marriage, as he informed her of it two days before it took place, and on the 17th June 1802 Ross M'Can wrote to John O'Ferrall, desiring John O'Ferrall to bring with him Mrs. O'Ferrall's private book.

On the 25th May 1832 Catherine O'Ferrall and her children filed their bill against Joseph Henry M'Can, John O'Ferrall, Matthew O'Connor, and Priscilla O'Connor his wife, who had obtained letters of administration to the testator Arthur Forbes, and Edward O'Ferrall, the executor of Gerald O'Ferrall, and Edward O'Ferrall having died the suit was duly revived against Sarah O'Ferrall, administratrix of Edward O'Ferrall, and administratrix *de bonis non* of Gerald O'Ferrall, alleging that the accounts of 1792, 1795, and 1814 were in several particulars therein mentioned fraudulent and erroneous, that the award was founded upon fraudulent accounts produced by Ross M'Can, and that it was void and fraudulent, and that the submission was revoked by the marriage of Catherine [601] Forbes; and praying that the accounts passed in 1792, 1795, 1814, and the award of 1802 might be declared fraudulent and void, and that the usual accounts of the personal estate of Arthur Forbes might be taken; that interest might be charged, with half-yearly rests, on the balances in the hands of Margaret and Ross M'Can respectively; and that the trusts of the will might be carried into execution; and that an account might be taken of what was due on the foot thereof to Catherine O'Ferrall and the other children of the testator, and that Ross M'Can might not have credit for any sums paid to John O'Ferrall beyond £1000; that the articles of the 22d May 1802 might be reformed, so as to include the whole fortune of Catherine O'Ferrall, except £1000 therein mentioned, and that an annual sum, independent of John O'Ferrall, might be settled upon her during the life of John O'Ferrall; and that the interest of John O'Ferrall in certain freehold lands which he possessed in right of his wife might be sequestered, to make good to Catherine O'Ferrall the losses occasioned by his conduct; and that in case the assets of Ross M'Can should not be found sufficient for that purpose, that then John O'Ferrall might be decreed to pay into Court such portion of the fortune of his wife Catherine O'Ferrall as he might have received, over and above the annual interest thereof, and that an account might be taken for that purpose; and if the assets of Ross M'Can should be found insufficient to make good the sum found due to the appellants, that the personal representatives of the said Gerald O'Ferrall might be decreed chargeable therewith, to such amount as the Court might direct.

[602] The defendants to the bill having put in their answers, and the cause being at issue, the cause came on to be heard before the Lord Chancellor of Ireland on the 14th and five following days of January 1834, and on the 6th of March following his Lordship decreed that the portion of Catherine O'Ferrall, as found by the award, ought to be increased by the sum therein mentioned, and after deducting therefrom £1000, to which John O'Ferrall was entitled under the marriage articles, it was ordered that the same should be laid out by Joseph Henry M'Can, within one month from the date thereof, in the purchase of government three and a half per cent. stock, to be transferred to the credit of the cause, and John O'Ferrall was declared entitled to have the interest of the portion of Catherine O'Ferrall, from the day of his marriage with her; and in taking the account John O'Ferrall was to be charged with all sums paid by Ross M'Can to Catherine O'Ferrall from the 7th January 1802 to the day of her marriage, and with all sums paid to John O'Ferrall after the marriage; and Ross M'Can was to be debited with half-yearly interest on her portion, except on the £1000 from the time it was paid off; and if upon taking the account any balance should appear due to Joseph Henry M'Can, John O'Ferrall should pay the same to Joseph Henry M'Can. And it was ordered, that a receiver should be appointed over Catherine O'Ferrall's moiety of the lands at Rowskly and Bruslanstown, and that such receiver should bring in, and from time

to time invest in like government three and a half per cent. stock, the balance which should from time to time be in his hands, to be transferred to the credit of the [603] cause; and in case John O'Ferrall should not pay the aforesaid balance to Joseph Henry M'Can, with the costs in the decree mentioned, Joseph Henry M'Can should have his remedy for the same against the life estate of John O'Ferrall in the interest and dividends on the said principal sums therein mentioned, and against the rents and profits of the said lands and premises, so far as John O'Ferrall was interested therein as the husband of Catherine O'Ferrall, and against the fund arising out of the rents. And, subject thereto, it was declared that Catherine O'Ferrall, John O'Ferrall having consented thereto, was entitled to the dividends of the principal sum and the rents of the said lands for her life, to her sole and separate use, so as she should not anticipate or incumber the same, and that her children were entitled to the principal sum according to the trusts of the marriage articles. And it was ordered that the defendant Sarah O'Ferrall, representative of Gerald O'Ferrall, deceased, should abide her own costs, and that the consideration of the liability of Gerald O'Ferrall should be reserved, in case Catherine O'Ferrall and her children should be unable to recover the same from Joseph Henry M'Can, or in case he should make default. And it was ordered, that the bill be dismissed against Sarah O'Ferrall, without costs. And it was ordered, that Joseph Henry M'Can, within one fortnight, according to the terms of the decretal order of 20th January 1832, in the cause of O'Ferrall and wife against M'Can and others, should give security in a sum of £8000 to abide the decree; and in case Joseph Henry M'Can should not, within one month from the date of the decree, transfer to the credit of the cause the sum before directed, it was [604] ordered that the appellants should be at liberty forthwith to proceed at law as they might be advised, upon the recognizance entered into by Ross M'Can, Sir Marcus Somerville, and David Hanly, and upon such other recognizance as might be entered into by Ross M'Can and his sureties; and that the amount thereof, when levied, should be invested in like government three and a half per cent. stock, and transferred to the credit of the cause; and that the several recognizances should stand as securities to plaintiffs for their costs, in that and the cross cause, until paid. And it was ordered, that the defendants Matthew O'Connor and Priscilla his wife should have their costs in the cause from the appellants, and that the appellants should have the same along with their own costs in the said cause against John O'Ferrall and Joseph Henry M'Can, and that the respondent John O'Ferrall should pay Joseph Henry M'Can his costs in the cause, and also the appellants' costs, in case the appellants should enforce the same against the respondent Joseph Henry M'Can.

On the 16th of June 1832 Joseph Henry M'Can filed a cross bill against the parties to the original cause, charging that John O'Ferrall and Catherine his wife, and Gerald O'Ferrall, deceased, had been guilty of frauds in concealing from the Court of Chancery and Ross M'Can the marriage articles made upon the marriage of John O'Ferrall with Catherine his wife, and that she had represented herself to the Court of Chancery as an unmarried woman, and thereby induced the Court to pay her £1000 of her fortune, and that the same had been done without the knowledge of Ross M'Can, and praying that the award might be established, and that an account might be taken on [605] the footing of the award of the assets of Arthur Forbes, and if Catherine O'Ferrall or John O'Ferrall, or Matthew O'Connor or Priscilla O'Connor, had received more of the assets than they were entitled to, then that such party might pay to Joseph Henry M'Can such surplus, and that he might have credit against Catherine O'Ferrall and her children for all sums paid by Ross M'Can to John O'Ferrall and Catherine O'Ferrall, on account of her fortune, subsequent to their marriage, and if it should appear to the Court that Joseph Henry M'Can or Ross M'Can was bound by the marriage articles, that then Edward O'Ferrall, as executor of Gerald O'Ferrall, might be decreed a trustee for Catherine O'Ferrall and her sons, and that Joseph Henry M'Can might have credit for all payments made by Gerald O'Ferrall's direction or consent, and if it should appear that Ross M'Can had paid to Catherine O'Ferrall or her husband the full amount of the sum awarded her, that Joseph Henry M'Can might be decreed not further responsible to Catherine O'Ferrall or her trustee, or any person claiming under the articles.

Edward O'Ferrall having died, the suit was revived against Sarah O'Ferrall, his

personal representative; and the defendants having put in their answers to the cross bill, the cross cause came on to be heard at the same time as the original cause, and was, by the decree of the 6th March 1834, dismissed with costs.

On the 16th of June 1834 the respondent Joseph Henry M'Can presented a petition, praying that the said cause might be reheard.

On a rehearing of the original and cross causes, on the 10th July 1834, the decree was varied by enlarging [606] the time for payment and transfer of the sum of £3822 ls. 7½d. until the 24th of July, and by directing the payment and transfer by Joseph Henry M'Can of £1000, as a fund for the plaintiffs' costs.

In the month of May 1835 John O'Ferrall, the husband of Catherine O'Ferrall, having taken the benefit of the insolvent act, John Dodd, as his assignee, was, by supplemental bill, made a party to the suit.

On the 19th November 1835 the Lord Chancellor, on a re-hearing, varied the decree of the 6th of March 1834, by directing that in case the payments made by Ross M'Can to John O'Ferrall should exceed what was due for interest on the sums secured by the articles of the 22d May 1802, then that such excess should be taken as paid in discharge of the principal, and deducted therefrom, and that interest should thenceforth be calculated on the balance which should be then remaining due only, and if the payment so made by Ross M'Can should have amounted to the whole of such sums so secured, that from thenceforth the interest of the said principal sum of £4000, secured by the articles, should cease during the lifetime of John O'Ferrall.

From the decrees of the 6th of March 1834 and 10th of July 1835 Joseph Henry M'Can appealed; and from the decrees of the 6th March 1834, 10th July 1834, and the 19th November 1835, Catherine O'Ferrall, Gerald O'Ferrall, Arthur O'Ferrall, and John O'Ferrall the younger, appealed.

Mr. Pemberton and Mr. Kindersley for the Appellant, Joseph Henry M'Can.—Mr. Gerald O'Ferrall being a trustee, was guilty of fraud in permitting John [607] O'Ferrall to receive his wife's fortune; he never gave notice of the marriage settlement to Ross M'Can, which bears date the day of the marriage, and might have been executed many years after the marriage; the witness who proves the execution of the settlement is not asked when it was executed. John O'Ferrall received from Ross M'Can upwards of £8000 on account of his wife's fortune; having no notice of the settlement, the payments made to John O'Ferrall on account of his wife were good payments, and Mrs. Catherine O'Ferrall having joined in the fraud has no right to relief. By an order of the 19th July 1806, Catherine O'Ferrall, upon her own petition and receipt, obtained £1000 of her fortune, and is this to be accounted for and paid to the trustees of the marriage settlement? Coverture is no excuse for fraud on the part of a married woman or infant, *Cory v. Gertcken* (2 Mad. 40), *Evans v. Bicknell* (6 Ves. 174), *Savage v. Foster* (9 Mod. 35); but even if she has a right to relief, Gerald O'Ferrall, who concealed the settlement, is primarily liable to make good the deficiency. The statute of limitations would prevent accounts of so long standing being opened after a period of more than thirty years from the date of the award, and sixty years after the death of the testator; it would be impossible, under such circumstances, to give a general account of his assets.

Mr. Wakefield and Mr. Hallett for the Respondents, Catherine O'Ferrall and her children.—Ross M'Can took credit for the £400 a year which was forfeited [608] upon the marriage of Catherine Forbes. Ross M'Can is proved to have known of the marriage of Catherine O'Ferrall before it took place, and he must be presumed to have had notice of the marriage articles before the award; and supposing he had not notice, it was his duty, as her guardian and receiver of her fortune, to have acquainted the Court of Chancery with her marriage, that a proper settlement might be made, under the sanction of the Court. Catherine O'Ferrall must be presumed to have acted under the control of her husband, over whom Ross M'Can had great influence. Ross M'Can was continually committing a fraud upon the Court; the accounts were all passed under the maiden name of Catherine Forbes. The award, therefore, and accounts, are all fraudulent and void. The statute of limitations is no bar to fraud. Ross M'Can was not only a mere executor or trustee, but he was the receiver appointed by the Court over the fortunes of the minors, and the Court will not sanction a fraud in one of its own officers.

Mr. Tinney and Mr. James Russell for Sarah O'Ferrall.—M'Can admits he knew



of the articles in 1811, and he still continues making payments to John O'Ferrall to 1816. The statute of limitations applies more strongly in favour of Gerald Ferrall than Ross M'Can. Ross M'Can is a receiver, and has never been discharged, and must be primarily liable before Gerald O'Ferrall can be charged. Gerald O'Ferrall never received any part of Catherine O'Ferrall's fortune, nor is there any proof that he was privy to the frauds practised by Ross M'Can and John O'Ferrall.

[609] Mr. Pemberton in reply.—The award has been made a rule of Court, and the parties are bound by it; the award is not bad in consequence of the marriage, because all the parties interested had concurred in it. The parents having consented after marriage, the children are bound. Gerald O'Ferrall was a party to the marriage articles, and ought to have given notice to M'Can of the marriage articles; he never gives notice, and acts quite inconsistently with his duty as a trustee. M'Can can only be called upon in the second degree; he can only be answerable through the medium of the trustee; it is owing to the default of the trustee that the whole mischief has happened.

Lord Chancellor (27th April 1841).—This case affords a melancholy instance of the extent to which frauds may be practised within the precincts of a court of equity. When such cases occur the Court must feel an anxious wish to afford all such relief as may be consistent with its principles and practice, and, as far as possible, to prevent its proceedings from being instrumental in protecting the author of such frauds. This is not only due to the parties injured, but to the public, who have an interest in the result, which may deter others from attempting similar practices.

The papers in the cause are very voluminous, and the argument, both at the bar and in the Court below, took a very extensive range; but it will not be necessary for me to occupy much time in stating the grounds upon which I have formed the opinion, that the plaintiffs, the appellants, are entitled to a much more [610] extensive relief than the decree appealed from has given.

The appellant Catherine O'Ferrall is one of the children of the Reverend Arthur Forbes, who died in 1783, having by his will given the residue of his property equally between his wife and children, having thereby directed that during his wife's widowhood £400 per annum should be paid to her for herself and the maintenance and education of his children, but that upon her second marriage she should receive £60 per annum only; and in that case he directed that the maintenance and education of his children should be paid out of his estate, under the direction of his nephews and certain other relations.

Margaret, the widow, after a contest, obtained probate of this will in 1790, and in 1791 married Ross M'Can, of whose estate the respondent Joseph Henry M'Can is now the representative, and died on the 17th November 1794, whereupon Ross M'Can obtained administration of her estate, and of the estate of the testator Arthur Forbes, during the minority of the children, which terminated on the 17th of January 1798, by the appellant Catherine then attaining twenty-one, and upon Arthur, another of the children, attaining twenty-one in August 1801, administration was granted to him; but Ross M'Can had, by an order of the Court of Chancery in Ireland of the 8th of January 1796, been appointed receiver of the fortune of the children, entering into security to account for such part of the fortunes of the minors as he should from time to time receive, as is usual in such cases.

[611] On the 22d of May 1802 Catherine married John O'Ferrall, and by articles, executed in contemplation of the marriage, it was provided that Gerald O'Ferrall, a trustee, should get in the fortune of Catherine, then in the hands of Ross M'Can, and otherwise, and pay £1000 to John O'Ferrall the husband, and invest the residue, and pay the income to the husband, for the joint lives of the husband and wife and the survivor, and after the death of the survivor divide the same among the children, as the husband and wife, or the survivor, should appoint, and in default of appointment, equally. It does not appear that any suit had been instituted during this period, but in 1791 the widow, and in 1796 Ross M'Can, were appointed receivers of the fortunes of the infants, under the direction of the Master, which appears to be according to the practice of the Court of Chancery in Ireland, and in 1796, on the 25th of May, an allowance of £80 per annum was ordered for the maintenance of the children, the widow being then dead; but it appears that from the time of the

marriage between her and Ross M'Can the £400 was paid to her or her husband, although by the will she was entitled only to £60, which was effected by concealing from the Court the fact of such marriage. Although, therefore, it appears that in 1792 the widow, and in December 1795 Ross M'Can, passed accounts before the Master, to which no irregularity in point of form has been imputed, it is certain that such accounts were erroneous and fraudulent to the extent of the difference between the £400 and £60 per annum, unless some allowance might have been claimed for the maintenance of the children from the date of the mother's marriage, she having been appointed guardian of their persons. [612] It does not appear that any other account was taken, or that any thing else took place affecting the interest of the children, or the liability of the accounting parties, till after the marriage of Catherine in 1802. There had, indeed, been a reference to arbitration, and an order for that purpose, but the time for making the award had expired, and no consent had been given to enlarge the time when the marriage took place.

Ross M'Can by his answer denied knowledge of this marriage until September 1802, and of the articles of the marriage until 1811. This knowledge of the marriage at the time it took place is, however, established by the evidence of Priscilla O'Connor, who says that she was informed of the intended marriage a couple of days before it took place by Ross M'Can, and by a letter from him to John O'Ferrall, dated the 17th of June 1802, in which he desires John O'Ferrall to bring with him Mrs. O'Ferrall's private book. Of his knowledge of the articles prior to 1811 there is not, I believe, any direct proof, but when it is considered that he was the husband of the mother of Catherine O'Ferrall, and that Gerald O'Ferrall was the trustee of the settlement, and that these parties combined with John O'Ferrall the husband to conceal the fact of this marriage also from the Court, there can scarcely be any moral doubt of his knowledge of the settlement. To have made known the existence of the settlement, or even the fact of the marriage, would have been destructive of the scheme which he appears to have formed of settling his accounts with John O'Ferrall, and that through the instrumentality of Gerald O'Ferrall, whom these parties had appointed as arbitrator, together with [613] Mr. Serjeant Browne, to settle all matters in difference between the children and Ross M'Can.

On the 25th of June 1802 an order was made, expressed to be upon the consent of Catherine Forbes, but who was then Mrs. O'Ferrall, and to which Ross M'Can was also a party, enlarging the time for making the award until the 26th of June instant, and on that day the arbitrators made an award, directing Ross M'Can to pay to Catherine Forbes £4872 13s. 4d.

At this time Catherine was a married woman, and the capital of her fortune was the property of her children. The submission, therefore, and the award, were inoperative, and so they seem to have been treated by the parties, for on the 6th of September 1802 an order was made for Ross M'Can accounting before the Master, and on the 4th of October 1803 an order was made that Ross M'Can should account before the Master as administrator of the original testator and of Margaret Forbes, and as guardian of the persons and receiver of the fortunes of the late minors respectively, and to inquire when they respectively attained twenty-one, and what was due to them respectively, and why M'Can had not duly accounted before. This reference was never prosecuted, and no report was ever made, and nothing which afterwards took place in the cause can have the effect of protecting Ross M'Can from accounting for the share of Catherine; although he appears to have passed an account before the Master in 1806, and in 1810, and 1814, as receiver, yet the proceedings were carried on in the name of Catherine Forbes, her settlement being concealed, although Ross M'Can admitted that he knew of the settlement in 1811. The accounts [614] of 1806 were not in fact taken by the Master at all, but as appears by the report itself, and by an affidavit of Ross M'Can of the 30th of April 1806, were adopted upon the alleged consent and approval of Catherine Forbes and the other children, the respondent M'Can well knowing that Mrs. O'Ferrall was a married woman, and incapable of consenting, and the whole of her property being at the time in trust for her children; and the accounts of 1810 appear, by an affidavit of Ross M'Can of the 9th of June 1810, to have been adopted by the Master upon the consent of John O'Ferrall. The accounts in 1814 were passed, and Ross M'Can's recognizance vacated, under an arrangement that they should not be

binding, as appears from a letter from him to John O'Ferrall, dated the 15th of February 1815, in which he uses the following words:—"By your consenting to have my recognizance vacated under the accounts which I passed before the Master in July last I do not mean to bind you or Mrs. O'Ferrall by that account; on the contrary, you and I will settle our accounts relative to the late Reverend Arthur Forbes's property as if no such account had been passed." These accounts cannot raise any impediment to the claims of the children of Catherine Forbes, and nothing more appears to have taken place till 1819, when a bill was filed by John Ferrall and his wife, which, having abated by the death of Ross M'Can, was revived against the present respondent Joseph Henry M'Can, and was dismissed in 1832, the defendant undertaking to give security for £8000 to abide any decree to be made on a bill to be filed in relation to the assets of the testator Arthur Forbes, on behalf of Catherine O'Ferrall and her children, or any of them. [615] The bill upon which the decree in question was made was accordingly filed by Catherine O'Ferrall and her children. This decree seems to assume, for certain purposes, the validity of the award, for it makes the sum thereby to be awarded the foundation of the claim which it enforces against M'Can's estate, adding, however, certain sums to it, which it appeared to the Court had been improperly withheld from the notice of the arbitrators, or which at least had not been included in their award.

I do not very well understand this mode of dealing with the award, supposing it to be valid, or dealing with it at all, if invalid and inoperative; and, being of opinion that it is invalid and inoperative as against the plaintiffs, I think the decree must be altered in this respect, and the account directed without reference to the award at all. But, as I do not find any ground for impeaching the regularity of the accounts passed in 1792 and 1795, the accounts to be taken must be upon the footing of the accounts so passed; but as it is proved that there are material errors and omissions in those accounts, the Master must look into, and, if necessary, correct such accounts, and such accounts must be in particular corrected by taking therefrom the £400 per annum from the time of the marriage of Margaret Forbes, and by substituting in the place of it £60 per annum, to which she was entitled after such marriage, to which there must be added an inquiry of who maintained the children from the marriage of the mother in June 1791 until the 25th of May 1796, when £80 per annum was allowed for the maintenance of the children, and if Ross M'Can or the mother maintained them, what ought to be allowed for such [616] maintenance during the time, and the amount thereof to be charged in the account, and interest, calculated upon the difference between the £400 per annum and the sum so to be credited to the account, in the same manner as interest is calculated upon the rest of the account. And that the Master do ascertain what balances were from time to time in the hands of Ross M'Can. And as John O'Ferrall has received large sums, part of the share of Catherine, in the testator's property, that an account be taken of what he has so received, and when and under what circumstances each of such sums was so received. This account is proper, not because payments to her by Ross M'Can can even *prima facie* be discharged as against the owners of the fund, inasmuch as Ross M'Can's connexion with the estate at the time of Catherine's marriage was confined to his office of receiver, and to what remained due from him in respect of his former office of representative of Arthur Forbes and Margaret his widow, in all which characters it was his duty to account to the Court, and which he had been ordered to do,—in such a case, if one even innocently pays money to other persons whom he supposes to be entitled in right of the parties in the cause, but who prove not to be so entitled, he will be responsible to such parties, inasmuch as in making such payments he departs from the strict line of his duty, and is therefore liable for any error he may commit; such account is also proper because the owners of the fund, although their primary claim is against Ross M'Can, may, if they fail to obtain payment out of his estate, recover it from John O'Ferrall, and because, although it is premature to declare rights dependent on circumstances not yet ascertained, and [617] it is not regular to do so between co-defendants, it may become necessary hereafter to act upon the result of such account between the estate of Ross M'Can and John O'Ferrall. It is also, I think, premature to make any provision as to the manner in which the articles upon the marriage of John O'Ferrall and Catherine Forbes ought to be carried into effect, the fund which is to be the subject of that

settlement, and the liabilities of John O'Ferrall towards that fund, being unascertained; the answers show a sufficient title in Catherine to support her position as co-plaintiff with her children. It would also be premature to make any declaration as to the liability of Gerald O'Ferrall; but I think his personal representative ought to have been retained before the Court. That, however, is not complained of; for the complaint of John Henry M'Can's appeal is only that he ought to have been primarily liable, for which there is no pretence. All questions of interest and costs ought also to be postponed until after the report. The cross appeal must be dismissed with costs.

Now, the usual course of proceeding in this House in arranging the minutes of the decree has been, to declare the principle upon which the decree is to be founded, and to refer it back to the Court to carry it into execution. That, however, has been found to lead, sometimes, to repetitions of appeals, the Court below not always carrying into effect the intention of this House in the way in which the parties understood the House that it should be carried into effect; therefore, where it is possible, I think it more expedient, and calculated to save expense to the parties, that this House, in making its order, should frame the decree [618] in such a manner as to prevent the necessity of any further reference to the Court below.

It is ordered, That the original appeal be dismissed: And it is further ordered, That the appellant in the original appeal pay the costs of the respondents Catherine O'Ferrall, Gerald O'Ferrall, Arthur O'Ferrall, since deceased, and John O'Ferrall the younger, and of the respondent Sarah O'Ferrall, administratrix of Gerald O'Ferrall the elder, incurred by them in respect of the original appeal, to the said respondents Catherine O'Ferrall, Gerald O'Ferrall, and John O'Ferrall the younger, and to the said respondent Sarah O'Ferrall, administratrix of Gerald O'Ferrall the elder: the amount of such costs to be certified by the clerk assistant: And it is further ordered, That the decrees of the 6th March and 10th July 1834, the two orders of the 2d July and 31st October 1835, and the decree of the 19th of November 1835, complained of in the cross-appeal, be reversed: And it is declared, That the plaintiffs in the cause of *O'Ferrall v. M'Can* in the Court of Chancery in Ireland are entitled to a decree for an account of the personal estate of Arthur Forbes, and of the receipts and payments in respect thereof of Margaret Forbes and of Ross M'Can, as personal representatives of Arthur Forbes, and as guardians and receivers of the fortunes of his children, and otherwise howsoever, without regard to the award of the 26th of June 1802, on any account taken subsequently to the marriage of Catherine O'Ferrall with the defendant John O'Ferrall, and also of the receipts and payments of the defendant Joseph Henry M'Can in respect of such estate; and that such accounts ought accordingly to be taken against Joseph Henry M'Can, and the estate of Margaret Forbes and Ross M'Can, and that it ought by such decree to be declared, that in taking such accounts Margaret Forbes is to be considered as entitled under the will of the testator Arthur Forbes to the annual sum of £400 only up to the time of her marriage with Ross M'Can, and to the annual sum of £60 only from that time; and that inquiries ought by such decree to be directed as to [619] by whom the plaintiff Catherine O'Ferrall and the other children of the said testator were maintained from the time of the marriage of Margaret O'Ferrall up to the 17th of July 1795, when the allowance of £80 per annum commenced, under the order of the 25th of March 1796; and if it should appear that they were maintained during the time by Margaret O'Ferrall or Ross M'Can, that then the Master ought to be directed to inquire what ought to be allowed for such maintenance during that time; and that the Master ought to be directed to inquire what balances were from time to time in the hands of Margaret Forbes and Ross M'Can on account of such estate, or of the share therein of Catherine O'Ferrall, and also to ascertain what, at the time of the marriage of Catherine O'Ferrall with the defendant John O'Ferrall, was the amount of her share and interest of and in such personal estate, and when, and by whom, and to whom, and in what manner, the same, and each and every part thereof, was paid, laid out, and invested, and what has become thereof, and what part thereof, and of the personal estate of the said testator, has at any time been paid to or received by or possessed by the defendant John O'Ferrall, and when, and by whom, and by what authority each and every part thereof was so paid, received, and possessed; and that it ought by such decree to be declared, that in taking such accounts against the

estate of Margaret O'Ferrall and Ross M'Can regard is to be had to the accounts passed on the 26th of June 1792 and 4th December 1795; but that any of the parties are to be at liberty to show errors and omissions in such accounts, and that the Master is to be at liberty, in taking the accounts directed by the said decree, to correct any such errors and omissions; and that such decree should reserve the consideration of all matters relating to the settlements made upon the marriage of Catherine O'Ferrall with the defendant John O'Ferrall, and to the claims and liabilities of John O'Ferrall in respect thereof, and of the liabilities of the estate of the late Gerald O'Ferrall in respect thereof, and also the consideration of interest upon balances, and of the costs of the suit: And it is further declared, That [620] the costs, charges, and expenses of the appellants in the said cross-appeal ought to be paid out of the fortune of the said Catherine O'Ferrall: And it is further ordered, That the cause be remitted back to the Court of Chancery in Ireland, to make a decree conformable to the above declarations, and to carry these directions into effect.

[621]

## BARONY OF HASTINGS.

The ATTORNEY GENERAL for the CROWN. Sir WILLIAM FOLLETT for Mr. LE STRANGE STYLEMAN LE STRANGE. Sir HARRIS NICOLAS for Sir JACOB ASTLEY [13th May 1841].

[Mews' Dig. x. 310; xiv. 1729. S.C. 8 Cl. and F. 144; 4 St. Tr. N.S. 1367. See *Kintore v. Kintore*, 1886, 11 A.C. 394; Parl. Pap. 1895, 272, p. 5.]

A summons to parliament, and a sitting under it, is evidence of a title to a peerage descending to the heirs of the body including females; so likewise is it evidence of a similar title, where there have been several summonses, both prior and subsequent to a sitting in parliament, and a sitting in parliament, though no sitting under a summons, has been proved, proof being adduced that during the period of that sitting there were no writs of summons in existence.

The petition of Sir Jacob Astley of Melton Constable in the county of Norfolk, and of Seaton Delaval in the county of Northumberland, praying that Her Majesty would be pleased to determine the abeyance of the barony of Hastings in his favour, by commanding a writ of summons to be issued to him by that title, [622] together with Her Majesty's reference, and a report of the attorney general thereunto annexed, and a similar petition of Henry Le Strange Styleman Le Strange of Hunstanton in the county of Norfolk, with Her Majesty's reference, and the report of the attorney general, were severally referred to the committee for privileges.

From the evidence produced in respect of the pedigree it appeared to the committee, That Mr. Styleman Le Strange, claiming from Armine, the eldest daughter of Sir Nicholas Le Strange, and Sir Jacob Astley, claiming through Lucy, the second daughter of Sir Nicholas Le Strange, had proved their descent from Sir John de Hastings, the second baron, who sat in the House of Peers in the 18th Edward I.:

That the barony fell into abeyance on the death of Sir Hugh de Hastings in 1543; and that Mrs. Browne of Elsing Hall, near Dereham in the county of Norfolk, (who was not a claimant,) was descended from Anne Hastings, the eldest daughter of Sir Hugh de Hastings; Henry Le Strange Styleman from Armine, the eldest daughter, and Sir Jacob Astley from Lucy, the second daughter, of Sir Nicholas Le Strange, who died in 1724.

In respect of the claim to the peerage it was proved, That on the 24th December, 49th Henry III., 1264,\* Sir Henry de Hastings, from whom the claimants are descended, was summoned by writ to parliament:

\* This is the earliest writ of summons to parliament now extant, by which the baronies of Lord Despencer and De Roos have been created; but as the rolls of parliament do not commence until the reign of Edward I., proof cannot be adduced from the parliamentary rolls of those peers having sat in parliament.

[623] That in the 18th Edward I., 1290, Sir John de Hastings, second Baron Hastings, the son of Sir Henry de Hastings, was proved to have sat in parliament by the parliamentary roll; wherein it is stated that Sir John de Hastings, *et ceteri magnates et procures tunc in parlamento existentes*, had granted to the king, for the marriage of his eldest daughter, as much as Henry III. had received on the marriage of his daughter:

That no writs of summons to parliament from the 49th Henry III. to the 23d Edward I. had been found:

That on the 23d, 27th, 28th, and 34th Edward I., and on the 1st and 6th Edward II., the same Sir John de Hastings was summoned to parliament, had a writ of summons to the coronation of Edward II., and died on the 6th Edward II., 1313:

That on the 6th and 18th Edward II. Sir John de Hastings (the third Baron Hastings), son and heir of the first Sir John de Hastings, was summoned to parliament, and died in the year 1325.

Lord Chancellor.—This case had come before your Lordships under a reference by Her Majesty, upon a petition of Sir Jacob Astley, and another of Mr. Styleman Le Strange, claiming the barony of Hastings, which is stated to have been either created or certainly to have existed in the 49th Henry III.

The pedigree, so far as it traces the descent from the party in whom that barony was vested, appears to me, after a laborious investigation of the evidence affording the different links in the pedigree, to have been made out. At the same time there always is [624] some degree of doubt in coming to a conclusion upon facts of such a very ancient date, and we always feel some hesitation in coming to a conclusion on evidence of that description. It does, however, happen in this case, that most of the steps of the pedigree are supported by public documents, inquisitions, and other instruments, which leave no doubt as to the facts which are stated in those documents; and, upon the whole, your Lordships will, I think, be safe in acting upon the evidence.

The evidence shews that the descent fell into abeyance in the year 1543. Anne Hastings, who was the daughter of Sir Hugh Hastings, and her sister Elizabeth, were the only two children of that Sir Hugh Hastings who would have been entitled to the barony if it had been claimed and acted on in the manner set out in this petition, and from that Anne Hastings is descended, not either of the parties claiming the title, but another party, who is not before your Lordships as a party claiming according to the form of proceeding which is adopted by your Lordships in cases of this sort. Mrs. Browne is proved to have been descended from that Anne Hastings; she, therefore, would be one of the parties in whom the title is vested as a co-heir.

The other sister, Elizabeth, is the ancestor of both the other claimants, Mr. Styleman Le Strange being descended from Armine, who was the elder daughter of Sir Nicholas Le Strange, and who died in the year 1768, and Sir Jacob Astley being descended from Lucy, the younger sister of that Armine. There are three parties, therefore, in whom the title is vested; Mrs. Browne, who is descended from the elder branch, [625] and the other two, who are descended from the junior branch, namely, the daughters of Sir Nicholas Le Strange.

Some questions have been raised at your Lordships' bar, which, undoubtedly, are entitled to the most serious consideration. The first of those is, how far there has been proved in this case that which is required, in the absence of a patent, to establish a title descendible to heirs general, namely, a summons and a sitting. That a summons and a sitting constitute a title descendible to heirs general has been established and acted upon in so many cases that I need not now consider it a question open to discussion. The point, therefore, is, in this case, whether there has been proved that which, according to former decisions, constitutes a title to a dignity of this description. The other is a point, not of law, but rather of fact, namely, whether the absence of any exercise of the right to this title, from the time when it is proved to have been last held by Sir John de Hastings, who died in the year 1389, does not raise a presumption that there must at that time have been something, which cannot now be traced, which precluded the party, who would otherwise have been entitled, from claiming the barony at that period.

Though length of time itself is undoubtedly no bar to a claim, yet when you are examining matters of fact, and are endeavouring to ascertain the rights of persons who now come forward to claim a dignity, undoubtedly it raises a great presumption against the validity of that claim when you find a dignity, descendible at a particular period, in a way that would entitle a party to take it up, and you find that that claim was not made, or, at all events, that the party did not [626] succeed, unless there are circumstances in the case which enable your Lordships to come to a satisfactory conclusion, that the circumstance of the dignity not having been taken up is satisfactorily explained. Where a title falls into abeyance, and is claimable either by two sisters, or the descendants of two sisters, no doubt the presumption against the title does not arise, because neither of those parties could assert a right to the title without the assent of the crown; and if the crown did not think proper to exercise its prerogative, by deciding to which of the two sisters the title should descend, neither party could assert her title in her own right. If the crown does not so decide in the first instance, it may go on from generation to generation; and the circumstances, therefore, of it falling into abeyance, and not being claimed, undoubtedly do not raise any strong presumption against the claim.

There have been cases before your Lordships in which you have reported in favour of the titles, where that circumstance did not exist, and where the title appears not to have been taken up by the next possessor, it not appearing that the circumstances of the case were such as presented any impediment which would have prevented him from claiming the title. It must always depend upon the particular circumstances of each case; it is, at most, but a case of presumption, that is to say, a presumption that there must have been something which cannot now be discovered, which might have prevented the party who would otherwise be entitled to the dignity from claiming it.

With regard to the first of those points, namely, how far, in this case, there has been a summons and a sitting, both being necessary to constitute a title to the [627] dignity claimed, the facts may be very shortly stated. Sir Henry de Hastings, the father of Sir John de Hastings, from whom the claimants are descended, appears to have been summoned to parliament on the 24th day of December in the 49th year of Henry III.; of that there appears to be no question; the proceedings in parliament at that period are preserved, and they prove the fact; but there is no evidence that that Sir Henry de Hastings sat in parliament; there is undoubted proof of his having been summoned, but no proof of his having sat. His son John de Hastings is, I think, clearly proved to have sat in parliament the 18th Edward I.

A sitting in parliament must be proved by some proceeding in parliament itself, and there is produced and proved, as of the date of the 18th Edward I. in the year 1290, a document professing to be in the nature of a grant to the king, described to be "in pleno parlamento ipsius domini Regis," which states the barons and lords present, and, among others, Johannes de Hastings, and, after naming others, it says, "et ceteri magnates et procures tunc in parlamento existentes." The grant is stated to have been not properly the subject of a grant by parliament, but, whether properly the subject of a grant by parliament or not, is, I apprehend, not material, provided it appears clearly that it was a proceeding in parliament, and the document itself states that it was "in pleno parlamento," and states the parties present to have been, among others, "Johannes de Hastings, et ceteri magnates et procures tunc in parlamento existentes."

There is nothing to impeach this as having been a proceeding in parliament; it is, therefore, a parlia-[628]-mentary proceeding, recognising Johannes de Hastings as being then a member of your Lordships' House, and I apprehend it comes therefore within all the rules by which your Lordships try the fact, of whether there has been a sitting. This has not been or pretended to be the great difficulty in the present case; but the difficulty in the present case is, that there is no proof produced of the summons of that Sir John de Hastings to sit in that parliament. At a subsequent date there are many instances proved of the same individual having been summoned; but then, in those subsequent parliaments, there is no proof of his having sat.

Now your Lordships, in investigating this, finds this as a matter of fact. You find an individual whose father was certainly summoned to parliament; you find the same individual summoned to subsequent parliaments; and you find the same individual sitting in a preceding parliament; and the question is, whether there be any

rule by which your Lordships are to be guided in coming to the conclusion that he was regularly summoned to the parliament in which you find that he sat. I apprehend that there is no such rule; but, although it is quite clear that in order to constitute the dignity claimed there must be a summons and a sitting, your Lordships having the fact of a sitting proved, must, according to the ordinary rules, investigate the question, whether that sitting was or was not under a summons, of which there is now no positive proof. Under the decisions, strictly speaking, the proper test and evidence of a summons would be the writ itself; but there are many cases in which writs cannot be produced, and in this case there is proof [629] that the writs of that period, that is, the period covered by the year 1290, in which this individual must have been summoned, if summoned at all, are not forthcoming. The case, therefore, as far as regards summons, rests on this individual himself having been summoned at different periods, your Lordships not having the summons produced for this period, but having the fact of his having sat in parliament in that year.

Under these circumstances, it appears to me that your Lordships may be well justified in coming to the conclusion that he had a writ of summons, which, at that period, would alone entitle him to sit in this House; for the only suggestion consistent with his having sat in this House at all without a summons would be his having intruded himself into the House without authority; whereas no peer at that time, nor at the present time, could enter this House without having his summons with him. The question is, whether your Lordships are to presume that he was there without that legal authority, or whether, connected with other collateral facts, of a summons at an earlier period, and summonses at a subsequent period of time, your Lordships may not safely come to the conclusion that he was summoned at that time upon the principle of law *omnia præsuntur legitime facta donec probetur in contrarium*. I apprehend your Lordships may do what you have done on former occasions; presume, upon the collateral evidence in this case, that that took place which alone could justify the sitting, namely, that Sir John de Hastings was summoned to parliament in the 18th Edward I.

[630] Take Sir John de Hastings, because there is no evidence of Sir Henry de Hastings having sat, though no moral doubt can exist of his having been the peer from whom Sir John de Hastings derives his title; but when a party is claiming a dignity, and he derives his title from some individual as his ancestor, he is bound to show the concurrence of those two circumstances of a summons and a sitting in that ancestor.

It appears to me that your Lordships are acting within the principle which has regulated your former proceedings in cases of this sort, in coming to the conclusion upon the evidence, that Sir John de Hastings was summoned and sat in the parliament of the 18th Edward I.

The title descended in the issue of that Sir John de Hastings through several generations; that Sir John de Hastings having had one son, whose issue enjoyed the barony for a certain period of time, but which issue failed in the year 1389. That Sir John de Hastings had also a daughter, Elizabeth, who married Lord Grey de Ruthyn, from whom another line descended, now represented by Lady Hastings.

Upon the failure of the line of the son of Sir John de Hastings, Sir John de Hastings, Sir Lawrence de Hastings, and then Sir John de Hastings again, upon the failure of that line, Sir John de Hastings having, it is very clearly proved, married another wife, both of his wives being named Isabel,—from his second wife was descended Sir Hugh Hastings, who is the ancestor of the present claimant. According to the rules of law the barony would, on his decease, have fallen to the Hugh Hastings who was descended in that line, who [631] died in 1396, and upon his death it would have gone to his brother Sir Edward, and thence arises the second difficulty which has been suggested at your Lordships' bar. I do not detain your Lordships by observing upon the difficulty, which at one time was suggested, of the proof of the second marriage of Sir John de Hastings with Lady Isabel, the daughter of Hugh Le Despenser, because it appears to me, upon looking at the inquisitions which have since been produced, that that fact is very satisfactorily established; and there is no doubt that Sir John de Hastings, by his second marriage with that Isabel, had the descendants who are represented in this pedigree as being the ancestors of the present claimants.

Then this question arises:—Sir John de Hastings, who died in 1389, was the last possessor of the dignity; and there was this difficulty raised at your Lordships' bar;



—that the male descendants of the second wife of Sir John were the parties entitled to the peerage, but that they did not make any claim to it, and that from that period to the present there has not been any enjoyment of the dignity by any person to whom, under those circumstances, it would vest.

If the case had stood nakedly upon those facts, although there are cases which would justify your Lordships in passing over that difficulty, and not concluding the case on account of not being able to explain how that happened, there would have been great difficulty in assuming that they were, in fact, entitled to the dignity, when no person descended from Sir John de Hastings had, during so long a period, asserted that title. But the circumstances of this case appear to me [632] to remove that difficulty; because it appears that upon the death of the male line of Sir John, called the second Baron Hastings,—there being descendants of Elizabeth, the daughter of that Sir John,—the question arose, how far the descendants of that daughter were entitled, in preference to the descendants of the son of a subsequent marriage, there being a rule of law applicable to land, and the question arising, whether the rule of law applicable to land did or did not apply to a dignity.

It is also proved that a contest arose\* between the [633] descendants of that Eliza-

\* The controversy arose between Reginald Lord Grey of Ruthyn, the heir of the whole blood of the third Earl of Pembroke, and Sir Edward Hastings, the collateral heir male, respecting the right to bear the arms of Hastings, without a mark of difference or abatement.

Though merely called “a plea of arms,” it would appear that the honours as well as the arms of the family were involved in the question, it being then understood that dignities, like lands, descended upon the heir of the whole blood of the person last seised, instead of upon the heir of the person first created. Reginald Lord Grey, who asserted that “the arms, inheritance, and name of Lord Hastings,” belonged to him, assumed that title, and it was always borne by his descendants, the Lords Grey de Ruthyn and Earls of Kent, until 1641, when the House of Lords, after referring the question to the Judges, resolved that the Lords Grey de Ruthyn never had any right to the barony of Hastings.

Sir Edward Hastings, however, also assumed the title of “Lord Hastings,” and never relinquished it. On the 9th of May, 11 Hen. IV. 1410, the controversy was decided in favour of Lord Grey de Ruthyn; but Sir Edward Hastings immediately appealed against the judgment; and on the accession of King Henry the Fifth a new commission was appointed for hearing the appeal. The proceedings were interrupted by the absence of one of the commissioners, and afterwards by the expedition to France in 1415, Sir Edward Hastings having been retained to serve in the retinue of the Earl of Dorset, by indentures dated in May 1415, under the designation of “Edward Seigneur de Hastings et de Stuteville.” In 1417 the appeal was resumed, but (as would appear from a petition of Sir Edward Hastings to the King, about 1421,) before judgment was given he was arrested by Lord Grey for the sum of £987, the costs of the original suit, and was thrown into the Marshalsea.

Fearing that the payment of those costs would be deemed an acknowledgment of Lord Grey's right to the honours and arms of his family, Sir Edward Hastings continued a prisoner for twenty-six years, part of which time he was, he says, in some pathetic documents on the subject, “boundyn in fetters of iron lyker a thief or a traitor than like a gentleman of birth.” Imprisonment and chains, the destruction of his own health, and the death of his wife and children, could not shake his firmness. He steadily refused Lord Grey's offer to release him from the debt, if he would admit his superior right to the objects in dispute. The only compromise to which he could be induced to consent was a marriage, either in his own person, or in that of one of his children, with one of those of his adversary; and in case his eldest son John Hastings should marry one of Lord Grey's daughters, he said he would relinquish to him and the heirs of that marriage “the name, right, inheritance, and arms,” etc., which he claimed as heir of John last Earl of Pembroke, “for I doubt not,” he says, “to shew the possession, right, and claim of my father, my brother Hugh, and to me descended as well by right and position of arms, as it is to shew by *diem clausit extremum* for two parts after the decease of John Hastings last Earl of Pembroke, as for the third part to me after the decease of the last Countess of Pembroke, which descent,

beth and Sir Edward Hastings, and that that contest continued for a considerable length of time, and was not determined until the year 1641, upon the question how far the dignity was affected by the rule of law applicable to land. And I wish to call your Lordships' attention to the fact, that when that contest was determined, and that question of law was decided, the title was in abeyance between Anne Hastings [634] and Elizabeth, the daughters of Sir Hugh, who died in 1514. From the year 1514 the title was in abeyance; and in 1641, when it appears that it was decided that the *possessio fratris* did not apply to a dignity, the parties then claiming the benefit of this dignity were not persons who could of their own authority take it up and exercise the privilege, but they were the descendants of daughters who could not claim the peerage without the act of the crown declaring in whose behalf the abeyance should be determined.

Therefore, at that period of time, it was precisely the same question that has been so often determined with respect to a title in abeyance, in which case there is no presumption arising from no claim having been made, because there is no right in either party to enforce that claim. When, therefore, your Lordships see, that at the period at which the ancestors of the present claimants would have been entitled to assert a title to the present dignity a question of law existed which prevented that right from being asserted until a period at which the title descendible in the line of issue male of the second marriage had fallen into abeyance, I think you have circumstances proved sufficient to explain how it happened that the title had been so long suspended, and why no person came forward to assert it.

This being the only circumstance in this case in which it differs from many others which your Lordships have had before you, and there being quite sufficient, in my opinion, to induce your Lordships to come to the conclusion that this point is not sufficient to overturn the title as derived from the evidence which [635] has been given, I should recommend your Lordships to come to the conclusion, that the claimants have made out their title; that is to say, that Mr. Styleman Le Strange, claiming from Armine, the eldest daughter of Sir Nicholas Le Strange, and Sir Jacob Astley, claiming through Lucy, the second daughter of Sir Nicholas Le Strange, have proved their descent from Sir John de Hastings, the second baron, who appears to have sat in this House in the 18th of Edward I., and held the dignity of the barony of Hastings; that it appears that the dignity fell into abeyance on the death of Sir Hugh Hastings in 1540; and that Mrs. Browne, who is not claiming, but whose title has been proved by the other claimants, is descended from Anne Hastings, the eldest daughter of Sir Hugh Hastings, who died in 1514, and which was therefore the elder branch. If your Lordships come to this decision, you will ascertain the fact that the barony was in abeyance in those three individuals, and that it will remain so till the crown think proper to determine it. I move your Lordships to find that the barony of Hastings was vested as a barony descendible to heirs general of the body in John de Hastings, who died in 1313, and that the said John de Hastings Baron Hastings was summoned to and sat in parliament in the 18th of Edward I., and left one son and daughter Elizabeth by his first marriage, and two sons by his second marriage; that the issue of the said John, the son of the said Baron Hastings, by his first marriage, failed in 1389, and that Frances, the wife of the Reverend Richard Browne, Henry Le Strange Styleman Le Strange, and Sir Jacob

right, claim, and inheritance, God's curse and mine have all mine heirs that will not sue the right after me, and upon these points I will . . . . . life;" adding, "for plainly I will never renounce my right without that my son have a great parcel of my right, other than in semblable wise as I have proffered you."

The latest of those remarkable papers, now extant, was written about January 1433-4, when Sir Edward Hastings was still in prison, and in which, as before, he styled himself "Edward Lord Hastings." After 1434 nothing has been discovered respecting him, except his death in January 1437. His son, John Hastings, warned, perhaps, by his father's unhappy fate, seems to have yielded to the usurpation of his rights by the Lords Grey of Ruthyn; and in the reign of King Henry the Eighth the representation of the house of Hastings fell among co-heirs, in which state it has ever since continued, and now remains.—From the original documents in the possession of Mr. Styleman Le Strange.

Astley, Baronet, are descended [636] from the eldest surviving son of the said Sir John Baron Hastings, who died in 1313, by his second marriage; and that the said barony is in abeyance between the said Frances Brown, being descended from Anne, the eldest daughter of Sir Hugh de Hastings, who died in 1540, and the said Henry Le Strange Styleman Le Strange, and the said Sir Jacob Astley, being descended from Elizabeth, the younger daughter of the same Sir Hugh Hastings, the said Henry Le Strange Styleman Le Strange being descended from Armine, the eldest daughter, and the said Sir Jacob Astley being descended from Lucy, the second daughter of Sir Nicholas Le Strange, who died in 1724.

The same was determined in the affirmative, and the Chairman was directed to report the same to the House.

[637] FROM THE COURT OF CHANCERY, IRELAND.

JOHN MALONE of Rathcaslin in the County of Westmeath,—*Appellant*;  
JOHN MALONE of Coburg Place in the City of Dublin, ALICIA O'CONNOR,  
HUGH MORGAN TUITTE, THOMAS ARDILL, HENRY O'CONNOR, THOMAS  
RICHARD ROOPER, JOHN CONROY BROWNE, EDMUND L'ESTRANGE,  
GEORGE L'ESTRANGE, GEORGE HENRY L'ESTRANGE, ALICIA  
STEPNEY, HENRY STEPNEY, ST. GEORGE STEPNEY, PATRICK POWER,  
MICHAEL WHITEHOUSE and CATHERINE his Wife, JOHN MALONE of  
Gardiner Street, and SAVILLE RICHARD WILLIAM L'ESTRANGE,  
—*Respondents* [25th and 27th May, 3d and 7th June 1841].

[*Mews* Dig. vii. 1462; xi. 68, 95, 550, 583. S.C. 8 Cl. and F. 179; 3 Ir. Eq. R. 536; and *sub. nom. Malone v. O'Connor*, 2 Dr. and Wal. 491, 536. On point as to appeal against order directing issue, see *Butlin v. Masters*, 1847, 2 Ph. 290; *Browne v. M'Cintock*, 1873, L.R. 6 H.L. 463.]

J. M. brought his bill against an infant and several other defendants, claiming, as against them, certain estates, upon two points,—one of law, upon the construction of Lord Sunderlin's will,—the other of fact, that he was the heir male of Lord Sunderlin, charging by his bill that the marriage between his father and mother took place in or about the month of January 1801. With the consent of all parties, one of them being an infant, an issue was directed to inquire whether the plaintiff was the heir at law of his father; and the plaintiff, by [638] the evidence of his mother, proved that the marriage took place in January 1801, and that her son Anthony was born in July of the same year (which would have negatived the claim of the plaintiff, by proving that he had an elder brother); but she swore that Anthony was the last child born before and the plaintiff the eldest son born after her marriage. The infant, having afterwards attained twenty one, was permitted to put in a new answer, and make a new defence; and it was afterwards ordered that a new trial of the issue should take place, with liberty for him and other defendants to appear by counsel on the trial, and to give the judges report in evidence in respect of those witnesses who, having given evidence in the first trial, had died.—Held, that though it is a matter of discretion in a court of equity whether it will first decide the law or the fact, that the Court had, in the present instance, exercised a sound discretion in adopting the latter mode, inasmuch as all but one had concurred in that course, and a different course as to one might have led to different determinations upon the same point:

That the issue directing the jury to inquire whether the plaintiff was the heir at law was the proper issue to be tried:

That though the date of the marriage proved was at variance with that alleged on the record, the Court was right in not dismissing the bill, but granting a

new trial, on the ground of their being a misapprehension of the date or the facts:

That the infant, though strictly speaking not a party to the issue, being permitted to make a new defence, was bound by the issue:

That the judges report was properly directed to be received in evidence, being evidence between the same parties and to the same point.

*Quere*, Whether a party who was an infant when a decree was pronounced, would, in a case like the present, be entitled to be let into a new defence?

[639] The Right Honourable Anthony Malone, being in and previous to the year 1774, seised in fee simple of real estates, of his own acquisition, also seised for life, with remainder in tail male to his nephew Richard Malone afterwards Lord Sunderlin, of certain other lands, and seised for life, with remainder for life to his said nephew, of certain fee farm rents, which estates held by him for life were his paternal estates, by his will of the 12th July 1774, after charging the estates of his own acquisition with certain legacies, devised the estates of which he had the power to dispose in the following words:

"It is my will, and I do accordingly devise all my real and freehold estates of my own purchase or acquisition, or over which I have any power or dominion enabling me to dispose thereof, situate in the counties of Westmeath, Roscommon, Longford, Cavan, and the county of the city of Dublin, or elsewhere in the kingdom of Ireland, unto my nephew Richard Malone, the eldest son and heir of my lately deceased brother Edmond Malone, in whom I place the utmost confidence, his heirs and assigns for ever; not entertaining the least doubt but that he will in due time, and upon the first proper occasion, take care not only to have the said estates, so devised to him by me, but my paternal estates settled in such manner that the said estates may continue in the male line of our family, and in our name and blood, and go to the several branches of it in succession, one after another, according to their priority of birth and seniority of age, the elder and his issue male being always preferred to the younger and his issue male, according to the usual course of family settlements, [640] as by the rules of law the same may be properly done. And I do hereby most earnestly recommend it to my said nephew to see the same so settled, still, however, reserving to himself, and limiting to all the male branches of our family to whom estates only for life shall be limited in remainder or succession, all such proper and reasonable powers as are usually given and attendant upon such limited estates, in order to enable him and them, as they shall be respectively seised in possession, to settle jointures upon their wives in such manner as they shall happen to marry, and to provide for their younger children, or for their daughters, if they should happen to have daughters only, and no issue male, and to make leases for reasonable limited terms when they shall be respectively seised, and in actual possession by virtue of any remainder that shall be so limited to them respectively, and all such other reasonable powers as my said nephew may think necessary or expedient to add, in order to guard against the consequences of unforeseen accidents or events. And I do hereby appoint my said nephew Richard Malone sole executor of this my will, and request that he will take upon him the execution thereof, and the performance of the trusts thereby reposed in him."

On the 8th of May 1776 the testator died, and thereupon his nephew Richard Malone afterwards Lord Sunderlin entered upon the estates of the testator, as well the fee simple estates as those which he held for the term of his life.

Anthony Malone at the time of his death left surviving him the following persons, and no other of the male line of his family, and of his name and blood; [641] (that is to say), the devisee, Richard Malone afterwards Lord Sunderlin, Edmond Malone, brother of the devisee, who were the sons of the testator's eldest brother Edmond, Henry, Richard, and Anthony Malone, the sons of Richard Malone, the testator's youngest brother, and Richard Malone, only son of the aforesaid Henry Malone.

Edmond Malone, the brother of Lord Sunderlin, died in the year 1812 without issue. Henry Malone died in the year 1814, leaving Richard his only son, and two daughters, Alicia, afterwards the wife of Henry O'Connor, and Catherine, afterwards the wife of Michael Whitestone. Lord Sunderlin died in April 1816, intestate, and without issue, having by recoveries acquired the fee of the paternal estates,

leaving Henrietta Malone and Catherine Malone, his two sisters, who, as his co-heiresses, upon his death entered upon the estates.

In December 1816, Richard Malone, the son of Henry, instituted a suit in Chancery against Henrietta and Catherine Malone, for having the paternal and acquired estates of Anthony Malone settled in such manner as his will directed.

The cause was partly argued before the Chancellor, when, in consequence of a compromise between the parties to the suit, a deed, dated the 1st of June 1820, was executed by them, whereby the paternal and acquired estates of Anthony Malone were conveyed to trustees by Henrietta and Catherine Malone, upon trust that they should receive for their lives or the life of the survivor an annuity of £3000, and, subject thereto, to the use of Richard Malone for life, with remainder to his first and other sons in tail male, with remainder to him in fee.

[642] Under the deed of the 1st of June 1820 Richard Malone entered into possession of all the estates, and by his will, dated the 16th of April 1830, gave all his estates, real and personal, to Henry O'Connor, since deceased, and to Alicia O'Connor his wife, Hugh Morgan Tuite, and Thomas Ardill, upon trust, after certain payments therein mentioned, to convey the paternal and acquired estates of Anthony Malone to Alicia O'Connor and Henry O'Connor, since deceased, for their lives and the life of the survivor, with remainder to Edmond Malone, since deceased, eldest son of Edmond Malone of Ballinahoun, for life, with remainder to his first and every other son in tail male, with remainder to the appellant John Malone, the second son of the said last-mentioned Edmond Malone, for life, with divers remainders over.

On the 16th January 1834 Richard Malone, the son of Henry Malone, died without issue, leaving his sisters, Alicia O'Connor and Catherine Whitestone, his co-heiresses at law, who were also co-heiresses at law of Lord Sunderlin, and of Anthony Malone; whereupon the respondent John Malone, of Coburg Place, claimed, as the eldest son of Richard Malone (who had died in 1806),—which Richard Malone was the son of Richard, which Richard was one of the brothers of Anthony Malone, the testator,—to be entitled as heir male of that Anthony, under the limitations contained in his will, and on the 11th August 1836 filed his bill against the respondent John Malone, of Gardiner Street, who claimed the estates as heir male of Anthony Malone, alleging that the father of the respondent John Malone, of Coburg Place, had died without lawful issue; and also against the appellant and the other respondents, [643] who derived their title to the estates from the will of the testator Richard Malone; stating the facts before mentioned, and alleging that the defendants at times pretended that said Richard Malone, the respondent's father, died without lawful issue, and that the respondent was not, as his son and heir, entitled to the said estates, respondent not being, as the defendants alleged, legitimate, in consequence of some alleged informality in the marriage of respondent's father and mother, the contrary of which pretence the respondent charged to be the truth, his father and mother having been legally and duly married before the birth of respondent. And the respondent further alleged in his bill, that the said defendants at other times pretended, that although a marriage was solemnized in the month of January 1801, which was before the birth of respondent, between the said Richard Malone and respondent's mother, yet such marriage was not valid, inasmuch as the same was celebrated by a Roman Catholic clergyman, the said Richard Malone being then a protestant. And the respondent further charged, that although his said father had been educated and brought up a member of the established church, yet, several years before his said marriage with the respondent's mother, his said father became, and at the time of said marriage was, and thenceforth continued to be and profess himself, a Roman Catholic, and that he ever after lived in that faith, and died therein; and that the said marriage was legally solemnized between his father and mother, then both professing the Roman catholic religion. And the bill charged, that the said marriage took place in or about the month of January 1801, in the chapel of Townsend Street in the city of Dublin; and the bill [644] prayed, amongst other things, that the trusts of the will of the said Anthony Malone might be carried into execution, and that the respondent's kindred and degree of relationship to the said Anthony Malone might be ascertained, and that the respondent might be decreed

entitled to an estate in tail male in possession in all the estates devised by the will of said Anthony Malone; and for an injunction and receiver.

The respondents by their answer submitted that Anthony Malone had made no declaration of trust binding upon Lord Sunderlin; and denied that the father and mother of the respondent were duly or legally married before the birth of the respondent, and insisted that such marriage, as was alleged by the respondent to have taken place, if any such had been celebrated, was not valid, inasmuch as same was celebrated (if at all) by a Roman catholic clergyman only; the father having been at the time of the alleged marriage, and until his death, a protestant of the church of England. The appellant, then a minor, by his answer, submitted his rights to the protection of the Court.

The plaintiff, for the purpose of proving the marriage of his father and mother, examined his mother, Bridget Malone, who, after having deposed to a former marriage between her and Richard Malone, which was celebrated by a degraded Roman catholic priest, and which was invalid, deposed, that she went to Preston in Lancashire, and resided there for nearly two years, that a second ceremony of marriage was performed between them in Townsend Street chapel, then called Lazars Hill, in January 1801, by the Reverend Patrick Smith, a Roman catholic priest; and that at the period of the said marriage, and for some years before, she and her [645] husband both professed the Roman Catholic religion; and she further deposed, that her youngest child living, when the second marriage took place, was named Anthony, who was then about six months old, and was born at Preston, and that the respondent, the plaintiff, was the first child born after the second marriage. In another part of her depositions she stated that her son Anthony was born in Preston in the month of July 1801, and that the marriage took place after her return from Preston to Dublin; that her son Anthony was living, from whom she had received a letter two years ago. The plaintiff examined another witness present at the marriage, who stated that the marriage was celebrated in January 1801, and the marriage was entered by the priest in the register book of the chapel of Townsend Street, under the general date, at the head of the page, of January 1801; and the entry seemed to have been inserted after the entries written under it had been made.

On the 13th May 1837 the cause came on to be heard, when the counsel for the appellant submitted to the Court that, as he would be adult in March following, the cause should stand over as to him; but counsel for John Malone of Coburg Place objecting, the cause proceeded; whereupon the Lord Chancellor, by consent of all the parties, given by counsel in open court, ordered, that an issue should be tried, John Malone of Coburg Place being plaintiff, and Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, defendants, with liberty for John Malone of Gardiner Street to attend by counsel at the trial, to inquire whether the plaintiff John Malone of Coburg Place was the heir at law of his father Richard Malone, deceased. On the [646] 6th of December 1837 the issue came on to be tried, and after the trial had lasted several days a verdict was found for the plaintiff John Malone of Coburg Place.

On the 12th January 1838 the defendants in the issue applied for a new trial, on the grounds that the case made by the plaintiff varied from the case made in the equity cause, that the defendants were surprised at the trial, that the verdict was against evidence, and illegal evidence had been received; whereupon, by an order of the 19th of February 1838, it was ordered, that there should be a new trial of the issue by the order of the 13th of November directed, with liberty to the respondent John Malone of Coburg Place to give the former verdict in evidence, as he might be advised; and as to evidence on the new trial of any of the witnesses who might have died since the former trial, it was ordered, that the Judge's report should be received in lieu thereof. A new trial was had, and, on the 4th December 1838, the plaintiff obtained a verdict, but none of the defendants appeared on the trial.

On the 18th June 1838 the appellant, having on the 25th March of that year attained twenty-one, in pursuance of an order of the 9th of June 1838, upon an application made by him for that purpose, put in a new answer, and insisted, upon the same grounds as the other respondents had done, that the respondent John Malone of Coburg Place was illegitimate; but that if any marriage had taken place between his father and mother, that the marriage had taken place in January 1801, and his brother Anthony, who was born in July 1801, was his elder brother, and

had a [647] prior claim; and, having entered into evidence, the cause came on to be heard before the Lord Chancellor on the 5th December 1838, when the Court declared as follows:—"This cause being set down by the plaintiff to be heard against the defendant John Malone, (the appellant), and his counsel having insisted that upon the pleadings and proofs in this cause the plaintiff's bill should be dismissed, the Court is pleased to declare that the same ought not to be so dismissed. And the Court declining to enter into the consideration of the question as to the construction of the will of the Right Honourable Anthony Malone, in the pleadings mentioned, until the right of the plaintiff to raise that question shall have been first determined, it was ordered, that the cause should stand over to be heard, for further directions against the said defendant John Malone, at the same time as the same shall be heard against the several other defendants."

The plaintiff served a draft of the decree, and proceeded to make up the decree; but the appellant having objected, it was never made up or signed by the registrar.

The respondents Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill having appealed against the order of the 19th of February 1838, on the 6th day of June 1839 the House of Lords ordered, that the order of the 19th of February 1838 should be varied by omitting such part thereof as directed the plaintiff to be at liberty on such new trial to give the former verdict in evidence, and that the defendants Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, [648] the trustees, should pay the costs of the former trial, and that, subject to such variation, the order should be affirmed.

On the 15th of November 1839 the cause came on to be heard, on the order of the House of Lords, the certificate of the second trial, and for further directions, and a supplemental suit against Saville Richard William L'Estrange, the first tenant in tail under the will of Richard Malone, when it was ordered, that the order of the 6th of June 1839 should be varied in the manner directed by the House of Lords; and it was ordered, that a new trial of the said issue should take place, with liberty for all the parties in the first cause to appear by counsel on the trial, and as to any witnesses examined at the first trial who were dead, the Judge's report to be received in lieu of their evidence, with a reservation of costs, and further directions. And it was further ordered, in the supplemental cause, that the defendant Saville Richard William L'Estrange should be at liberty to appear by counsel at the trial of the issue, and to make full defence, in like manner as if he had been a defendant to the issue; and that the supplemental cause should stand over to be heard at the same time as the original cause.

At the sittings after Hilary Term 1840 a new trial of the issue was had, when, after a trial of nine days, the jury was discharged by the learned Judge, the jurors not having been able to agree to a verdict.

From the orders of the 13th November 1837, the 5th December 1838, and the 15th November 1839, the appellant appealed.

[649] Mr. Pemberton and Mr. Knight Bruce for the Appellant.—When the cause came on to be heard, the appellant, being an infant, objected to the cause being heard till he came of age; the objection was overruled, and an order made for the trial of the issue, with the consent of all parties. The appellant, being an infant, was incapable of giving his consent and attending at the trial. He did not consent; the statement of his consent is an error upon the record, and he is not bound by the trial. The issue as directed is improperly framed. The plaintiff might have been the heir at law of his father, and yet not entitled under the description in the will; his brother might have been living at the time the bill was filed, and died afterwards. The bill ought to have been dismissed, as the case put upon the record differs from the case proved. The validity of the marriage depends upon the date; and if the marriage, as alleged in the bill, took place in January 1801, there is an elder son who was born subsequent to the marriage. The Court, before it directed an issue, ought to have first put a construction upon the will. The whole expense of the trial may be useless if it eventually turns out that there is no trust. In *Gordon v. Gordon* (3 Swanston, 459) Lord Eldon stated, that the expense and time of the trial was wasted, and that the right ought to have been decided before the character assumed by the plaintiff had been established. So *Blackburn v. Jepson* (17 Vesey, 473); and in *Lynn v. Beaver* (1 Tur. and Russ. 63) the trial was stayed until a construction had been put upon

the will. There is a serious doubt if the plaintiff succeeds in the issue whether he will be entitled under the will. The latter cases have restricted cases of this [650] nature. *Cunliffe v. Cunliffe* (Ambler, 686); *Knight v. Knight* (3 Beavan, 148); *Meredith v. Henegge* (1 Simons, 542). There is not sufficient certainty either as to the objects or as to the subject matter devised. There is a different direction with regard to L'Estrange and the other parties. Under the liberty for all parties to appear by counsel, they could not address the jury or call witnesses. *Wright and another v. Wright* (7 Bingham, 459). And it is ordered that the Judge's report be received as evidence, as far as regards those witnesses who have died in the absence of the appellant, who had no opportunity of a cross-examination; and they cited Cockburne and Hussey (2 Ridgeway, 504), and Blake and Vaysie (3 Dow, 192).

Sir William Follett and Mr. Jacob for the Respondents.—There is a mistake as to the dates, but there is no misapprehension as to the facts. Anthony was born at Preston before the marriage, and the appellant was born after their return to Dublin. It frequently happens in trials at nisi prius that there are contradictions as to dates, though the facts are correct. The right course, therefore, under these circumstances, was to submit the case again to the jury, which, with certain variations, was so established by this House. The appellant puts in his answer, enters into evidence, and makes the same defence as the respondents; it is too late to object to the trial of this issue; the right of the plaintiff to be heard depends upon this issue; the right to be heard did not depend upon the issue directed in *Gordon v. Gordon*. When the plaintiff has established his legitimacy, then the Court will enter into the construction [651]-tion of the will; this is not the proper time to enter upon that subject. The bill ought not to be dismissed, because the bill alleges a marriage in 1801, and there is evidence of a marriage in 1802. It might have been a surprise, and upon that ground a new trial was directed, and this House affirmed that order; but then it is said the issue is not properly framed. If the plaintiff is the heir at law, he must be the heir male, and this is the common form. With regard to his not being able to address the jury, the practice is not uniform. In a case in which Sir William Follett was counsel, Mr. Earl, under a similar direction, addressed the jury. When an issue is drawn, the parties agree who are to have the conduct of it; if the parties are dissatisfied with the directions, they can apply to the Court for other directions. Issues do not bind any particular person; they are directed to inform the conscience of the Court. In *Rhodes v. De Beauvoir* (6 Bligh, 195) the Tibbutts were ordered to be examined as witnesses, yet they are interested, and were ordered to attend. In *Blundell v. Gladstone*, before the Vice Chancellor, which it not reported, twenty or thirty persons were interested under the will, yet there was only the tenant for life plaintiff, and one defendant; the remainder-men and other parties interested did not have liberty to attend the trial, not having desired it. In the Duke of Roxborough's case a great number of persons were interested and only some of the parties were ordered to try the issue. In *Humphreys v. Hollis* (Jacob, 73) three persons who were interested, were not made parties to the issue, and there an action was held to have been properly tried during an abatement by the [652] death of one of the defendants, who was not directed to attend the trial. These parties, though they do not attend the trial, are bound by the issue. Infants likewise are bound by a decree taken by consent. *Wall v. Bushby* (1 Brown, 484). If the plaintiff wanted to vary the order, he ought to have applied for a rehearing. In *Kelsall v. Kelsall* (2 M. and K. 409), the Court allowed an infant, after decree, upon his attaining twenty-one, to make a new case. The direction that the Judge's report should be read has been affirmed by this House. The depositions of deceased witnesses might have been read without any order for that purpose. The Judge's report was ordered to be read, in order to save expense of proof.

Mr. Pemberton in reply.—The plaintiff having put his case upon a marriage of 1801, it was proved an eldest son was born in August of that year. He disproved his own case, and the Court ought to have dismissed the bill. If the plaintiff had intended to have made a new case, he ought to have applied to the Court to amend the record, or file the supplemental bill for that purpose. The mother, a witness, and the priest who makes the entry, all concur in fixing the date of the marriage as being in January 1801. If ever there was a state of circumstances favourable to the construction of the law, before the fact of legitimacy was tried, this was the case. Pro-



tracted litigation, and expense incurred, which may be perfectly useless. I cannot distinguish this case from *Gordon v. Gordon*; in both cases the fact of legitimacy was in issue. If the plaintiff had not been legitimate, he had no colour of [653] title. In *Rhodes v. De Beauvoir*, Tibbutts had a very small interest. If this House had ordered Rhodes to have been examined, and to have excluded him, then that would have been an analogous case. Here is the owner of the estate, having no opportunity of addressing the jury or examining the witnesses.

Lord Chancellor (7th June).—This case involves several points of very considerable importance in the practice of courts of equity, on some of which it will be necessary to come to a decision; and others of which, although they have been discussed at the bar, do not, in the view that I take of this case, call for any opinion.

The contest between the parties arises upon a will of one Anthony Malone, who, by his will, left his property to his nephew, with a recommendation that he should continue that property in the male line of the family. He, however, assumed that this recommendation from the testator did not bind him to settle the property, so as to continue it in the male line of the family; but he conceived that the will gave him an absolute dominion over the property; and he accordingly, or those who claimed through him, settled the property to the present appellant as tenant for life, with remainder to his first and other sons in tail expectant upon the prior estate for life. The present plaintiff alleges that he is the heir male; that is, the male representative of that Anthony Malone; and, contending that the recommendation in the will of Anthony Malone was obligatory upon Richard Lord Sunderlin, who took under that will he insists that he is now entitled to have the property so settled as [654] that he, John Malone, should be entitled to that property in possession.

In stating this he states the mode in which he derives his relationship from that Anthony Malone who made the will. He states that he is the son of Richard Malone, which Richard Malone was the son of Richard, which Richard was one of the brothers of Anthony Malone the testator; and, according to the statement of it, if these facts were verified and established, no doubt the plaintiff would fill the character which he assumes, of the heir male of the family of Anthony Malone.

It is obvious that a suit so constituted embraces two points; one of fact, and the other of law. It is necessary for the plaintiff, claiming as heir male of Anthony Malone, to make out that he does in fact fill that character. Establishing that fact, then a question of law arises, whether the will of Anthony Malone imposed a duty on Lord Sunderlin, who took immediately under the will, so to settle the estate as to make the estate descendible in the male line of the family of Malone.

In cases of that kind where the party assumes a character which he must establish before he can raise the point at law, it is contended on the part of the present appellant that it is the duty of the Court to decide the point of law in the first instance; because, if the point of law be against the plaintiff, then it is immaterial whether he fills the character he assumes or not; and, for this purpose, the case of *Gordon v. Gordon* was principally relied upon; other cases were cited, particularly the case of *Lynn v. Beaver*, which, when looked at, proves to be no authority for that [655] proposition; and if the facts of that case were at all similar to the present, it will be found that the question of practice was not the same, because if the plaintiff in that suit had been one of the next of kin, and the sole question had been whether there were not other next of kin, the question would not have been whether the plaintiff filled a situation entitling him to ask for the decision of the Court, but whether there were not other persons equally filling that situation who ought to be before the Court before the question was decided.

It appears, however, from reference to the decision in *Lynn v. Beaver* [1 Tur. and Rus. 63], that it was decided by the consent and concurrence of all parties, and it is quite clear that it must have been so. It was suggested at the bar that that might be an error in the report; but it is clear that it was not an error, because it appears that the Master, on the reference to him by the Vice Chancellor, Sir John Leach, found that the plaintiff was not the next of kin. The question was, whether a person of the name of Foster was next of kin; and it came before Lord Eldon on exceptions to the report. Now, upon the exceptions to the report, Lord Eldon had nothing to decide but whether the Master had come to a right conclusion. It was impossible that Lord Eldon should

have come to the decision to which he came, unless he had the consent and concurrence of all parties assuming there was a plaintiff before the Court, who was himself the next of kin. That case, therefore, is no authority to the present purpose.

Other cases have occurred within my own experience, which, however, were not cited at the bar, but in [656] which very different questions have been raised, and in which Sir John Leach had adopted a practice which Lord Eldon did not entirely approve of; when cases of this sort, of persons claiming as next of kin, came before the Court, Sir John Leach was in the habit of saying, "I will not decide this question until I have all the parties before the Court who represent the next of kin; they may be numerous, or they may be few." And it was his habit to refer it to the Master in the first instance to ascertain who were the next of kin. Lord Eldon thought that occasioned very considerable expense, which, possibly, at last might be useless; and, therefore, finding that he had a next of kin before the Court who was entitled to fill that character, whether jointly with others or not, he thought it better to decide the question of law between the parties, than first to put them to the expense of deciding who were the next of kin, which might become useless, but in all those cases there was a person filling the character which he assumed.

The case of *Gordon v. Gordon* [3 Swan, 459] is entitled to the highest consideration, because it is a case which Lord Eldon decided; and Lord Eldon's observations, as reported, would imply that he doubted at least whether it might not have been better to have decided upon the other parts of the case before the expense was incurred of an issue as to whether the plaintiff was heir at law or not. I cannot but feel very considerable doubt whether these expressions did fall from Lord Eldon, at least without some qualification which is not to be found in the report; because, when the facts of that case were considered, (and I very well remember the [657] case at the bar,) it is clear that the Court could not deal with the question without knowing who was the heir at law.

That was a contest between two brothers for the family estates. It related to the legitimacy of the elder one, the younger brother claiming because he alleged the elder brother was illegitimate. In that contest the parties came to an arrangement between themselves, by which they agreed upon a certain division of the property. It afterwards appeared that the younger brother, at the time he got his elder brother to enter into this compromise, upon the supposed doubt whether the marriage had taken place anterior to the birth of the eldest son, was in possession of evidence of the marriage, and that, therefore, had induced his brother to part with this property, to which the elder brother was clearly entitled, upon the supposition of there being a doubt as to the marriage, when, in point of fact, he was in possession of evidence to prove it. The elder brother discovering this, filed his bill to be released from that arrangement, upon the ground that the younger brother, had practised a fraud upon him, and ultimately succeeded. But how could that question have been decided between the parties without the fact being known whether the elder brother was legitimate or illegitimate. The whole foundation of the charge was, that his younger brother knew it, and concealed the fact from him, when he got him to come into the arrangement. It is impossible, therefore, that Lord Eldon could have meant this,—that the Court had decided whether the arrangement was fraudulent or not, without first ascertaining the fact upon which the existence of the alleged fraud rested.

[658] If these authorities do not lead to a conclusion favourable to the party appealing in this case, there is no authority in his favour. In my experience I have never known a case take the turn which it is alleged this case ought to take. A party comes assuming a certain character, and, founded upon that character, assumes a certain right to the decision of the Court with respect to the property in question. If he has not first established the character he assumes, how can the Court deal with the consequential inference, without knowing whether he is the party that he assumes to be?

Then another observation which arises is, that, generally speaking, it would lead to very evil consequences if this Court were to adopt that course of practice, so as to enable a plaintiff to obtain the decision of the Court on the point of law, without putting him to the proof of the character which he assumes. If the defendants had demurred to the bill, for the purpose of raising the question at law, the fact of the plaintiff being heir male would have been admitted. Any one of the defendants had

the power, if they had thought fit to adopt that course, by demurrer, to have admitted, for the purpose of argument, that the plaintiff was,—what he claimed to be,—heir at law, but adding, we demur, because we allege that, even assuming that fact to be so, he has no right to the equity he claims; but they did not think proper so to do; and the plaintiff proceeds with his case before the Court, bound to prove the fact, if he can, by evidence, or, if not, at all events to prove sufficient to entitle him to an opportunity of proving before a jury that he does maintain the character which on the pleadings he has assumed, and on the assumption of which alone he claims to be en-[659]-titled to the equity which he asks the Court to decree in his favour.

Supposing this were merely a matter of discretion, which I admit it may be considered to be, and that there is no positive rule upon the subject,—and I can easily conceive a case occurring in which it would be left to the discretion of the Court either to dismiss the plaintiff's bill upon the facts as they appeared, or to declare that, even assuming the plaintiff to be what he asserted himself to be, still he could have no equity,—then the question is, what is right to be done in that case, assuming that there is a discretion in the Court, either to decide the point of law first, or to put the plaintiff to prove his title first.

The question is raised as to the first order pronounced in this case in the year 1837, by which the Court directed an issue to be tried, whether the plaintiff was the heir male of his father. Now, the form of that has given rise to some singular objections at the bar. At that time the present appellant, who was then the defendant, was a minor. The property which had descended to those claiming through Lord Sunderlin had become vested in two trustees, and under that trust the present appellant was entitled to the estate as tenant for life in remainder. The order for the issue is drawn up by consent, and that order is the first appealed from.

Now, a case has been referred to, for the purpose of shewing that, though an infant is not competent to give consent, that is to say, that it is the duty of those who represent the infant to abstain from consenting, he not being of age to bind himself, or by his own act to dispose of property which may belong to him, yet [660] that if an infant does consent he is bound by that consent.

It does not appear to me at all necessary to enter further into that question, because if your Lordships shall be of opinion that the order made in 1837 was a right order to be made, if that consent had not been given, it is quite immaterial to consider whether the infant ought or ought not to be bound by that consent. But there is another reason which makes it immaterial to consider how far that consent was binding upon the infant, which is this: that the Court has thought proper in a subsequent stage of the cause to relieve the infant from the consequences of that consent, and to permit him to put in a new answer, and to go into new evidence. And the Court has ultimately come to a decision, which is the principal subject matter of this appeal, not upon the order for the issue in 1837, but upon the order of 1839, when this appellant had attained his majority, when he had been permitted by the Court to put in a new answer, and to enter into a new defence, and when he was in a situation to ask the Court to come to such an adjudication upon the cause as the Court might think just, without reference to the former proceedings. It appears, therefore, immaterial to consider the order of 1837, except so far as, that order having existed, and the trials having taken place under it, it might operate upon the discretion of the Court, if the Court had a discretion to exercise, in considering what course it ought to adopt when the cause ultimately came before it in 1839.

I should here observe upon a part of the case which was very much pressed at the bar, that the bill ought to have been dismissed on this ground: that the [661] plaintiff, having alleged himself to be the legitimate son of his father Richard, had then disproved his own legitimacy by the evidence of his mother Bridget, who had been examined to prove his legitimacy, but who actually proved that he was illegitimate, and; upon the depositions as printed for the appellant, no doubt that would be the result of the evidence of Bridget the mother; but those are only partial extracts from the depositions, which ought not to be looked at without looking at other parts of the same depositions; and when the deposition of Bridget the mother is looked at, although there is evidently an inaccuracy in one part of her deposition, in the other it is perfectly plain that she never meant to depose to any facts which constituted proof of the illegitimacy of her son: for Bridget says, that having con-

tracted this marriage, and there being a doubt whether the marriage was valid, upon the ground of doubt whether the husband was a protestant or a catholic, or whether he had been a catholic twelve months previous to the marriage, she states the period at which the child was born, — she states the marriage to have taken place in January 1801, and in another part of her deposition she states the elder brother, Anthony, to have been born in July 1801, which of course would have made him the eldest child of the marriage; but in another part of the deposition she says, in so many words, that the present plaintiff in the suit was the first child born after the marriage in January 1801; and she says, that the other, who would have been the elder brother, born in July 1801, was the child born last preceding the marriage. Therefore there is clearly some misapprehension, either as to date or to some other circumstances. But it is clear [662] that, taking the whole of this deposition together, she states and proves, supposing what she says to be true, that the plaintiff was born the first child after the marriage, and consequently, therefore, would be the eldest son and heir of Richard. It is quite clear to me, therefore, that upon such evidence it would have been quite out of the question for the Court of Chancery in Ireland to have dismissed the bill. There may have been ground for doubt, arising from ambiguity or mistake in the evidence, but it certainly was a case which required further investigation before it could be dismissed.

Then the cause proceeded. The issue was tried, and that took place which has been the subject of discussion at the bar, that at the trial, instead of adhering to the marriage as it had been represented to have taken place, other evidence was given which took the other party by surprise, and which was thought a sufficient ground for the Lord Chancellor of Ireland to direct a new trial of that issue. All this time the defendant remained a minor; but he attained his majority in March 1838, and then he applied for leave to put in a new answer, and to enter into a new defence, and leave was given.

Now, that leave having been given, and that course having been adopted, and that not being a subject of complaint at the bar, I abstain from entering into that part of the case, further than to observe, that if the question should arise, how far a party who was an infant during the time when a decree was pronounced, afterwards attaining twenty-one, is entitled to be let into a new defence in a case like this,—if that question should arise, it is one which, I think, will require [663] serious consideration. There is very great obscurity and a great deal of contradiction in the authorities upon that subject, and it is a proper subject for very serious consideration whenever the question may arise. In this case it was done, and it has not been complained of, and, therefore, your Lordships can come to no decision upon that point.

That, however, put the plaintiff in this situation, that although an order has been made for an issue, and although proceedings have taken place under that order, no issue has, in fact, been tried, coming to any conclusion as to the character of the plaintiff in this suit. After the defendant had attained twenty-one, he applied to put in a new answer, claiming an interest in this property in common with others, against the claim of the plaintiff. The whole case must depend on the plaintiff's proof of the fact, and the conclusion to be come to upon the law, because if he succeeds in both, of course all those who claim under Lord Sunderlin's will lose their estate; they all stand on Lord Sunderlin's title, and their rights depend upon whether he had or had not a right under that will to dispose of the property as he did; if he had not, and if the plaintiff is the heir male, he is clearly entitled. I am far from assuming that that will be the result of this cause, but I am only stating what is the situation of the parties.

The Court, as I have stated, allowed this defendant to put in a new answer. He made a new defence; and the case came on before the Court of Chancery in Ireland, upon an order of the House, altering, in some respects, the direction for the new trial which the Court of Chancery in Ireland had made; at the [664] same time it came on on a new case made by this appellant. I pass over the intermediate order which is the subject of appeal, namely, an order of a prior date, in which the Court merely directed the cause to stand over as a subject matter of appeal, which your Lordships would not be very much disposed to encourage, particularly when, in the course of events, it was perfectly impossible that that appeal should be heard until after the time was expired to which the cause was postponed. I come at once to

the last order of November 1839, in which the appellant, relieved from the consequences of the order of 1837, proceeded to make a new defence, and to examine witnesses of his own, and came before the Court of Chancery as upon an original hearing. The cause, however, came on, as far as the other parties were concerned, upon the order of this House directing the Court of Chancery in Ireland to make certain alterations in the order which had been made by that Court.

The appellant says that he considers himself as much entitled as he would have been upon the original hearing to have the decision of the Court upon the construction of the will, before any investigation was directed as to the title which the plaintiff claimed in his character of heir male.

Now, if I am right in assuming that it is a question for the discretion of the Court whether the Court will decide, in the first instance, upon the construction of the will, or will take the course of sending the question of fact to an issue, I will beg your Lordships to consider what was the subject matter then submitted to the discretion of the Court. It was then a matter of more doubt than it could have been supposed to be in [665] the outset, whether the plaintiff did or did not sustain the character he assumed. He had obtained a verdict; but upon application to the Court a new trial had been directed, and the order directing a new trial had been affirmed by this House. Here then was a question involving the interests of various defendants, some tenants for life, others tenants in remainder, and other persons interested under the title derived from Lord Sunderlin, all of whom had, by the order of 1837, bound themselves to the propriety of the issue trying the plaintiff's title, and who, therefore, could not then dispute it. That order of 1837, at least as to them, was binding. They had been through various proceedings questioning the result of that trial, and they were all parties to the order of this House; at least the defendants in the action were parties to the order of this House directing that the new trial should proceed, with certain modifications, which were introduced into the order. It appears, therefore, that the plaintiff was claiming against various defendants, all of whom, with the exception of the present appellant, had consented and were bound to take the course of having the plaintiff's title in the first instance decided.

Now, if, as I conceive, it would be right in ordinary cases,—I am not at all stating that a case may not arise in which the Court might not be justified in taking the contrary course,—but if in ordinary cases the Court would be right in calling upon the plaintiff to establish the character in which he is suing, how much more so must it be in the exercise of the discretion of the Court when all but one have concurred in the mode of investigating the question between the parties? Now, what would have been the result if a different course [666] had been followed? Supposing the Court had attended to the application of the appellant, and had said, *quoad* the present appellant, we will look at the will, and see whether the plaintiff is entitled to a decision upon that will, assuming that he is what he represents himself to be; if the Court had come to a decision against the plaintiff, the present bill would have been dismissed, *quoad* the present appellant, but the bill would not have been dismissed against the other defendants. The trial must have gone on if the parties had chosen, and the plaintiff might have got a verdict establishing his title as eldest legitimate son of Richard his father; and, having obtained that, he would have a right to ask the Court to decide upon the construction of the will. The equity of that Court might or might not have been administered by the same individual; but, whether that was so or not, a contrary conclusion might have been come to; and if it had been against the plaintiff he might have come to this bar to have that question decided, whether that construction of the will was right or not; and if this House had been of opinion that the Court below had come to an erroneous conclusion in dismissing the plaintiff's bill, the plaintiff would succeed, but succeed against whom?—against all but the most important party represented at this bar; because if the bill had been dismissed as against all but the present appellant, the present appellant would be no longer a party to the proceeding. That is a position which there would have been great reason to regret if the cause had come to this House for adjudication. If the Court was entitled to consider the expediency of the one course or the other, it does not appear to me that, under the circumstances, there could have been a [667] doubt as to the proper exercise of the discretion of

the Court in proceeding in the course which it had proceeded for several years; namely, ascertaining first the accuracy of the representation of the plaintiff as to the character which he assumed.

Therefore, as to the substance of the order of 1839, I have no hesitation in stating, that in my opinion that order was correct. Some objections have been made as to the form of the order, which, however, I apprehend to be equally untenable with those to which I have adverted. One objection is, that the form in which the question of right was directed to be tried was not the form in which a matter of that sort could be investigated. The plaintiff claims as heir male; the issue is, whether he be or be not heir male. He endeavours to make out that fact by showing that he is the eldest son after the marriage. No doubt that, if established, would constitute his title. But then it is said that this may let in a title which has accrued subsequently to the institution of the suit. The issue was directed to try the real point, the real point being the character of the heir male. The issue, therefore, being directed to try that question, the rest are merely the means by which the character so stated may be established.

Then it is said, that the issue is, not to try whether he is heir male, but to try whether he is heir; and it is wrong, because it ought to have been to try whether he is heir male; that is to say, the party claiming as heir male, namely, as eldest son of his father, that it is too vague and too ambiguous to try whether he is heir, but that it ought to have been, whether he is heir male,—whether he is the eldest son. The result of [668] the investigation under the issue as directed I apprehend would be quite satisfactory as to whether he was heir male or not; but that is seriously put forward as one of the grounds of objection.

Another ground, of more importance, no doubt, but which is equally untenable, regard being had to the practice of courts of equity upon this subject, is, that the issue which has been tried is an issue which binds him, but to which he is not, strictly speaking, a party. That is the ordinary course in which issues are directed by a court of equity to be tried, and of necessity it is so, because questions arise which affect the rights of a great variety of parties who may be all interested in the question of the construction of the will; but because an issue is directed all the parties cannot be defendants. Who is to conduct the defence? Cases have occurred, and some in which I have myself directed issues, where persons were interested in the same estate, and interested in the same question, and where there appeared no means of selecting, between the one and the other, which should be the party to conduct the defence; and I remember one case particularly, of very great importance, in which it was so equally balanced between the two that I thought it right to give them an equal chance, and, therefore, I made them both parties to the issue, and put it to them to choose among themselves who should be intrusted with the defence, and I think that succeeded; they did select those who should be intrusted with the defence, without being bound by it. But it frequently happens, in a case of that sort, that a great number of persons are interested; there may be twenty or thirty persons interested in the result of the proceeding. Are they all [669] to be defendants, and all to have an equal title to conduct the defence? That would be inconvenient, and would be so impracticable, that it is not the course of the Court. The Court selects those persons whom it thinks the most proper to be selected for that purpose, and, if the case requires it, permits the other parties to attend, to see that the case is properly conducted, and that justice is done. Here the Court very properly selected those individuals who represented all the interests of those claiming under the will of Lord Sunderlin; it selected the trustees, whom the devisees, the owners of the estates, had selected to conduct the defence; and the order of 1839 gave to the present appellant, together with others, a right to attend the trial, to see whether his trustees properly conducted the defence.

That being the course of the proceeding, and that being the form of this issue, that disposes of several other minor points which were urged. The parties to the action at law are, of course, claiming against all the trustees, and representing all under an adverse title; if so, the evidence is to be regulated in the same way. Then there is no objection to the evidence of the persons who have been examined, and who may have died since the former issue, and prior to the trial of the issue now directed, being laid before the jury, by the best means the Court has of knowing

what is said, namely, by the notes of the Judge being read to the jury. Courts of equity are in the habit, for the purpose of saving expense, of giving directions as to the mode of trial, which might not be correct unless such directions were given; for instance, in directing proceedings to be laid before a jury, it dispenses with the [670] formal proof of facts established before the court of equity; it saves the party the expense of going through that formal proof, and directs certain evidence to be received before the jury.

Then there are other objections also founded upon this; namely, that the present appellant, the defendant, is affected by evidence which might or might not have been false. But when your Lordships consider that the point which has been tried is the same point, and between the same parties, in which the Court came to this conclusion on the original hearing, I have no hesitation in saying I think the Court came to a right conclusion, and that, if the hearing of 1839 had been the first hearing, and no order had been made in 1837, and no order in 1838, and no intermediate trial, it would have equally been so. So much difficulty has arisen in ascertaining the truth, that, in my opinion, it was the right course for the Court to pursue, to proceed, by means of an issue, to establish the fact in the first instance, so as to enable the Court then to act upon the fact, when found. All these objections having failed, I submit to your Lordships the proper course for this House will be to dismiss the appeal, with costs.

Orders affirmed, and appeal dismissed with costs.

[671] ON A WRIT OF ERROR FROM THE COURT OF EXCHEQUER CHAMBER.

EDWARD GILL FLIGHT, THOMAS FLIGHT, and JOHN KNIGHT,—*Plaintiffs in Error*; JOHN THOMAS,—*Defendant in Error* [8th, 10th, and 14th June 1841].

[*Mews* Dig. i. 352; v. 1062, 1079, 1133. S.C. 8 Cl. and F. 231; 5 Jur. 811; and in K.B. and Ex. Ch. 11 Ad. and E. 688; 10 L.J. Ex. 529. Explained in *Eaton v. Swansea Waterworks Co.* 1851, 17 Q.B. 267. Discussed in *Glover v. Coleman*, 1874, L.R. 10 C.P. 116; *Hollins v. Verney*, 1884, 13 Q.B.D. 307; and *Cooper v. Straker*, 1888, 40 Ch. D. 27; and see *Warren v. Brown*, 1901, 49 W.R. 206.]

Under 2 and 3 Will. IV. cap. 71, sects. 3 and 4,\* a party is entitled to maintain an action for an obstruction to the enjoyment of light and air, though the twenty years' enjoyment has been obstructed by an interruption which was made for thirty-three days previous to the expiration of the twenty years. The interruption, in order to prevent an action being maintained, must be an interruption acquiesced in for one year after the party interrupted shall have had notice thereof.

[672] This was an action on the case, brought by Thomas, the defendant in error, against Flight and others, the plaintiffs in error, for raising a wall against a

\* By the third section it is enacted, that when the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By the fourth section it is enacted, that each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

window in a house occupied by Thomas, whereby the light and air were prevented from entering through the window into the house.

The defendants pleaded, that at the time of their raising the wall the window had existed and been enjoyed for nineteen years and part of another year only; and that the wall continued from the time of the raising thereof continually until the commencement of the suit, and until the time of pleading; and that the period of one year did not elapse from the said time of the raising of the wall, before or until the commencement of the suit; and that at the time of raising of the wall, to wit, on the 1st day of January, A.D. 1832, and from the time of such raising continually until the commencement of the suit, Thomas had notice that the defendants had raised the wall, and thereby prevented the light and air from entering the house through the window, with a traverse, that at the time of erecting the said wall the light and air ought to have entered in the manner and form alleged by Thomas.

Knight pleaded to both these counts, in the same manner as the Flights.

At the trial before Parke, B., at the Dorchester summer assizes, 1838, it was proved, that at the time of the raising the wall by the defendants the part of the window mentioned in the plea had been enjoyed for the space of nineteen years and 330 days; that the space of one year had not elapsed from the time of the raising of the wall before the commencement of the [673] suit; that at the time of the commencement of the suit the window had been enjoyed for the full space of twenty years, without any interruption, save and except the interruption mentioned; and that the plaintiff had notice of the wall being raised, whereby the light and air were prevented entering the house. The Judge, upon these facts, directed the jury to find (who found) a verdict for the plaintiff. The plaintiffs tendered a bill of exceptions to the Judge, who, having sealed the same, and judgment being entered upon the verdict in the Queen's Bench, a writ of error was brought in the Exchequer Chamber, where, upon argument, the judgment of the Court below was affirmed.

Upon this judgment of the Court of Exchequer Chamber a writ of error was brought.

Sir William Follett and Serjeant Manning for the Plaintiffs in Error.—The window had only existed nineteen years and a fraction when the defendants raised the wall against the window. The question is, whether the plaintiffs can maintain an action. By the old law they could not have maintained an action unless there had been a use of twenty years, whence a presumption would have arisen of a grant. The act was introduced by Lord Tenterden, in order to give facilities in the pleadings and proof, but not to alter the period from which a presumption of the right would arise. The consequence of holding that this action can be maintained would be, that an act, legal in the first instance, would afterwards become illegal. If the owner of the window had thrown down the wall he would have [674] been liable to an action; yet, after the twenty years had expired, he might have brought an action against the owner of the wall, and both actions might come on to be tried before the same Judge, at the same assizes. An act lawful in its origin cannot be made unlawful by any thing that afterwards occurs. Mr. Baron Parke says, "he should be glad if the absurdity arising from the clauses could be got rid of." In order to get rid of absurd consequences, the act of parliament ought to have been construed by the Judges in a different way. There is a variety of cases where a literal construction would work a wrong, where the Courts, contrary to the literal construction, have given an interpretation which would work no wrong. The intent of the act of parliament is to be regarded (Co. 2 Inst. 112; Co. Litt. 360 a; Plowden, 88, 398).

Mr. Erle for the Defendant in Error.—The title of the defendant to the enjoyment of light depends upon the construction of the act of parliament. If he has been in possession of the window without such an interruption as the act contemplates he is clearly entitled to the enjoyment of it; but the interruption, as defined by the act of parliament, must be for one year during the currency of the twenty years, and no such interruption has in the present case existed. The words of the act are perfectly clear and unambiguous, and, whatever may be the consequences, courts give effect to clear and unambiguous words. Every court has sanctioned this construction. *Wright v. Williams* (1 Mee and W. 77), *Jones v. [675] Pricel* (3 Bing



ham's New Cases, 52), *Tickle v. Brown* (4 Adolphus and Ellis, 369). There was an inchoate right for maintaining an action for building up the wall during the twentieth year, and there are many instances of acts legal in their commencement becoming illegal. Insolvent pays a brother's debt, but if within three months he takes the benefit of the act it is an illegal payment, 1 and 2 Vict. c. 110, sec. 59. So, in the case of bankruptcy, acts legal in their commencement may become illegal by relation back.

Sir William Follett in reply.—If an interruption of a day had taken place before the act the twenty years must be reckoned from that interruption. Does the act mean that a person who has never enjoyed the right for twenty years can maintain an action to enforce his right? Such a construction would be in direct violation of the sixth section of the act: "that, in the cases mentioned in the act, no presumption shall be allowed in favour of any claim upon proof of the enjoyment of the right for a less period than the period mentioned in the act." It is said in bankruptcy, that an act legal in its commencement may afterwards become illegal; in that case there is an alteration in the circumstances of the party; here the parties stand in the same relation, and that which was legal before is now illegal. In all future cases nineteen years and a day will be sufficient to constitute a right. In rights of way and rights of water, if the judgment below be confirmed, the period which constitutes the right will be altered, and the whole term of the law unsettled.

[676] Lord Chancellor (14th June).—The facts of this case, as stated in the bill of exceptions, are, that a window having been created, and having been enjoyed for nearly twenty years, in the course of the last year, before the expiration of the twenty years, the defendant erected a wall, which the plaintiff complains obstructed the light and air of that window. Upon these facts being proved, and error assigned under the direction of the learned Judge who presided at the trial, as the bill of exceptions expresses it, "the said Baron did then and there declare and deliver his opinion to the jury that the several matters so shewn and proved to the said jury were sufficient, and ought to be allowed as decisive evidence, that the light and air ought to have entered through the said front of the same window in manner and form as the said plaintiff had in his said replication to those pleas respectively in that behalf alleged, and to entitle the said plaintiff to a verdict upon the issues raised in his replication to those pleas respectively, and with that direction left the same to the said jury."

This turns upon two sections of the act of the 2d and 3d Will. IV. chap. 71, by the third of which sections it is enacted, "that when the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding." By the next section it is provided, "that each of the respective periods of years herein-before mentioned shall be deemed and [677] taken to be the period next before some suit or action, wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

These being the words of the act of parliament, and the fact in this case being, that the twenty years' enjoyment of the window expired before the year expired after the erection of the wall which occasioned the interruption, so that, in point of fact, when the suit had commenced twenty years had elapsed from the time when the window was first opened, and one year had not elapsed since the time when the obstruction was erected, the question is, whether the learned Baron was correct in stating to the jury, that under the provisions of this act it gave the plaintiff a right of action.

The argument at the bar principally rested upon this, that there had not been twenty years' enjoyment. That there had not been a year's interruption was clear from the facts stated upon the bill of exceptions; but the ground of the objection to the direction of the learned Judge was, that there had not been twenty years' enjoy-

ment. Now, in point of fact, there is no doubt that there was not twenty years' enjoyment, according to the ordinary meaning and usage of that term, but whether there had or had not been twenty years' enjoyment within the meaning of the act, because [678] whatever term the act uses, if it explains the meaning of that term, it is quite immaterial whether the word may or may not be used in any other sense, where it is not explained what the meaning of the term is. Now, as I read these two sections, the meaning is, that there must be twenty years from the commencement of the right to enjoyment to the commencement of the suit, and no interruption shall be considered as an interruption within the meaning of the act,—that is to say, for the purpose of interfering with the twenty years,—unless that interruption shall have lasted one year. The act, therefore, explains what it means by enjoyment without an interruption of one year's duration. Twenty years must elapse, but no interruption shall be considered as preventing the twenty years from running unless that interruption has a duration of one year.

Now, I think it was hardly disputed (although when it was put to the learned counsel an attempt was made to show a distinction) that, within the terms of the act, if an interruption of any duration had taken place, and had ceased during the running of the twenty years, so that at the expiration of the twenty years there was no obstruction that would prevent the action being brought at the expiration of the twenty years, it must be so within the terms of the act, because the objection is, not that there is not twenty years' enjoyment, but that there is not twenty years' enjoyment without interruption, and whether that interruption be in the middle or be at the end of the term cannot, within the meaning of this clause, create any difference in the result.

[679] That would be the construction which, I should think, would be the obvious construction of these two clauses, if there had been no decision upon the subject. It does, however, so happen that in all the Courts at Westminster this question has arisen more or less directly.

In the case of *Jones v. Price* the real point decided was, that the twenty years must be pleaded as being next before the commencement of the suit. The right was there laid, not as next before the obstruction created, but next before the commencement of the suit. Now, if the right mode of pleading be next before the commencement of the suit, that of course implies that the plea would have been bad if it had been next before the injury complained of.

In *Richards v. Fry*, in 7 Adolphus and Ellis, page 704, it was held, that the laying the term of enjoyment before the act complained of was bad, and that it ought to have been next before the commencement of the suit. There is also the case of *Wright v. Williams*, and the case of *Lawson v. Langley*, in 4 Adolphus and Ellis, page 890; which cases prove this,—not only that it is good to lay the right twenty years before the commencement of the suit, but that it is bad if it is not so laid. It is bad if it is laid next before the injury complained of. Those cases decide that, according to the true construction of the act, the twenty years is to be reckoned from the date of the commencement of the right claimed until the commencement of the suit.

Then we have only to put a construction on the words of the act relating to the interruption. The words of the act are positive,—“that no interruption [680] for less than one year shall be reckoned for the purpose of this act,”—the purpose of the act being to give twenty years' enjoyment the effect of absolute right,—that no interruption of the enjoyment of that right for less than one year shall have effect for the purposes of the act.

Under these circumstances I think there cannot be a doubt that the construction put upon this act by the Court below was a correct construction, and I shall move your Lordships to affirm the judgment, with costs.

Lord Brougham.—I entirely agree with my noble and learned friend, that the learned Baron to whose direction the exception was taken, which was afterwards brought by writ of error to the Exchequer Chamber, and subsequently brought from the Exchequer Chamber before this House, was right. I cannot get over the words of the act in the fourth section, with respect to the commencement of the twenty years being next before the action brought, and the proviso with respect to an interruption for one year's duration. The arguments which were used to show, not merely the inconvenient consequences, but the absurd consequences, that might result, I do not think sufficient to countervail the plain and obvious meaning of the words. I

cannot get rid of those words; and the absurdity imputed in the argument to that construction does not appear to me sufficient to warrant a departure from that plain construction. Then, as my noble and learned friend has remarked, though the precise case may not have arisen, yet, as far as the cases have approached to the present case, they are clearly in [681] favour of this construction. As to the doubt said to be thrown out with reference to one of those cases, namely, *Wright v. Williams*, I think it is not necessary to say more than to observe, that I, for one, certainly do not partake of that doubt. I agree, therefore, with my noble and learned friend, that the judgment of the Court of Exchequer Chamber must be affirmed.

Affirmed with costs.

[682]

FROM THE COURT OF CHANCERY.

JAMES KAY,—*Appellant*; JOHN MARSHALL the elder, JAMES GARTH MARSHALL, and HENRY COWPER MARSHALL,—*Respondents* [10th, 14th, 15th, and 18th June 1841].

[*Mews'* Dig. i. 354; x. 694, 737. S.C., 8 Cl. and F. 245; 5 Jur., 1028; 2 Web., P. C. 36; 5 Bing. N.C. 492; 7 Scott. 548; 1 Beav. 535. Distinguished in *Pirrie v. York Street Flax Spinning Co., Lim.* (1894), 11 R.P.C. 447; and see *Plimpton v. Malcolmson*, 1876, 3 Ch. D. 563; and *Herrburger Schwander et Cie v. Squire*, 1888; 5 R.P.C. 581; 6 R.P.C. 194; *Beavis v. Rylands' Glass and Engineering Co., Lim.*, 1900, 17 R.P.C. 97.]

A patent was taken out for new and improved machinery for spinning flax. The improvement consisted in spinning flax at a shorter reach than it had been hitherto spun, by fixing the rollers at two inches and a half distance from each other; but spinning machines having before been used for varying the distances between the rollers, according to the length of the staple or fibre to be spun, though flax had never been spun at so short a distance,—Held, that the patentee had failed in his claim to a new invention, and that his patent was void.

In 1835 a bill was filed by the appellant against the respondents, stating that in the year 1824 the appellant, having invented new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances by power, obtained letters patent, dated the 26th July 1825, granting to him, his executors, administrators, and assigns, the sole and exclusive right and privilege of making, using, exercising, and vending his invention in Great Britain and Ireland for the period of fourteen years. That by a specification [683] under his hand and seal, dated the 26th January 1826, and duly enrolled, after describing the nature of his invention and its several parts, and in what manner the same was to be performed, he declared that what he claimed as his invention in respect of new machinery for preparing flax, hemp, and other fibrous substances were the macerating vessels marked (B) in the drawing annexed to the specification, and the trough of water marked (C) in such drawing; and that what he claimed as his invention in respect of improved machinery for spinning flax, hemp, and other fibrous substances was the wooden or other trough marked (D) in the drawing for holding the rovings when taken from the macerating vessels, and the placing of the retaining rollers (*cc*) and the drawing rollers (*cc*) nearer to each other than they had ever before been placed, say within two inches and a half of each other, for the purpose aforesaid.

The bill stated, that, in the process of spinning flax by power, the skein of flax commonly called a roving was drawn out or elongated, immediately before its being spun, by means of drawing and retaining rollers, the drawing rollers moving at a greater velocity than the retaining rollers; and that, in the machinery for spinning flax by power commonly in use prior to the appellant's said invention, the drawing and retaining rollers were placed at a distance of from twelve to twenty inches, or thereabouts, from each other, such distance being regulated by the length of the staple or fibre of the flax, and that such machinery was not adapted to the spinning of flax in a wet or macerated state, by reason that wet or macerated flax could not, when the rollers were placed at the distance of the [684] ordinary length of the

staple, be drawn out or elongated to the requisite degree of fineness, without slipping or breaking; that the appellant, after many experiments, discovered that by a new combination of the drawing and retaining rollers, that is to say, by placing the drawing rollers at a distance of two inches and a half only from the retaining rollers, the skein of flax or roving might be drawn out and spun in a wet or macerated state, and that when drawn out and spun in such prepared state a thread of a much finer and stronger texture could be produced than could be produced from the skein or roving drawn and spun with the machinery and according to the method in use prior to the appellant's said invention.

The bill then stated, that subsequently to the date of the appellant's letters patent the process of macerating flax in the mode described in his specification had become altogether, or in a considerable degree, unnecessary, the skein or thread of flax being, by reason of the improved preparation thereof, rendered capable of being sufficiently wetted for drawing and spinning by being made merely to pass through a trough of water previously to being drawn out and spun, which prior to such improved mode of preparation was not the case.

The bill then stated, that the appellant's invention of machinery for spinning flax by means of placing the drawing rollers within the said short distance of the retaining rollers was a new invention, and one of great public utility, but that nevertheless the defendants had, in violation of his exclusive right to the benefit of his invention, caused great quantities of new and improved machinery for spinning flax to be constructed upon the principle of the appellant's invention, and had used and continued to use the same in their spinning mills at Leeds and elsewhere in the county of York, and also at Shrewsbury, and elsewhere in England.

The bill prayed that the defendants might be restrained from all further infringement of the appellant's patent, and that they might account for the profits derived from the use of the appellant's invention in the spinning of flax.

The respondents, after the time for demurring had expired, obtained leave of the Court to put in, and they accordingly put in, a general demurrer to the bill, which came on to be argued, on the 2d June 1835, before his Honour the Vice Chancellor, when it was ordered that the demurrer should stand over, with liberty to the appellant to bring such action as he might be advised, but which order was afterwards discharged by the Lord Chancellor, and the demurrer overruled.

The respondents, upon an application to the Master of the Rolls for leave to file two pleas to the bill, which was granted, put in two pleas to the bill, and an answer in support thereof, whereby the respondents pleaded,—

First, the appellant had not before and at the time of the making of the letters patent in the bill mentioned found out and invented any new and improved machinery, as in the bill and the letters patent and specification was alleged:

Secondly, the alleged invention of the appellant, as in the said bill and letters patent and specification mentioned and described, was not before and at the time of the making of the said letters patent of much or any public benefit and utility, as in the said bill and letters patent was alleged.

[686] On the 2d June 1836, on the hearing of the cause, the Master of the Rolls ordered that the parties should proceed to a trial at law, at the then next summer assizes for the county of York, upon the following issues:—

First, whether the appellant had before and at the time of the making of the letters patent in the bill mentioned found out and invented any new machinery, as in the said bill and letters patent and specification was alleged:

Second, whether the alleged invention of the appellant, as in the bill and letters patent and specification mentioned and described, was before and at the time of the making of the said letters patent of much or any public benefit and utility, as in the said bill and the said letters patent was alleged.

And the plaintiff and defendants there were to be respectively plaintiff and defendants at law, and the Judge who tried the issues was to be at liberty to indorse special matters on the *postea*, as he should think fit.

The issues accordingly came on to be tried at the summer assizes for the county of York in the year 1836, before Parke, B., and a verdict was found for the appellant on both issues, with the following indorsement on the *postea*:—"That, before the granting of the patent, flax, hemp, and other fibrous substances were spun with

machines with slides, by which the reach was varied according to the length of the staple or fibre of the article to be spun, and that that has been a fundamental principle of dry-spinning known and used before the granting of the patent; the reach having varied in cotton-spinning between seven-eighths of an inch to one inch and a quarter; in flax or line spinning, from fourteen to thirty-six inches; tow [687] spinning from four to nine inches; worsted spinning from five to fourteen inches. But before the granting of the patent it was not known that flax could be spun by means of maceration, as having a short fibre, at a reach of two inches and a half, or about those limits. But before that time Horace Hall had taken out a patent for, etc., with a specification as annexed; and the machines manufactured according to that patent were constructed with the reach of four inches and three quarters, and before that time the application of moisture in spinning flax for the purpose of separating the fibres and reducing the length of the staple had been used under Hall's patent."

The Master of the Rolls, on a motion by the respondents, that a new trial might be directed of the issues, or in case he should not think fit to direct such new trial, then that a case might be directed to be made for the opinion of the Judges of the Court of Common Pleas, on the 31st January 1837, ordered, that a case be made for the opinion of the Judges of the Court of Common Pleas.

The case stated the substance of the letters patent and specification, the order of the Master of the Rolls directing the issues, the issues so directed, the verdict found on those issues, and the indorsement on the *postea* to the effect above mentioned; that the letters patent mentioned in the said indorsement as having been granted to Horace Hall, with the specification thereto belonging, should be considered part of the case; and that the finding of the jury on the issues and the facts, as found and indorsed on the *postea*, were to be assumed to be true. The question for the opinion of the Court was, whether the appellant's patent was valid in point of law?

[688] Upon this case the Judges of the Court of Common Pleas having certified that they were of opinion that the appellant's patent was not valid in point of law, the cause came on to be heard on further directions before the Master of the Rolls on the 27th May 1839; and on the 16th July 1839 it was ordered that the appellant's bill should stand dismissed out of Court, with costs both at law and in equity, except the costs of the issues, such costs to be taxed by the Master.

Since the institution of the suit the patent had been extended for a term of three years beyond the period for which it was originally granted, by order of Her Majesty in council, bearing date the 13th day of June 1839.

Against the said orders of the 31st January 1837 and the 16th July 1839 the appellant appealed.

Sir F. Pollock and Mr. Kindersley for the Appellant.—Upon the two issues, whether the appellant has invented new machinery, and whether the invention was of public utility, the jury has found for the appellant. Whether there was an insufficient specification, the ground upon which the Court of Common Pleas proceeded, was not involved in the issue between the parties. It is admitted that the macerating process is new; if any part of this process of spinning flax is new the plea is bad. The spinning of fine flax had never been brought to perfection before the appellant took out his patent, nor had flax ever before been spun at so short a reach. The appellant does not claim to spin flax alone, or to macerate it alone; his invention is, to moisten the flax, and spin it, by machinery. It is said that the machinery is [689] not new; but it has been applied in a new manner, and the inventor of a new application of old materials is entitled to claim a patent for a new invention.

Mr. Pemberton and Sir William Follett for the Respondents.—The plea denies, as it is alleged in the pleadings, that new machinery has been found out. What is claimed as new machinery is not new machinery. Any machinery means any machinery mentioned in the bill and specification. In what respect can it be said that there is new machinery? Is the placing the rollers nearer new machinery? In dry spinning the rollers have been placed nearer in cotton than the appellant has placed them in spinning flax. The rollers have always varied in distance according to the length of the fibre to be spun. Supposing a natural substance to be found out which could be spun at a distance of one to three inches, could not the rollers be varied to that distance without violating Kay's patent? But, granting that the macerating of flax is new, then the patent ought to have been taken

out for macerating the flax, and not for two processes; the one for macerating the flax, and the other for spinning flax when so prepared. If part of the invention fails the whole is void. The appellant does not by his bill rely upon the macerating process, which he alleges is now become useless, but upon the improved machinery, which, not being new, cannot be the subject of a patent.

Sir Frederick Pollock in reply.—The jury has found that the machine is new, and it is not competent for the Court to say it is not new. Cotton cannot be spun by a flax machine. It is a new and improved machine for [690] preparing and spinning flax. The same machinery may be employed for any other purpose, except macerated flax.

Lord Chancellor (18th June).—In this case the plaintiff, Mr. Kay, complains of the defendants having invaded his patent; and the course taken below was certainly not of very ordinary occurrence, as your Lordships will see, when I call your attention to the mode in which the case was disposed of in the course of the proceedings. The bill sets forth the patent and the specification, which states that the invention was in respect of new machinery for preparing and spinning flax, hemp, and other fibrous substances; and then it states, that the first process, namely, for macerating the flax, had, to a considerable degree, become unnecessary. It then complains of what the defendants have done,—not as at all interfering with his, the plaintiff's, patent, as relative to the preparing flax for spinning, but as having invaded his patent, so far as it was an improved machinery for drawing and spinning flax,—stating, that that continued to be used, and was a mode very generally adopted.

That is the complaint made by the bill to which the defendants pleaded; and by the plea they raised two objections to the plaintiff's title. The first objection was, "That the plaintiff had not, before and at the time of making the letters patent in the bill mentioned, found out and invented any new and improved machinery, as in the said bill and the letters patent and specification was alleged." That objection, therefore, was, that the patent was bad, because the [691] invention contained in the letters patent and specification was not new,—that there was not any novelty in it,—alluding to the rule of law, that if any part of that which is claimed as an invention, and as new, was not in fact new, the patent would be bad. First of all, upon the construction of this plea, I cannot entertain a doubt but that the terms "any new and improved machinery, as in the said bill and the letters patent and specification was alleged," are to be construed as meaning any such machinery as is there alleged, and in respect of which the patent is claimed. But I apprehend that that does not now come before your Lordships for decision.

The two pleas having been set down for argument an issue was directed, which was afterwards tried. No judgment was pronounced upon the validity of the plea; the parties, though it is not expressed perhaps in terms in the order, thought it more expedient to proceed to the trial of the truth of the plea, not asking or obtaining the judgment of the Court as to the legality of the plea, and as to how far the plea raised the important fact. They proceeded accordingly to trial, and upon the trial the jury found in favour of the novelty, and in favour of the usefulness; but there was an indorsement upon the *postea*, which stated, that there had been, "before the granting of the patent, flax, hemp, and other fibrous substances spun with machines with slides, by which the reach was varied according to the length of the staple or fibre of the article to be spun, and that that has been a fundamental principle of dry spinning known and used before the granting of the patent; the reach having varied in cotton spinning between seven eighths of an [692] inch to one inch and a quarter; in flax or line spinning, from fourteen to thirty-six inches; tow spinning, from four to nine inches; worsted spinning, from five to fourteen inches. But before the granting of the patent it was not known that flax could be spun by means of maceration, as having a short fibre at a reach of two inches and a half, or about those limits. But before that time Horace Hall had taken out a patent for, etc., with a specification as annexed, and the machines manufactured according to that patent were constructed with the reach of four inches and three quarters."

Now that indorsement, which is to be taken as part of the information which the Court is to act upon, as ascertained before the jury, states the various distances

at which the rollers were placed in the ordinary spinning machines, and states, as a fact, which cannot now be in dispute, "that, before the granting of the patent, flax, hemp, and other fibrous substances were spun with machines with slides, by which the reach was varied according to the length of the staple or fibre of the article to be spun." We have it, therefore, as a fact now to be assumed as true, that spinning machines were constructed with rollers the distances between which varied according to the substance to be spun.

Now all the variation which the plaintiff introduced into the ordinary spinning machine, which he claims as his invention, is fixing the rollers at two inches and a half distance from each other, and that he states is such an improvement to the ordinary spinning machine as entitles him to be protected from the rest of the world against their using spinning machines with the rollers [693] at that distance. It is not, as was argued at the bar, one invention, namely, the macerating of flax, and using flax so macerated, with a particular machine. The earlier part of the invention he not only does not claim as against the defendants, but does not claim of the defendants having used it, and in point of fact it is quite clear that he has not adopted that mode. Another mode has been adopted of macerating the flax, and the flax so macerated by another process has been used in a machine with the rollers at two inches and a half distance. If the patent be good, so far as the spinning machine is concerned, that is to say, if the plaintiff has a right to tell the defendants and all the rest of the world that they shall not use the common spinning machine with rollers at two inches and a half distance, then the existence of the patent deprives the defendants, and all the rest of the world, of the right of using the ordinary spinning machine in the form in which they had a right to use it before the patent was granted. Now that is not the object of the patent. If he has discovered any means of using the machine which the world had not known before, the benefit of that he has a right to secure to himself by means of a patent; but if this mode of using the spinning machine was known before (and the indorsement upon the *postea* states that it was known before) then the plaintiff cannot deprive them of having the benefit of that which they enjoyed before; the indorsement upon the *postea* stating, that the rollers had been used at a variety of distances, not precisely specifying two inches and a half, but stating that the distances had been made to vary according to the length of the fibre to be spun, appears [694] to me to establish a fact which, of itself, is conclusive against the plaintiff.

Some question was raised at the bar, as to whether the effect of this maceration was to shorten the fibre. There is no very distinct evidence upon the subject; but, upon referring to what has taken place in the Court below, it does not appear that any doubt existed as to that; that the effect of maceration was to detach one fibre from another,—the substance consisting of a variety of fibres of the length of two inches and a half each, when combined they constituted a compound fibre of considerable length, but when detached by means of maceration, by the application of moisture, then each individual fibre was reduced to the length of two inches and a half. It does not appear to me, however, that this case can depend upon that circumstance, because the real use of the spinning machine before this process of maceration was introduced was this,—a machine for spinning with rollers at any distance, at the option of the parties using it, or according to the nature of the substance to be spun,—and any substance might be spun that was capable of being so spun, with rollers of two inches and a half distance, because the fibre was of that length, or for any other reason; that is quite immaterial. The question is, whether it is an innovation the placing the rollers at two inches and a half distance from each other? But by the indorsement upon the *postea* we are told, that the distance between the rollers varied according to the length of the fibre of the article to be spun.

Under these circumstances, the case being now reduced simply to the question, whether the construction [695] proposed by the patent is an improvement of the spinning machine, it appears to me that the judgment of the Court of Common Pleas is well founded, and that such a patent is not valid in point of law.

Some objection was made as to the course which was adopted in granting the case; that is to say, the terms in which the case was sent. There is no question that the parties below were willing to adopt the terms proposed, in order to put an end to the litigation, and that the Court, therefore, sent a case embodying the

rights of parties, namely, the validity of the patent, confined to the particular point raised. That of itself would be an answer to the objections now made to the terms in which the case was sent, because this House will not permit parties upon appeal to raise a question which they did not think proper to raise and upon which they did not obtain the judgment of the Court below.

But, even independently of that consideration, although the terms of the question for the Court of Common Law are the validity of the patent, you must take the whole case together; you have there the facts stated which raise the objections to the validity of the patent which are contained in the pleas, and these facts are confined to the question of novelty and the question of usefulness. In point of fact, therefore, although the terms in which the question is couched are larger than the plea, it is the very same question that was raised before the Master of the Rolls, and that was the question upon which the judgment of the Court of Common Pleas was pronounced; and it does nothing more than establish this proposition, that the objection taken to [696] the patent, as not being new, and nothing useful, is a good objection, and that the patentee has failed to show that that for which he has claimed a patent was a new invention.

Lord Brougham.—I entirely agree with my noble and learned friend.

Judgment affirmed with costs.



# REPORTS OF CASES heard in the House of Lords, and decided during the Session 1847-48. By C. CLARK and W. FINNELLY, Barristers-at-Law. Vol. I.

JESSY STEWART DINGWALL FORDYCE, executrix of ARTHUR DINGWALL FORDYCE,—*Appellant*; Sir HENRY BRIDGES, executor of J. D. DINGWALL,—*Respondent* [February 23, 1847].

[*Mews'* Dig. i. 488; xiii. 1888; S.C. 11 Jur. 157. Adopted, on point as to construction of statute, in *River Wear Commissioners v. Adamson*, 1877, 2 A.C. 778. And see *In re O'Loughlen*, 1871, L.R. 6 Ch. 406. 4 and 5 Will. iv. c. 22 is superseded by the Apportionment Act, 1870, which also applies to Scotland.]

## *Apportionment of rent—Statute: Scotland.*

The act 4 and 5 W. IV., c. 22, for the apportionment of rents, annuities, and other periodical payments, extends to Scotland.

The intention of the Legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute.

This was a suit instituted under the act 4 and 5 W. IV., c. 22, by the respondent, as executor of J. Duff Dingwall, deceased, to obtain, on behalf of the estate which he represented, an apportionment of the rents and profits of certain lands in Brucklay, of which the deceased had died seised, all of which rents and profits had been claimed and taken by Mr. Arthur Dingwall Fordyce as heir of entail on the death of Mr. J. D. Dingwall. John Duff Dingwall was for several years heir of entail in possession of the lands of Brucklay, and died on the 26th October, 1840, and consequently during the currency of a half year. The respondent, as his executor, drew the rents for the half year, ending at Whit Sunday 1840, [2] being the term immediately preceding Mr. Dingwall's death. A. D. Fordyce drew the rents for the half year ending at Martinmas 1840, being the term during the currency of which the death had occurred. In April 1842 the respondent instituted this suit claiming under the statute an apportionment of the rents of that half year. He founded his claim on the provisions of the 4 and 5 W. IV., c. 22, by the second section of which it is enacted, that "all rent-service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power, and which lease shall have been granted after the passing of this act, and all rents-charge, and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods," etc., shall be apportioned so and, in such manner, that on the death of any person interested in them, his or her executors, etc., shall be entitled to a proportion of them according to the time which shall have elapsed from the last period of the payment to the day of the death, etc. Mr. A. D. Fordyce put in several pleas; the first of which alleged, that "the act 4 and 5 W. IV., c. 22, did not extend to Scotland." On this plea, Lord Cuninghame, the Lord Ordinary, made an order for referring the case to the judges of the First Division of the Court of Session, but appended to his order a note, in which he discussed at full length the question raised by the plea, and expressed his opinion that the act did not extend to Scotland. The judges of the First Division having differed in their opinions, the case was remitted for the advice of the other judges. Of these, the Lord President (Boyle), Lord Moncrieff, and Lord Cuninghame were of opinion that the statute did not extend to Scotland; all the rest held that it

did; and on the 7th March, 1844, a final decree was pronounced to that effect. This was the decree appealed against.

[3] Mr. Anderson (Sir F. Kelly was with him) for the appellant.—The judgment of the court below must be reversed. The statute cannot apply where the estate is Scotch, and where the owner of it is a domiciled Scotchman, and the law which governs its administration is the law of Scotland alone. That is the case here. The words of the act relate not to territory, but to the description of payments. There may be payments of annuities due to parties domiciled in England dying during the currency of a term, and leaving English executors or administrators, and to such cases, as the succession would then be governed by the law of England, the statute in question may be applied. But it does not apply to cases where the property and the domicile of the holder, being Scotch, the succession must be governed by the Scotch law.

The Lords intimated that the question of domicile, as affecting the law of succession, did not affect this case, which was purely a question on the construction of the words of the statute.

Mr. Anderson continued.—There is nothing in the statute, nor in the general rules relating to the construction of statutes, which will justify the application of this act to Scotland. Analogy is not in favour of such an application. It is said that certain general terms in this act warrant its application to Scotland, but the English Bankrupt Act contains terms quite as general, yet it has never been held that that act extended to Scotland. Again the act of 4 and 5 W. IV., is an act passed to amend the 11 Geo. II., c. 19. That was a purely English act, it treated of every thing English, and it applied English rules to English matters. It was called, "An Act for the more effectually Securing the Payment of Rent, and preventing Frauds by Tenants," and it was, therefore, perfectly clear that it was exclusively an English act; for the Scotch law did not recognize [4] "tenants" in the sense in which that word was employed in that statute. Besides which, the very provisions of that statute confined its operation to England. The Statute 4 and 5 W. IV., c. 22, is merely "An Act to amend an Act of the 11 Geo. II., etc." Its enactments must consequently be construed with those of the act it was passed to amend, and it must be confined to the purpose thus announced in its description. It may by possibility apply to rents which are payable in Scotland, but not unless they belong to or are regulated by the law of England. [Lord Brougham.—Perhaps there may be some ground for contending that this statute was not at first intended to apply to Scotland, but are there not words in it which directly make it applicable there?] The words are merely, "in the United Kingdom of Great Britain and Ireland," but this expression seems to have been casually introduced—it is not enforced by any other expression of the intention of the Legislature, and it is contradicted by the general nature of the statute and the objects with which it deals, all of which are exclusively English.

Mr. James Russell and Mr. Elmsley appeared for the respondent but were not called on.

Lord Brougham.—I have no doubt whatever upon this case, and I do not think that we ought to call on the other side. We must construe this statute by what appears to have been the intention of the legislature. But we must ascertain that intention from the words of the statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. The first part of the statute is general, but the things described in it may in some of them include matters that are the subjects of Scotch law, and then comes that extensive phrase, "in the United Kingdom of Great [5] Britain and Ireland." The words here used include, in terms and in spirit, England, Scotland, and Ireland. By those words we are bound, and I therefore move that the judgment of the court below be affirmed.

The Lord Chancellor.—I am not able to see that any doubt can exist in this case. Whatever may have been intended by the legislature, it has used words which in express terms declare that all payments, arising from lands in "Great Britain and Ireland," shall be subject to the apportionment decreed by this statute. Why is not Scotland included in these words? I cannot see any reason for saying that it is not included. On the contrary, it seems to me that, it is expressly and inevitably included within the very words of the act.

Judgment affirmed with costs.

[6] JOHN M'KENNA,—*Plaintiff in error*; GEORGE PAPE,—*Defendant in error*  
[Feb. 8; March 11, 1847].

[Mews' Dig. viii. 409. S. 3 of 6 and 7 Will. IV., c. 38, was repealed by 8 and 9 Vict., c. 64, s. 1.]

The Act 6 and 7 W. IV., c. 38, s. 3, extends to prevent a person who is already a publican from obtaining a licence to carry on the business of a grocer on the same premises, as absolutely as it does to prevent a person, licensed as a grocer, from carrying on in the same premises the business of a publican.

This was an action on the case. The first count of the declaration stated, that the plaintiff was a person duly licensed, pursuant to the statutes in that case made and provided, to exercise and carry on the trade and business of a retailer of spirits, to be consumed on his premises, in the county of the city of Dublin, and being so licensed, he became desirous to trade in and sell coffee, tea, cocoa, nuts, chocolate, and pepper, in a certain room situate in and belonging to his house then and there situate, within the Dublin excise district, and for that purpose he then and there duly made entry of the said room with the proper officer of excise, in whose survey the said room was situated, and was intended to be used, etc.; that the defendant was the collector of excise for the said district, and a person employed for the purpose of granting excise licenses authorised or required to be taken out by persons carrying on any trade or business subject to the laws of excise. And the plaintiff being so licensed, as aforesaid, to retail spirits, and having made the entry of the said room, and being otherwise entitled to receive such licence as hereinafter next mentioned, applied to the defendant, as such collector, for a licence to trade in and sell coffee, etc., in the said room whereof entry had been made, etc., and then and there paid to the defendant, as such collector, a certain sum of money, to wit, etc., being the amount of duty imposed upon such licence, and then and there demanded the same. And it thereupon became the duty of the defendant, as such collector, etc., so to grant and deliver such licence as aforesaid. Breach, that he refused, whereby plaintiff was hindered and prevented from engaging in the said trade, to plaintiff's damage, etc.

The second count was similar to the first; but instead of payment of the duty for the licence, alleged a tender of it.

General demurrer and joinder.

Judgment, without argument, was given *pro forma* for the defendant on this demurrer in the Court of Exchequer, in Dublin, which judgment was afterwards affirmed in the Exchequer Chamber (7 Ir. Law Rep. 98). This writ of error was then brought.

Mr. Napier and Mr. Peacock for the plaintiff in error.

The plaintiff contends, that the duty of the excise officer is merely of a ministerial nature, and that consequently he is bound to perform it whenever a party puts himself into a condition lawfully to call on him to do so. The case of *Ferguson v. Kinnoull* (9 Clark and Finnelly, 251) establishes that principle. Here the plaintiff had put himself into a condition lawfully to demand this licence. The refusal to grant it gave the plaintiff a right of action: he was not bound to aver malice. [Lord Brougham.—Misfeasance of a public officer in the discharge of his duty is sufficient to maintain an action of this sort. The malice is presumed from the illegality of the act. The question here does not turn on the pleadings, but on the construction of the excise statutes.\*]

\* The statute 6 and 7 W. IV., c. 38, s. 3, enacts, "That from and after the passing of this act, no person in Ireland, who shall be duly licensed, under any act or acts for granting excise licenses, to deal in or sell tea, coffee, cocoa, nuts, chocolate, or pepper, nor any person deemed a grocer within the meaning of the laws of the excise in force in Ireland, at or immediately before the passing of this act, shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer, or in any house or on any premises within one quarter of a mile of the house or premises of such retailer, other than a licence to retail spirits in quantities not less, at one time, than one pint, and to be consumed elsewhere than in the house, or on the premises of

[8] The defendant rests his answer to this action on the construction of certain provisions in the excise acts. He does not deny the plaintiff's general right to the licence, but contends that, under the circumstances of this case, that right is taken away. This argument cannot be successfully maintained. An established right cannot be taken away by mere implication; and it is not pretended that the grant of the licence here is in terms forbidden by any statute. It is said that the two trades of grocer and publican cannot, by the provision of the Irish excise acts, be carried on at the same time by the same person, unless the houses in which they are carried on are at a certain distance from each other. But it is clearly settled, by the case of *The Taylors of Ipswich* (11 Co. Rep. fol. 53, a, Thomas and Fraser's ed. p. 101), that, by the common law, a man may carry on as many trades as he pleases; and this right cannot be taken away from him, except by positive prohibitory provisions in a statute. There are no such provisions here.

The error in this case has arisen from confounding the grocer's with the publican's licence. They are in reality distinct. The publican's licence must be applied for to the magistrates, who may grant or refuse it at their discretion; and who, after it has been granted, may withdraw or annul it. The holding of it places the party under the superintendence of the police. The grocer's licence is altogether different. A party is entitled to it on performing certain preliminary conditions; he need not go before the magistrates to ask for it; and they have no controul over him when he has obtained it. The holding of it does not subject him to the interference of the police. [Lord Brougham.—But may not the excise officers enter a grocer's premises, and see whether he is selling tobacco and coffee that have properly paid custom duty?] [The Attorney General.—He may.] But that matter does not affect this question; for the contention here is founded on the presumption that the two licences are the same in their nature, and subject a party to the same supervision, and that the fact of being a publican disqualifies a man from being a grocer. There are no words expressly declaring such a disqualification to be found in any of the statutes. The 45 Geo. III., c. 50, s. 19, declares what persons shall not have a spirit licence, and among these persons a jailer and a grocer are mentioned; and any licence issued to any such person is declared to be void. The 61st section of that act gave the magistrates the power of annulling a publican's licence when a grocer's licence has been granted to the same individual; so that, if a man first got a public-house licence, and afterwards become a grocer, his publican's licence could be avoided. But that act was repealed by the 46 Geo. III., c. 70, and a grocer then became capable of taking a retail spirit licence. The latter act was in its turn repealed by the 47 Geo. III., sess. 2, c. 12, and the first statute would consequently have revived, but that the matters to which it had related were, in this last statute itself, made the subject of special legislative provision. By the 14th section of the 47 Geo. III., the grocer was empowered, as a matter of right, to take out a licence to sell spirits, in not less than two quarts, and not to be [10] consumed on the premises. Then came the 53 Geo. III., c. 137, by the 4th section of which it was enacted, that when any such licence was required by a grocer, it should be lawful for the party desiring it to apply to the officers of excise, who "shall grant the same." The 55 Geo. III., c. 19, transferred the management of the duties from the Office of Stamps to that of the Excise; it consolidated all the previous acts, but it left the grocers as they were. The 39th section of this act stated what trades should not be allowed to obtain a publican's licence, and concluded with the words "other than a grocer capable by law of receiving such licence," so that by that act the grocer's right to receive such a licence was recognized. The 58 Geo. III., c. 57, recites the 45, 47, and 53 Geo. III., and repeals all that relates to grocers in those acts. The grocer is, by this act, restored to the privileges he had before the passing of any of them, and, as he may sell spirits by retail, and in any quantity less than two quarts, he obtains a new statutory privilege instead of that which he had under the 14th section of the 47 Geo. III. Two quarts were therefore the *maximum* but not the *minimum* of what he could sell. Then comes the 59 Geo. III., c. 106, which repeals the 39th section of the 55 Geo. III. and by the 6th section of which (after referring to the 33rd section of that statute), it is provided, that a person exercising certain trades shall not be capable of receiving

such retailer; and any licence to retail spirits in any other manner, granted after the passing of this act to any such grocer, or person so licensed as aforesaid, shall be wholly null and void to all intents and purposes whatsoever."

a spirit licence, and any licence issued to a person so declared not capable of receiving it, shall be void. That provides in express terms for the case where a man gets a licence and then enters into a forbidden trade; his licence is then to be void. That shows that it was necessary to have an express enactment in order to produce that result. There is no such enactment here.

The 6 Geo. IV., c. 81, an act of the United Kingdom, declares, that all persons licensed under that act to deal in coffee, shall be deemed grocers, and entitled to take out a licence to sell spirits in any quantity not exceeding two [11] quarts, to be consumed elsewhere than on the premises; but such person could not obtain an exercise licence to sell spirits to be consumed on the premises without first getting a magistrate's certificate for that purpose; and if he obtained a licence without such certificate, the licence was declared void, and the party was subjected to a penalty. Such a person was therefore in a different situation from a grocer who had a right to a licence to sell less than two quarts, though not to be consumed upon the premises. The legislature found that it was an evil for grocers to sell spirits in their shops in less quantities than a pint, which, under the terms of the previous acts, might be done, and the 6 and 7 Wm. IV. was passed to put an end to that evil. That was the whole object of that act; and its effect merely is to alter the nature of the licence, and to put the party under certain restrictions. The 6 G. IV., c. 81, shows clearly that it was not the intention of the legislature to prevent a publican from having a grocer's, or a grocer from having a publican's licence. That act, in its schedule of duties, imposes a duty of 11s. on every licence to sell coffee, tea, cocoa, nuts, or pepper. It then goes on to say, that "every retailer of spirits (except retailers of spirits in Ireland, after mentioned) shall" pay a certain duty; and "every retailer of spirits in Ireland, being duly licensed to trade in, vend, and sell coffee, tea, cocoa, nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts, or any spirits to be consumed on the premises, "shall, at a rent of £25, pay a duty of £9 9s." That part of the act clearly contemplates the case of a grocer or person selling tea and coffee, likewise selling spirits to be consumed on his premises. Now, he can only sell spirits in that way by virtue of a public-house licence; and the act therefore contemplates the union of a publican's and a grocer's licence in the same individual. The act of 6 and 7 Wm. IV., c. 38, must be read in conjunction with that statute, and cannot be construed as having any other meaning than [12] that of merely altering the quantities previously allowed to be sold. By both these statutes the party is prevented from selling more than two quarts, or less than one pint, on the premises where he carries on the business of a dealer. This view of the statute is confirmed by the case of *Dickson v. Pape* (7 Ir. Law Rep. 107), where it was held, that the higher duty imposed on grocers taking out spirit licences, by the schedule to the 6th Geo. IV., c. 81, s. 2, is not the duty chargeable on the licence specified in the 6 and 7 Wm. IV., c. 38, s. 3. The two acts must be read together; and the result of them is, not that the two trades cannot be carried on together, but that the mode of dealing in one trade is altered. This view of the matter is confirmed by the 3 and 4 Wm. IV., c. 68, which, by the 13th section, describes the persons not capable of holding a licence to sell spirits by retail, but does not mention grocers. It is therefore clear, that a person holding such a licence may afterwards obtain a grocer's licence.

Should the House, however, be of a different opinion, then it is submitted, that, in the event of a man holding the two licences, the publican's and not the grocer's licence might be, by the grant of the grocer's licence, avoided; but the holding of a publican's licence will not authorise the refusal of the grant of a grocer's licence. That the avoiding the publican's licence might be the result of the grant of the grocer's licence can make no difference in the duty of the officer. If the party was, as it was submitted he was, entitled to demand the grocer's licence, the officer ought to have granted it without reference to the consequences. The refusal to grant it is a good cause of action, and this judgment must be reversed.

The Attorney-General (Sir J. Jervis) and Mr. James Wilde, for the defendant in error.—The single question here is, whether the plaintiff can hold the publican's and [13] the grocer's licence together. It is contended here, that it was the officer's duty to grant the grocer's licence, though the publican's licence might thereby become void. That assumes, that the party may receive the two together. But the form of the

declaration disposes of that; for the declaration alleges, that the plaintiff was licensed to sell spirits by retail, and, being so licensed, he became and was desirous to sell tea and coffee, and for that purpose made an entry, etc. If the officer had granted him a licence under the circumstances here alleged, the licence would, so granted, have been void, and the party receiving it, and selling under it, would have been subjected to a penalty. Can it be said that it was the duty of the officer to do that, by the doing of which he would have subjected the party to a penalty. This statement, alone, puts an end to the pretence of a duty on the part of the officer to grant the licence; for the law will not allow a party to do indirectly what it directly forbids to be done; nor will it require him to do that which, under a liability to a penalty, is forbidden to be done. The law prevents a party from taking a grocer's licence and then getting a publican's licence, and yet the contention here is, that he may have a publican's licence and then have a right to demand the grant of a grocer's licence. This would be to effect indirectly, what the law will not allow him to do directly. The spirit of the prohibition equally extends to both cases.

There is no distinction between a publican's licence and an excise licence. The magistrates grant the one; and then they grant a certificate on which, and on which alone, the other can issue. The case of *Dickson v. Pape* [7 Ir. L.R. 107] is not in point. The question now before the House did not arise then. But, in *The Queen on the prosecution of Boland v. The Commissioners of Excise* (2 Jebb and Symes, 243), it did arise; and there the Court of Queen's Bench in Ireland dis-[14]tinctly held, that the effect of the 6 and 7 Wm. IV., c. 38, s. 3, is that a licensed publican is not entitled to a grocer's licence for the sale of tea and coffee, upon the same premises.

A reference to the statutes passed on this subject, will show that the intention of the legislature was to prevent a grocer selling spirits in small quantities, to be consumed on the premises. The 31 Geo. III., c. 13, s. 3, enacts, "that no license shall be granted to any person for selling, by retail, any spirituous liquors in Dublin, except to such persons as shall keep victualling houses, inns, and use and exercise no other trade whatever; and any licence granted to any other person shall be null and void." The 32 Geo. III., c. 19, s. 3, contains the same provisions, with this addition, "that any licence which shall be granted to any person exercising the trade or business of a grocer, or in whose house the trade or business of a grocer shall be carried on, shall be null and void, and such person shall be subject to the penalties,"—penalties granted by that act against retailers of spirits without licence. The 36 Geo. III., c. 40, contains similar provisions, and gives a legislative definition of the term "retailer." These were all Irish acts. Those which were passed after the Union proceeded in the same spirit.

The 58 Geo. III., c. 57, permits a grocer to sell spirits in certain quantities only. It may be admitted that the 6 Geo. IV., c. 81, declares that certain persons shall have no licences whatever, but that does not show that, under the provisions of that statute, all the persons besides those who are thus totally excluded may have a licence; for the 26th section of that act provides that if any person shall deal in spirits by retail, or carry on any trade for which a licence is required by that act, without first obtaining such licence, he shall be liable to penalties. It is plain, on a review of all the statutes, that a grocer is not entitled to hold at the same time a publican's and a grocer's [15] licence; and the statute now particularly under consideration expressly says that a grocer shall not sell less than one pint, which shall not be consumed on the premises. It is impossible that such a person should ever be held entitled to a publican's licence.

The 6 Geo. IV., c. 81, imposes two different penalties, one on a person who retails spirits, and is not a grocer, and another on such a person being at the same time a grocer. The retail spirit licence is a two guinea licence; it has nothing to do with the restriction of the liquor being consumed on the premises, but it is subject to the restriction of not selling more than two gallons at a time. But the grocer's retail spirit licence costs nine guineas, and prevents the party from selling more than two quarts at a time. If both conveyed the same rights, it is impossible to suppose that any man would give nine guineas for what he might get with fewer restrictions at the price of two guineas. The 6 and 7 Wm. IV. is more than a mere alteration in the extent of the right of the sale. If there could be any doubt upon its con-

struction, its general purpose, and the special words used in it ought to determine that point. The rule as to the construction of statutes to be followed here was stated in this house by Lord Chief Justice Tindal in the *Sussex Peerage Case* (11 Clark and Finnely, 143; see also *Fordyce v. Bridges*, ante [1 H.L.C.] 1). The intention of the legislature is to be the guide. The intention of the statute here was to prevent the two trades of grocer and publican from being exercised together, and the words of the act are sufficient to effect that purpose.

Mr. Napier in reply.—The case of *The Queen* on the prosecution of *Boland v. The Commissioners of Excise* [2 Jebb and Symes, 243], is not in point, for that was an application for a *mandamus*, which might be refused on many grounds besides that of the bare legal rights of the parties. The plaintiff [16] here is not effected by the 6 Geo. IV., c. 81, nor by the 6 and 7 W. IV., c. 38, for he is not a grocer seeking to obtain a publican's licence, and it is that circumstance alone which can bring him within the provisions of that statute. He is like any other individual seeking to obtain a grocer's licence, and he is entitled to have it on performing the requisitions of the statute. He has performed them, and the refusal to grant him the licence is a breach of duty for which the defendant is answerable in this action.

The Lord Chancellor (11th March).—This is a case which came from Ireland upon a writ of error, having been first decided in the Court of Exchequer in Ireland, then in the Court of Exchequer Chamber. The question is, whether the action which was brought can be maintained against a public officer for having refused to give the party a grocer's licence to sell tea and coffee, he having previously got a publican's licence.

This case turns entirely, in my view of it, upon one clause in the act of Parliament which provides. [His Lordship read the third section (see ante, p. 7).] So that the enactment is beyond all dispute, that a party being a grocer shall not obtain a licence to sell spirits, except a limited licence to sell spirits above a certain quantity, and a provision as to the place where they are to be consumed.

The plaintiff in error here is not a grocer applying for a spirit licence, but he is a publican with a spirit licence applying for a grocer's licence; and the argument comes to this, that if he obtains a grocer's licence first he cannot under the act afterwards obtain a publican's licence; but that if he obtains a publican's licence first, he may then become a grocer. Now that seems to be such an absurdity, upon the face of it, that it does not appear to me [17] to require more than the actual statement of it for its complete refutation. The question is, whether this part of the enactment does not make it impossible for any one person to hold the two licences together, except the limited licence, which is permitted by the act of Parliament? The plaintiff here, or any other person, could, if the argument is right, in case of his obtaining a grocer's licence first, hold both licences together, contrary to the express term of the enactment which I have referred to; and contrary, as it seems to me, to the obvious meaning of the legislature. I think that this cannot be done, and I am, therefore, of opinion that the judgment of the Court below is right and ought to be affirmed.

Lord Brougham.—I entirely agree with my noble and learned friend. When this case was first brought before us in the argument at the bar here (and it was argued with great fulness and great acuteness), I thought there was a difficulty in it arising from the officer exercising a power which he had not, to refuse the licence; but it is clear what the object of the legislature was, and that object no doubt was, as I then threw out, revenue, namely, to get the price of the licence; but there is, indirectly also, another object, and a very important one, to check contraband dealings. I am clearly of opinion that the judgment of the Court below ought to be affirmed.

It is a great pity that this poor man was advised to carry the case so far, because really it was of no use to him to bring this writ of error. It would have been better to submit to the decision of the Court below.

The judgment of the Court below was affirmed, and the writ of error was dismissed with costs.

[18] **CHARLES BARRETT** and Another, on behalf of the Durham County Coal Company,—*Appellants*; **THE STOCKTON AND DARLINGTON RAILWAY COMPANY**,—*Respondents* [March 16, 18, 1847].

[Mews' Dig. xi. 741; S.C. 11 Cl. and F. 590, *q.v.*]

*Railway Acts, Construction—Illegal Charges—Repayments with Interest—Costs.*

A decree giving effect to allegations read from an answer, not proved nor admitted, is varied in that respect, and an inquiry on the subject is directed before the Master.

Monies paid for the use of a railway, under protest as overcharges, were afterwards paid into Court under an order made by consent, and vested in the public stocks, to abide final judgment in an action brought to try the legality of the charges, which the judgment declared to be illegal:—

Held, that the party who paid the monies was entitled to the stocks and dividends and accumulations thereof.

After the judgment at law finding payments, made to the railway company, to be overcharges, a bill filed, pending a writ of error on that judgment, to restrain the company from continuing the overcharges, and for an account, etc., is not improper nor premature, and the plaintiffs are entitled to the costs.

By the 62d section of the act 2 Geo. IV., c. 44, which incorporated "the Stockton and Darlington Railway Company," for making and maintaining a railway from the river Tees at Stockton, to Witton Park Colliery, with several branches therefrom, all in the county of Durham, the said company was empowered to demand, recover, and receive for the tonnage of all goods which should be carried upon the said railways, the tolls therein mentioned, viz., for all coal, such sum as the said company should from time to time appoint, not exceeding 4d. per ton per mile: for all the articles for which a tonnage was thereinbefore directed to [19] be paid, which should pass the inclined planes upon the said railways, such sum as the company should appoint, not exceeding 1s. per ton; and for all coal which should be shipped on board of any vessel in the port of Stockton-upon-Tees, for the purpose of exportation, such sum as the said company should appoint, not exceeding  $\frac{1}{2}$ d. per ton per mile. The 66th section empowered the company to make regulations as to the mode in which the tolls should be paid, and authorized the persons appointed to receive the same, in default of payment, to seize the goods in respect whereof such tolls ought to have been paid, and the waggons or other carriages laden therewith, and to detain the same until such payment should be made, and if not redeemed within five days, the same were to be appraised and sold, as in cases of distress for rent, under the authority of this and additional acts of Parliament, subsequently passed, but which are not material to this appeal. The company, prior to the year 1826, constructed "the Stockton and Darlington Railway," and branches therefrom, and, among others, a branch to Middlesborough, in the port of Stockton-upon-Tees; and they also constructed, among other inclined planes, one called the Brusselton Inclined Plane.

In the year 1828, another company, called "the Clarence Railway Company," obtained an act (9 Geo. IV., c. 61), to enable them to make and maintain a railway from the river Tees, near Haverton Hill, to a place called Sim Pasture Farm, in the parish of Heighington, all in the county of Durham, with branches. The powers of this company were afterwards altered and enlarged by five acts, which are not material to the appeal. This company, under the authority of these acts, subsequently to the construction of "the Stockton and Darlington Railway," and prior to the year 1836, constructed the railway called "the Clarence Railway," which joins "the Stock-[20]-ton and Darlington Railway," at Sim Pasture, and extends thence to Haverton Hill, and thence, by a branch, to a place called Port Clarence, on the north bank of the river Tees, within the port of Stockton-upon-Tees, and nearly opposite Middlesborough.

In May 1836, the appellants formed "the Durham County Coal Company," for



the purpose of purchasing or taking collieries and coal mines, and working the same, and selling the produce. This company commenced business the 1st of July, 1836, and had an office at Darlington, where the business was conducted.

During the month of July 1836, the coal company sent from their collieries, for the purpose of being shipped, several waggons of coal, which were carried along the Stockton and Darlington Railway to and over the Brusselton Inclined Plane, and thence along the same railway to its junction with the Clarence Railway at Sim Pasture, and thence along the Clarence Railway and its branches to Port Clarence, where such coal was shipped on board of vessels lying there, within the port of Stockton-upon-Tees, for the port of London, for consumption there. In the same month the coal company also sent from the same collieries, for the purpose of being shipped, other waggons of coal, which were carried along the Stockton and Darlington Railway to and over the Brusselton Inclined Plane, and thence along the Stockton and Darlington Railway, and the Middlesborough branch thereof, to Middlesborough, where such coal was shipped on board vessels lying there, for the port of London, for consumption there. During this period the Stockton and Darlington Railway Company had a toll-house on their railway, near its junction with the Clarence Railway at Sim Pasture, and the several waggons of coal sent by the coal company, were weighed at this toll-house by an agent of the railway company, and the servant of the coal [21] company, who had the charge of the coal waggons, delivered to the said agent tickets, setting forth the numbers of the waggons, the weight and description of coal in each, and its destination; and these tickets stated, as to the waggon loads of coal which were sent along the Clarence Railway, that they were intended for export.

In August 1836, the Stockton and Darlington Railway Company, according to their practice, caused to be delivered at the coal company's office an account of the charges of the railway company, for tolls, tonnage, and other dues in respect of the several waggon loads of coal, sent by the coal company, during the previous month, to Port Clarence and Middlesborough respectively. Those charges amounted to the sum of £532 13s. 11d., from which deduction of £59 11s. 3d. was made by the railway company for discount and allowances, thereby reducing the demand to £473 2s. 8d. The account contained a charge of 2½d. per ton per mile upon all the coal sent during the said month, by the coal company, to Port Clarence, and there shipped for London; and a charge of 6d. per ton for the passage over the Brusselton Inclined Plane, of all the last mentioned coal, and also of all the coal sent, during the same month, by the coal company to Middlesborough, and there shipped for London. The coal company were dissatisfied with this account, conceiving that the railway company were not entitled to charge more than the export rate of ½d. per ton per mile on the coal sent to Port Clarence, and there shipped for London, that being, moreover, the tonnage rate charged by the railway company on the coal sent to Middlesborough, and shipped there for London; conceiving also that the railway company were not entitled to charge any rate at all for passing over the Brusselton Inclined Plane, upon the coal shipped for London, either at Middlesborough or at Port Clarence. The coal company [22] claimed, in respect of these two charges, deductions of £161 10s. 6d. for the first, and of £116 12s. for the second, to be made from the said sum of £473 2s. 8d. Communications on the subject between the agents of the respective companies, resulted in an agreement, that the coal company should pay the said account, and all future accounts containing charges after the same rates, without prejudice to their right to recover back from the railway company such sums as should appear to have been overpaid beyond the amount authorized by their acts of Parliament, until the decision of a Court of law could be obtained on the construction of the Acts, in an action to be brought by the appellant Barrett against the railway company, for the purpose of trying their right to make the charges complained of.

The coal company continued to send coal for exportation along the Stockton and Darlington Railway to Sim Pasture, and thence along the Clarence Railway to Port Clarence, where it was shipped for London and other ports; and the Stockton and Darlington Railway Company continued to send in their monthly accounts to the coal company, charging them up to the end of December 1840, with a tonnage rate of 2½d. per ton per mile; and from that time with a tonnage rate of 1½d. per ton

per mile, upon all the coal so shipped at Port Clarence, and the coal company paid the full amount of such accounts, under protest, in accordance with the said agreement.

The proposed action was brought in 1837, in the Court of Common Pleas, to recover back the overcharges made by the railway company, and paid by the coal company, upon coal sent by the Clarence Railway, from the 1st of July to the 1st of November, 1836; and on a special verdict returned by the jury two questions were raised—viz., 1st, whether the coals carried along the Stockton and Darlington Railway to Sim Pasture, and thence [23] along the Clarence Railway to Port Clarence, and thence shipped for London, were liable to the higher duty per ton per mile, as claimed by the railway company, or only to the duty of  $\frac{1}{2}$ d. per ton per mile: 2dly, admitting that the said coals were shipped for the purpose of exportation, within the meaning of the Stockton and Darlington Railway Acts, whether such coals were liable to pay the inclined plane duty of 6d. per ton for carriage over the Brusselton Inclined Plane, in addition to the other railway dues.

The Court of Common Pleas, after hearing those questions argued in November 1840, held that, according to the just construction of the 62d section of the act 2 Gen. IV., c. 44, the coals in question must be considered as shipped for exportation, and as liable to the lower duty (of  $\frac{1}{2}$ d.); but that all coals, including coals intended for exportation, were liable to pay duty for passing over the inclined plane, and that for any excess of duties taken by the defendants, the plaintiff was entitled to judgment (2 Manning and Gr. 134).

Judgment was accordingly entered up for Barrett, for £705 8s. 4d., in respect of over payments made by the coal company to the railway company, from the 1st of July to 1st of November, 1836. That judgment was affirmed in the Exchequer Chamber upon writ of error, brought there by the railway company, and also affirmed by this House, in 1844, upon a like writ (11 Clark and Fin. 590).

In 1841, pending the proceedings on the writ of error in the Exchequer Chamber, the bill in this cause was filed, and, after stating the matters hereinbefore mentioned, it charged, among other things, that the judgment of the Court of Common Pleas was a final judgment within the meaning of the agreement entered into between the parties; that the defendants pretended that the mileage rates of  $2\frac{1}{2}$ d. and  $1\frac{3}{4}$ d. per ton, which had been charged by them in their monthly accounts with the coal company since the [24] 1st of November, 1836, included some charge for haulage, and was not entirely a tonnage rate; that the railway company were not authorized by any of their Acts to make any charge for haulage, or for anything in the nature of haulage, save the inclined plane rate for the use of the stationary engines; that they were only entitled to charge for haulage as a matter of private contract, in cases where haulage had been contracted for, and had been performed, and that they had never done any haulage for the coal company since the 1st of November, 1836. The bill prayed for an account of all sums of money, which, since the last mentioned date, had been received by the railway company or their agents, from the Coal Company or their agents, in respect of the excess of the aforesaid rates of  $2\frac{1}{2}$ d. and  $1\frac{3}{4}$ d. per ton per mile, charged by the railway company, upon coal which, since the said date, had been sent by the coal company along the said railway to Port Clarence, for the purpose of being shipped there, and exported to the port of London, or elsewhere, above the export tonnage rate of  $\frac{1}{2}$ d. per mile; and that the railway company might be ordered to pay to the coal company what, upon taking such account, should appear to be the amount of such over payments, with interest thereon, after the rate of £4 per cent. per annum; or that the railway company should pay such amount and interest into Court, to be invested in £3 per cent. Bank Annuities until the writ of error in an action should be decided. The bill also prayed for an injunction to restrain the railway company from exacting a higher rate than  $\frac{1}{2}$ d. per ton per mile on coal sent to Port Clarence for exportation, or that a receiver of the excess of the charges made above that rate might be appointed, and the same be paid into Court and invested in the said stock.

The respondents in their answer to the bill, admitted that they had charged and had been paid by the coal company, under protest, the rate of  $2\frac{1}{2}$ d. per ton per mile [25] from the 1st of November, 1836, to the end of December 1840, and the rate of  $1\frac{3}{4}$ d. from the latter date, upon the coal stated in the bill to have been shipped at

Port Clarence for exportation; but they alleged that the 2½d. was not exclusively a tonnage rate, but that it included a charge of ½d. per ton per mile for services rendered by the railway company in the transit of the coal, which was matter of private arrangement between the railway company and the coal owners, and that the actual tonnage rate, during the period that 2½d. had been charged, was only 1½d. per ton per mile, and that after the end of December 1840, the charge for haulage and other conveniences was made a distinct charge. And the respondents in their answer submitted to the judgment of the Court, "whether it is or is not the fact, that the said railway company are not authorized by any of their Acts to make any charge for hauling, save the said inclined plane rate for the use of the stationary engines; or whether it is or is not the fact, that they are only entitled to charge for haulage as a matter of private contract, and in cases when haulage has been contracted for and performed by the railway company." They also insisted that a final decision upon the construction of their acts of Parliament had not been obtained, and stated their intention of appealing to this House in case the judgment of the Court of Common Pleas in the action should be affirmed in the Exchequer Chamber.

In March 1842, after the judgment of the Court of Common Pleas in the action was affirmed in the Exchequer Chamber, upon a renewed motion before the Vice Chancellor of England, for an injunction as prayed for by the bill, an order was made by consent, and without prejudice to any question in the cause, that a sum of £141 Os. 9d., then standing in the Darlington District Bank, in the names of two persons, on behalf of the appellants and respondents respectively, should, with the interest of £1 2s. 6d. allowed thereon, be paid into Court to the credit of the cause; [26] and that the respondents should pay into Court the sum of £4000 on account of the overpayments made by the appellants, according to the judgment in the action, without prejudice to the amount of the over payments. The two sums of £142 3s. 3d. and £4000 were, in pursuance of the said order, paid into Court in April 1842, and were laid out in the purchase of £4539 7s. 1d., three per cent. Bank Annuities.

The cause was part-heard by the Vice Chancellor in December 1842, when his Honour (by consent) ordered the respondents to pay a further sum of £3597 16s. into Court to the credit of the cause, on account of overpayments made to them by the coal company, according to the judgment in the action, without prejudice, etc.; such sum when paid in to be invested in the purchase of £3 per cent. Bank Annuities; and the Court continued the order of March 1842, by which the railway company were directed to deliver their usual monthly accounts of mileage rates and inclined plane rates to the coal company; and the coal company to pay into the Darlington district bank, in the names of trustees, the amount of the difference between the sum charged in such accounts for mileage rate, and the sum chargeable for mileage rate after the rate of ½d. per ton per mile, for all coal which should be sent by the coal company along the railway, or the branches thereof, for the purpose of being shipped at and exported from Port Clarence or elsewhere, within the port of Stockton-upon-Tees, to the port of London, or elsewhere. And the coal company were ordered to pay the balance of such account to the Stockton and Darlington Railway Company, who, while such payments should be continued, were ordered to give to the coal company the use of their railway and inclined plane, and the steam engine thereat, for the carriage of such coals; and the sums so ordered to be paid into Court to the credit of the cause were ordered to be invested in the usual manner.

In November 1844, after the judgment in the action [27] was affirmed in this House, the appellants presented a petition to the Lord Chancellor in the cause in equity, stating, among other matters, that there was then standing in the name of the Accountant General, in trust and to the credit of the cause, £8525 19s. 11d., three per cent. Bank Annuities, and £124 3s. 3d. cash, which had arisen from the investment of the sums of money paid into Court and the dividends thereof, and submitting that the said sums of £141 Os. 9d., and £4000 and £3597 16s., paid in as aforesaid, ought in the taking of the accounts of over-payments between the coal company and the railway company, to be treated and allowed to the railway company as payments at the times when the same were respectively paid into Court towards repayment to the coal company of the amount of tolls, which, according to the judgment in the action, had been overpaid to the railway company; and that

the coal company were entitled to the stock which had arisen from the investment of the said sums, and to all the accumulations and dividends thereof. The petition then prayed that the said sums of £8525 19s. 11d., three per cent. Bank Annuities, and £124 3s. 3d. cash, might be ordered to be paid to persons named as trustees of the coal company, on behalf of the coal company; and that in taking the accounts of the over-payments made by the coal company, the railway company might be credited with the said sums of £141 0s. 9d. cash, £4000 cash, and £3597 16s. paid by them into Court, as payments on account, at the respective times when the same were so paid.

The cause and the petition came on to be heard together before the Vice Chancellor, who made a decree therein, dated January 1845, whereby it was declared, that in respect of all coals which, since the 1st of November, 1836, had been sent by the coal company along the Stockton and Darlington Railway to Sim Pasture, and thence along the Clarence Railway to Port Clarence, for the purpose of [28] being shipped at, and exported from, and which had been shipped at and exported from, Port Clarence or elsewhere within the port of Stockton-upon-Tees, the coal company were entitled to receive back from the railway company the amount of 1½d. per ton per mile out of the rate of 2½d. per ton per mile, paid by the coal company to the railway company, from the 1st of November, 1836, up to the 31st of December, 1840, inclusive; and the amount of ½d. and ¾ths of a penny per ton per mile out of 1½d. per ton per mile paid by the coal company to the railway company, from the 31st of December, 1840, up to the 1st of July, 1841; from which day the said rate of ½d. and ¾ths of a penny had been paid into the Darlington District Bank: And that the coal company were also entitled to receive back the sum of £141 0s. 9d., the amount paid into said Bank in respect of the said rate of ½d. and ¾ths of a penny per ton per mile, and paid into Court in April 1842: And it was referred to the Taxing Master to tax the defendants their costs of the suit and of the petition, to be paid by the plaintiffs: And the plaintiffs and defendants by their counsel agreeing that the sum of £7532 13s. 7d. was the amount to be received back by the coal company in respect of their over-payments, upon the footing of the aforesaid declaration, including the £141 0s. 9d., it was ordered that the amount of the costs of the defendants when taxed should be set off against the said sum; and that the £8525 19s. 11d. three per cent. Bank Annuities, standing in the name of the Accountant General, should be sold, and out of the proceeds, and the sum of £372 9s. 9d. cash in the Bank to the credit of the cause, it was ordered that the balance of the said sum of £7532 13s. 7d., after deducting therefrom the taxed costs of the defendants, should be paid to the trustees of the coal company: And it was ordered that the residue of the proceeds of said sale and of said cash, after such payments as aforesaid, should be paid to the treasurer of the railway company.

[29] Barret and Stokes, plaintiffs in the cause, representing the coal company, appealed against that decree.

Mr. Stuart and Mr. Faber for the appellants.

The first objection to the decree is, that it assumes that the respondents are entitled to charge the appellants on coals sent for export, not only ½d. per ton per mile, which has been thrice decided to be the legal parliamentary rate, but also ½d. per ton per mile for haulage, the right to which, as a charge authorized by the acts of Parliament, has never been admitted by the appellants, but was expressly disputed in the cause. The decree declares that the appellants are entitled to receive back no more than the amount of 1½d. per ton per mile, out of the rate of 2½d. paid by them; whereas it ought to have been declared that they are entitled to receive back 1½d. per ton per mile, out of the said rate of 2½d. The acts of Parliament do not sanction the charge for haulage, and this suit being instituted for repayment of all monies illegally exacted under authority of the Acts, from the 1st of November, 1836, the appellants are entitled to repayment of all sums exacted from them beyond the legal rate of ½d. per ton per mile. If the Court had considered that the respondents had any claim in respect of haulage or other services, it ought to have declared the appellants entitled to receive back the whole amount of the excess above that which has been decided to be the legal parliamentary charge, after deducting such sums, if any, as might appear to be justly chargeable against them for haulage; and in that case an account ought to have been directed to be taken of what haulage

or other services, if any, had been rendered by the railway company to the coal company, and what sums were properly payable by the coal company in respect thereof.

Secondly, as the decree established the right of the appellants to recover back sums illegally exacted, they ought to have been allowed interest upon the several sums so exacted, from the times when such over-payments were [30] respectively made. They recovered interest at law on the amount of over-payments made during the period to which the judgment at law applied, and to allow the respondents the benefit of the interest on the monies which were subsequently extorted—illegally as has been now decided—is contrary to the plain principles of equity. The order ought to be that, in ascertaining the amount ordered to be repaid to the appellants, the several sums of £141 Os. 9d., £4000, and £3597 16s., paid by the respondents into Court to the credit of the cause, should be taken as repayments on account to the appellants, at the several times when the same were respectively paid into Court. The result of the cause being, that those monies were the appellants' monies, they ought to have been declared to be entitled to the whole of the stock purchased with them, and to the dividends and accumulations thereof. These being over-payments, which ought never to have been made, and being now declared to be the monies of the appellants, they are entitled to all the benefit that accrued from the investment of them.

The last objection to the decree is, that it fixes the appellants with the costs of the suit, in which they have succeeded, the Vice Chancellor thinking the suit was unnecessary or premature. But the suit being occasioned by the threat of the respondents to distrain on the appellants for the exaction of illegal rates, the decree, instead of visiting the costs on the appellants, whose rights were established, ought to have ordered the whole costs to be paid by the respondents. The appellants were entitled to the benefit of the final judgment in the action from the date of that judgment (November 1840); and their right to maintain a suit in Equity, founded on their legal title, accrued from that date, and not from the date of the decision of this House, by which the respondents writ of error was dismissed. It was, therefore, a mistake to hold that the bill in this cause was filed too soon, or that it was inconsistent with the agreement made in August 1836.

[31] The legality of the charges for the inclined plane having been established by the decision in the action, the appellants have submitted to that decision, and raised no question on that point in this cause.

Mr. Bethell and Mr. Smythe for the respondents.

As to the objection to the decree for having given the respondents their costs, the Vice Chancellor could not do otherwise. The bill was not only premature but quite unnecessary, as the action at law would have put a true construction on the Railway Act, and disposed of all the matters in dispute; they were all, except the costs, actually settled out of court before the bill was filed. The appeal has been brought for costs only.

The real question in the cause was, whether the railway company was entitled, up to the 31st of December, 1840, to charge 1d. or  $\frac{1}{2}$ d. for the transit of coals on the railway for export. The passages read from the respondents' answer to the bill on the hearing of the cause, put the appellants out of Court on the merits of that question, for it showed that the  $\frac{1}{2}$ d. per ton per mile for the haulage was never disputed. That  $\frac{1}{2}$ d. formed part of the original charge of 2 $\frac{1}{2}$ d. It has been decided in the action at law that the legal charge for the transit of the coal by the railway was only  $\frac{1}{2}$ d. per ton per mile, so that if that charge be added to the charge of  $\frac{1}{2}$ d. for haulage, and other services of that nature, not denied to have been rendered by the respondents, and if both charges, amounting to 1d., be deducted from the rate of 2 $\frac{1}{2}$ d., which was actually charged, the appellants will be entitled to repayment of the difference. The passage of the answer which was read at the hearing of the cause, distinctly claimed the charge for haulage, and there is no room left for alleging that it is a shift and pretence now set up for the first time. But it also appears, by the special verdict in the action, that the only difference between the parties [32] was, whether 1 $\frac{1}{2}$ d. or  $\frac{1}{2}$ d. was the legal charge for the transit of the coals. The bill contained an error on this point, which was corrected in the answer.

[The Lord Chancellor.—The bill denies that any haulage, or other service in the nature of haulage, was done for the plaintiffs by the railway company, and denies

that the company had any right to charge for it. There is no evidence that any such services were done. Unless there is some evidence of that sort, then it is clear the respondents put the appellants under duress to pay what they had not shown any right to.]

Not only the special verdict and the answer to the bill, but also the evidence in the action, showed that the dispute between the parties was limited to the charge for transit, the charge of  $\frac{1}{4}$ d. for haulage having never been disputed.

As to the objection that the decree did not give the appellants the interest on the monies invested, it appears that the monies were paid by agreement, and the respondents were to hold them until the decision of the Court could be obtained in the action. That agreement was renewed at the trial, and extended till final judgment in the action, as stated in the answer to the bill. The monies were subsequently paid into Court, by orders in this cause, made by consent, for security only, and without any intention of making them productive to either party under the circumstances. Regard being had to that agreement, the appellants could not be entitled even to the principal monies at the time of filing their bill, there being then no final decision in the action. The question of interest depends on the rights of the parties at the date of filing the bill, which professed to be founded on a final decision in the action, which, however, was not given until 1844.

[The Lord Chancellor.—It appears that one of the orders for paying the monies into Court and vesting [33] them, was obtained on the application of the appellants, although with consent of all the parties. The decree orders the monies so paid in, to be repaid, without the interest.]

All the embarrassment in the case arose from the filing of the bill unnecessarily, or, at all events, prematurely: the Vice Chancellor would have done right if he had dismissed it altogether.

Mr. Stuart, in reply.—The main question is, how much we are to recover back; the decree recognizes our right to recover in respect of over-payments, and therefore leaves no ground for any argument for dismissing the bill.

The Lord Chancellor.—It appears to me—but I do not know whether the noble Lords who are present concur with me—that as the Court has pronounced a decree for the repayment of sums of money, and as the parties against whom that decree was made have not appealed, we cannot now take any notice of the argument that the Court ought to have dismissed the bill.

Lord Brougham and Lord Campbell assented.

Mr. Stuart.—That relieves me from the consideration of all questions except this,—whether or not we have got back as much as we are entitled to? Now, how can it be said, taking the case upon the bill and answer, that we have got back all that was justly due to us? The difficulty has arisen from the statement in the answer with respect to haulage or other services. That statement admits that the monthly accounts, up to the end of December 1840, were made out without any separate charge for haulage, or any services whatever. There was no separation in the accounts between the charge for haulage or other services, and the charge for the export tonnage rate. They were mixed up together all the time, from the 1st of November, 1836, till the end of December 1840. [34] We charge in our bill that no haulage or other services were performed, and, therefore, there was no right to make any charge for them during that period. How do the defendants meet that charge in their answer? Is it in evidence that, during the period from the 1st of November, 1836, to the end of December 1840, any haulage or other services were performed? Certainly not. But this is admitted, that whatever haulage or other services were performed, were to be paid for under a special agreement, and not to be levied under the authority of the acts of Parliament; and, moreover, that there never has been any dispute between the parties upon that subject. Now, what is stated in the answer, but which has not been proved in evidence, cannot be assumed to be true, though it may be the subject of inquiry. What is stated in the answer is that passage, the substance of which is, that they allege that they did perform haulages up to August 1837. That is their allegation, which they have not proved, and which, therefore, could only be made the subject of inquiry.

The Lord Chancellor.—They substitute other services in lieu of it after 1837.

Mr. Stuart.—Do they say here that we have agreed to pay for these other services?

The Lord Chancellor.—I do not think you need trouble yourself upon that. There is no doubt that the  $\frac{1}{2}$ d. was charged from November 1836, up to the end of 1840, for something. They say it was in respect of haulage. Then the answer states that the haulage was discontinued in August 1837, but they then performed other services which entitled them to the  $\frac{1}{2}$ d. per ton per mile, and so it stands upon the answer, and there is no evidence on either side; I think, therefore, there ought to be an inquiry whether the railway company are entitled to the  $\frac{1}{2}$ d. per ton per mile from November 1836 to December 1840, with respect to haulage or any other services, —whether they are entitled to it in any way.

[35] Mr. Stuart.—We are perfectly satisfied with that inquiry; it will bring out the justice of the case.

The Lord Chancellor.—If you fail in that inquiry, you will of course have to pay the costs of it.

Mr. Stuart.—That is the main alteration in the decree which I ask; but I ask also that we may have the costs. We have been made to pay the costs; although it is admitted by the decree that we have made over-payments.

Lord Brougham.—Then you mean to say that the alteration which is now suggested in the decree, giving you an inquiry, would relieve you from paying the costs which you have been made to pay.

Mr. Stuart.—On the decree as it stands, we ought to have had the costs.

The Lord Chancellor.—The way in which the facts are established now, is, that the railway company did make an excessive demand. An action was brought to try their right to make that demand, in which the railway company failed. That concluded the question up to November 1836. After final judgment in that action, the railway company continued to make the demand, and to exact from the coal company the payment of these excessive sums: the bill then was filed for the purpose of securing the money over paid, not to leave it in the hands of the railway company, but to get it secured in Court; and also for an injunction to restrain them from going on making these illegal demands, as they ultimately turned out to be. Supposing that the Court had jurisdiction—which is not now in dispute—I cannot say that that was a bill improperly filed, because they were going on charging money against which there was final judgment at law. When they got the judgment of this House, it only showed that they were wrong from the beginning; the parties clearly had the right to file the bill. The result must be, according to the view I take of it, that the plaintiffs ought to have the costs up to the hearing.

[36] Mr. Stuart.—It is the common case of a plaintiff succeeding in his demand.

The Lord Chancellor.—He is justified in filing the bill, and he has succeeded in his demand.

Lord Brougham.—What takes place afterwards must depend upon the result of the inquiry. Not only you may not have your costs *quoad ultra*, but you may have to pay their costs.

Mr. Stuart.—The subsequent costs I ask to be reserved; that is just: there is a dispute not yet determined, but referred for inquiry.

There still remains the question of interest on the money invested in stock—the question of our having the stock upon the footing of the payment having been made into Court at our risk. I ask your Lordships to give us either the interest or the benefit of the investment in the stocks. There is some difficulty about the terms of the orders being made by consent; but what I say about our right to have the stock, and the fruits of the investment of these sums—which ought never to have been taken from us—is, that it was our application to the Court which produced the investment; and whether they consented to it or not, even if the investment was made by their consent, being made on our application, no consent of theirs could relieve us from the consequences of having applied to the Court to invest. The investment was made on our application, and, according to my view, it would be open to them, if it turned out that we had been wrong instead of right, and if they became entitled to the money in dispute, to say “It was you who applied to the Court to invest it; you have been raising a dispute in which you have failed; the result of your failure is, that the bill is dismissed, and we are put in the same position that we were in before; we

are now entitled to that money in dispute between us, and if we had it, we should have had interest; now you fail in your suit, and your investment in the funds has turned [37] out badly, and we are to be paid for the result of those two bad speculations." I think the result in that case would be, that the railway company would be entitled to get back their money with interest, and also the costs of the suit. Why should the same justice not be measured out to the appellants?

The Lord Chancellor.—Assuming that the application was on your behalf, you do not ask to have the stock and the dividends upon it, but you ask for the original naked sum: that is the order you have got. If you meant to say that the money invested and the stock purchased with it was yours in the result, that it was invested on your risk, you ought to have asked for the stock and not for the money. I am now looking at the order of the 16th of March, 1842. The order merely directs the payment of the £4000 into Court, and to invest it; that is consistent, and so is the order of December 1842. Then the decree gives you the original sums. Now, does your appeal apply to that? There is no question about interest, properly speaking. What you are now claiming is the fruit of the investment; and do you raise that question in your appeal?

Mr. Stuart.—We do distinctly in our third reason; and in our petition in the cause—which was adjudicated upon by the Vice Chancellor at the same time with the cause, and the order on it is incorporated in the decree,—we say that these sums, on account of over-payments, were to be treated and allowed as payments at the time when they were paid into Court, and that the petitioners, the coal company, are entitled to the stock which has arisen from the investment of the said sums, and to all the accumulations and dividends thereof. Now, that is treating it in a very fair manner, because we say they were payments on account when these sums of money were paid into Court, in consequence of our filing this bill, in which we turn out to be right. We take them as [38] payments on our account. Up to that time we charge interest on the money, because it was in the pocket of these parties.

The Lord Chancellor.—That is not in question now; you are only asking for the dividends upon the investments.

Mr. Stuart.—I ask to take the stock purchased with those sums of money paid into Court, as repayments *pro tanto* of the overcharges.

The Lord Chancellor.—The difficulty arises from its being done by consent.

Mr. Stuart.—As to the consent, I trust your Lordships will be of opinion, that if, upon our application, this is done, and they consent to our entering upon this speculation—

The Lord Chancellor.—The worst of it is, that it does not appear that it was part of your application. You apply for an injunction, and then, by some arrangement, it was settled that the money should be paid into Court. I cannot understand those words in any other sense. "By consent, and without prejudice to any question in the cause;" the money was deposited *in medio* to abide the result of the question of right, and it was to become the property of whichever party should succeed on the question of right.

Mr. Bethell.—Those sums have not been ascertained to be due at all. They are general sums of money paid in on account, not like the specific sums paid originally into the Darlington Bank; but these other sums are paid in merely as security.

The Lord Chancellor.—We can only judge by the order what was the intention of the parties. The order was, that the defendants, the railway company, do, within six weeks from the date thereof, pay the sum of £4000, on account of the over-payments made by the plaintiffs to the defendants, according to the judgment of the Court of Common [39] Pleas, without prejudice to the amount of over-payments into the bank, with privity of the Accountant General, etc. That they agreed to pay, because they admitted there had been a decision against them, and that that £4000, therefore, was due from them to the coal company. They might as well have paid it to the coal company at once, except on account of this, that there had not at that time been judgment in this House on the writ of error. They say that there being a judgment, and it now being ascertained that the contract between the parties was final judgment in the action, and not in this House, no doubt that £4000 was payable by the railway company to the coal company. Instead of paying it over to the latter, the money was paid into Court and invested. The parties agreed to lay it out. What could they agree to lay it out for but that the money,



the investment, should abide the result of the question of right and go to the party who succeeded? There was a subsequent order to pay in £3597. There was altogether £7500 and odd, viz.: £4000, £3597 and odd, paid in upon the two orders, besides that which was paid into the Darlington Bank; that was a small sum of £141, but it comes to rather more than what is subsequently found to be due, and, no doubt, the railway company are entitled to have the difference repaid, that is to say, to have so much of that money as was not due from them.

Mr. Stuart.—That is a mere question of apportionment, about which there can be no difficulty. Here you are dealing with this investment in respect of over-payments charged upon us, now decided to have been overpayments, and pending the time that we were obliged to consume in litigation with this party, an accumulation of the dividends takes place—

The Lord Chancellor.—I do not think we need trouble you; you are entitled to have restored so much of the stock as represents the money which you are found entitled to. [40] I proceed on this ground, which does not interfere with any rule of the Court, that the parties paying in the money, which afterwards turns out to be the property of the coal company, have by consent agreed that that should be invested. That consent is repeated in the last order.

Mr. Stuart.—Then I have nothing to trouble your Lordships with; that sets the decree right as to the amount of over-payments; the enquiry that your Lordships suggested will bring out the truth on the other question; subsequent costs will be reserved. We shall be entitled to costs of the suit up to the hearing, and to have the stock, or so much of it as is now ascertained to have been purchased with our money—to have the stock and the accumulations transferred to us.

The Lord Chancellor.—You must have a reference upon some of those matters.

Mr. Stuart.—Yes, of course. There will be no difficulty in working them out in detail.

The order and judgment of the House was to this effect:—

“That so much of the said decree, complained of in the appeal, as directs it to be referred to the Taxing Master of the Court of Chancery, to tax the defendants (respondents) their costs of the suit and the said petition, and as orders that such costs when taxed should be paid by the plaintiffs (the appellants), by being set off as therein-after mentioned, be and the same is hereby reversed; and it is declared that the Durham County Coal Company were entitled to so much of the stock and cash standing to the credit of the cause at the date of the decree as represents £141 0s. 9d., with £1 2s. 6d. interest thereon, making together the sum of £142 3s. 3d.; the sum of £4000—which were respectively paid into Court and invested under order of the 16th of March, 1842—and the sum of £3391 12s. 10d., part of the sum of £3597 16s. cash, which was also paid into Court, and invested under order of the 5th of December, 1842, it being admitted that the said sums of £141 0s. 9d., £4000, and [41] £3391 12s. 10d., making together the sum of £7532 13s. 7d., is the amount in the decree mentioned agreed to be received back by the Durham County Coal Company.

“And it is further ordered, that it be referred to the Master of the said Court to ascertain the portion of the said stock and cash which belonged to the said coal company, having regard to the aforesaid declaration; and also to inquire and state how much of the £8535 19s. 11d. bank three per cent annuities, and £372 9s. 9d. cash, standing in the bank in the name of the Accountant General, to the credit of this cause at the date of the said decree, was sold and applied in payment of the sum paid by the said Accountant General, under the said decree, to F. Scott Stokes and Geo. Townsend Andrews, as trustees of the said coal company, and what is the amount of the difference between the portion of the said £8535 19s. 11d. bank annuities, and £372 9s. 9d. cash, sold and applied for the purpose of the last mentioned payment, and the portion of the said £8535 19s. 11d. bank annuities, and £372 9s. 9d. cash, which he shall find to have belonged to the said coal company. And it is further ordered, that the said Master do ascertain the value in cash, according to the price of stock at the time of the last mentioned sale, of the excess (if any) of the stock and cash so belonging to the said coal company, over the stock and cash sold and applied in making the aforesaid payment to the said F. S. Stokes and G. T. Andrews, as trustees of the said company. And that what the Master shall find to

be the amount of the value in cash of such excess at the time aforesaid, be paid by the defendants, the Stockton and Darlington Railway Company, to the said trustees of the said coal company.

"And, it is further ordered, that it be referred to the Taxing Master of the said Court to tax the plaintiffs' their costs of this suit and of the said petition, up to and including the costs of the hearing of this cause in January 1845, before His Honour the Vice Chancellor of England; and that such costs, when taxed, be paid by the defendants, the railway company, to the said trustees of the said coal company.

"And it is further ordered, that it be referred to the said Master in rotation to inquire and state to the Court whether the said railway company were entitled to a charge of  $\frac{1}{2}$ d. per ton per mile, or any or what other charge upon any and what quantities of coals sent or carried by the said coal company, along the Stockton and Darlington Railway, in any [42] part thereof to Sim Pasture, between the 1st of November, 1836, and the 31st of December, 1840, in respect of haulage or any other services done or rendered to or for the said coal company by the said railway company during the last mentioned period, or any or what part or parts thereof, and if he shall find that the railway company were entitled to make such charge, that he do also ascertain what is the amount of the several sums of money which were charged by the said railway company to the said coal company during the last mentioned period, in respect of the last mentioned rate of  $\frac{1}{2}$ d. per ton per mile, and what is the amount which the railway company were entitled to charge as aforesaid.

"And it is further ordered, that all further directions and subsequent costs be reserved until after the said Master shall have made his report; and that the said cause be remitted back to the Court of Chancery to do what may be just and consistent with this judgment and declaration."—Lords' Journals, 18th of March, 1847.

[43] HENRY BARROW EVANS and Others,—*Appellants*; RICHARD ASHLEY SCOTT and Others,—*Respondents* [March 22, 23, 25, and 30, 1847].

[Mews' Dig. x. 1283. S.C. 11 Jur. 291. On question of construction of settlement, see *Remnant v. Hood*, 1860, 2 De G. F. and J. 396; *In re Leader's Estate*, 1886, 17 L.R. Ir. 297. As to costs (1 H.L.C. 69) see *Armstrong v. Armstrong*, 1874, L.R. 18 Eq. 541.]

#### *Settlement—Portions.*

The trusts of a term in a post-nuptial settlement of real estates were: "After the decease of the husband and wife (the settlors), to raise £1000 for the portion of every daughter and younger son, to be paid to sons at the age of twenty-one, and to daughters at that age or marriage, if such ages should be attained or marriages had after the decease of the survivor of the settlors, and not sooner: And if any younger son died, or became an eldest or only son before twenty-one, or any daughter died before that age unmarried, or before his or her portion became vested, the portions provided for such son or daughter, so dying, etc., before his or her portion became payable as aforesaid, should survive and accrue to the survivors of such daughters and younger sons, to be equally divided between them, and paid when their original portions should become payable."

Then followed a proviso for the issue of a younger son or daughter dying in the lifetime of the settlors, or after their death before his or her portion became due and payable: And a trust, after the death of the settlors, for maintenance of such sons and daughters, or their issue, entitled to portions as aforesaid, until his or her portion became payable: With *cesser* of the term, on payment of the portions, or in case there should not be any younger children or issue of them living at the death of the survivor of the settlors.

The settlors had seven children (besides an eldest son), four of whom died in the lifetime of their parents, under the age of twenty-one, and unmarried.

Held, by the Lords, reversing a decree in Chancery, that the three survivors were

entitled to have the portions of the four deceased children raised for them, in addition to their own.

The question in this appeal was, whether a sum of £7000 or £3000 was raiseable under the trusts of a term comprised in a post-nuptial settlement, made, in 1794, by and between Charles Evans and Mary Caroline his wife, of the first part, and three sets of trustees of the second, third, and fourth parts, respectively.

[44] By that settlement, real estates (which had been devised to the lady by her father) were limited to the use of trustees for 99 years, upon trusts long since determined, and subject thereto to the use of the said Charles Evans, for his life; with remainder to the use of the said Mary Caroline Evans, for her life; with remainder to the use of trustees to preserve contingent remainders; with remainder to the use of John Niblett and Thomas Brockhurst, their executors, administrators, and assigns, for a term of 500 years, to commence from the day of the decease of the survivor of them, the said Charles Evans and Mary Caroline his wife; with remainder to the use of Charles Barrow Evans (then the only son and heir apparent of the said Charles Evans by the said Mary Caroline his wife, but since deceased), and his assigns for his life; with remainder to the use of trustees during his life to preserve contingent remainders; with remainder to the use of the heirs male of the body of the said Charles Barrow Evans, with other remainders not necessary to be mentioned.

The deed then proceeded to declare, that the term of 500 years was limited upon this special trust, and for the intent and purpose that they (the above named trustees)

“Do and shall, after the decease of the survivor of them, the said Charles Evans, and of the said Mary Caroline his wife, by sale, mortgage, or demise of all or any part of the premises herein comprised, or by and out of the rents, issues, and profits thereof, as to them (the trustees) shall seem meet, levy and raise the sum of £1000 *for the portion of each and every of the daughter and daughters, younger son and sons of the said Charles Evans by the said Mary Caroline his wife, to be paid, etc., that is, the portion or portions of such of them as shall be a younger son or sons to be paid unto him or them at his or their age or ages of twenty-one years, and the portion or portions of such of the said children as shall be a daughter or [45] daughters, to be paid to her or them at her or their age or respective ages of twenty-one years, or day or days of marriage, which shall first happen, if such respective ages shall be attained or marriages had after the decease of the survivor of them, the said Charles Evans and Mary Caroline his wife, and not sooner.*”

“And in case any of the younger son or sons of the said Charles Evans, by the said Mary Caroline his wife, shall happen to die before he or they shall have attained his or their age or respective ages of twenty-one years, or shall happen to become an eldest or only son before he shall attain his age of twenty-one years, or if any of the daughters of the said Charles Evans by the said Mary Caroline his wife, shall happen to die before she or they shall have attained her or their age or respective ages of twenty-one years or have been married, or before his, her, or their portion or portions shall become vested, then and in such case the portion or portions hereinbefore provided for all and every such younger son or sons so dying, or becoming an eldest or only son, and for all and every such daughter and daughters so dying and unmarried, before his, her, or their said portion or portions shall become payable as aforesaid, shall go, survive, and accrue to the survivors and survivor of such daughters and younger sons, equally to be divided between them, and to be paid and payable at the same time and times as his, her, or their original portion or portions is or are hereinbefore directed to be raised and paid, or shall become payable as aforesaid: And if any other of the children, being a son, shall die or become an eldest or only son before the times or ages aforesaid, or, being a daughter or daughters, shall die unmarried before the said age or ages, then such surviving or accruing portion or portions shall, from time to time, be again subject and liable to the same or the like right, chance, or condition of accruer or survivorship to and amongst the remaining child and children, as herein-[46]-before is expressed, touching his, her, or their original portion or portions.”

“Provided always, that in case any or either of such younger sons or daughters shall happen to die in the lifetime of the said Charles Evans and Mary Caroline

his wife, or after the decease of the survivor of them, before his, her, or their portion or portions so provided and intended as aforesaid shall become due and payable, leaving issue, then such child or children to be entitled to have, receive, and take the share or shares, portion or portions, as his, her, or their parent or parents would have been entitled unto if living, in equal shares and proportions, if more than one, and if but one, then he or she to have, receive and take the whole thereof, subject to the like clauses of survivorship or right of accruer."

"And upon further trust, that they (the said trustees) do and shall in the meantime and from and after the decease of the survivor of them the said Charles Evans and Mary Caroline his wife, by and out of the yearly issues and profits of the said premises comprised in the said term of 500 years, raise and pay unto, for or towards the maintenance and education of all and every of the said younger son and sons, daughter and daughters of the body of the said Charles Evans by the said Mary Caroline his wife, entitled to such portion or portions as aforesaid, or the issue of such son or sons, daughter or daughters, who shall then be entitled thereto as aforesaid, interest for their respective portions at and after the rate of £5 for every £100 by the year, until his, her, or their original portion or portions shall become payable by virtue of these presents; and upon this further trust to permit and suffer the said Charles Barrow Evans, or the person or persons who shall, by virtue of the limitations hereinbefore contained, be then entitled to the reversion and inheritance of the said premises comprised in the said term of 500 years, to receive and take the residue of the rents, issues, and profits [47] of the said premises to and for his or their own use and benefit."

"Provided also, and it is hereby declared, that from and immediately after the raising and paying the said respective portions hereinbefore provided for the said younger son and sons, daughter and daughters of the said Charles Evans, by the said Mary Caroline his wife; or in case the said portion or portions shall be paid by the said Charles Barrow Evans, or the person or persons who shall or may be entitled to the reversion and inheritance of the said premises expectant on the determination of the said term of 500 years; or in case there shall not happen to be any younger children, or the issue of any of them living at the time of the decease of the survivor of them the said Charles Evans and Mary Caroline his wife, then and in either of those cases, the said term of 500 years shall cease, determine, and become absolutely void."

The deed contained, among other powers and provisos, a power to raise £10,000 for such purposes as the said Charles Evans and wife might appoint; and a power to raise £10,000 for the advancement and benefit of the younger children. in addition to the provisions made for them under the said term of 500 years.

There was issue of the marriage between Charles Evans and Mary Caroline his wife, nine children, three born before the date of the settlement, and six afterwards, viz.: Charles Barrow Evans, the eldest son (father of the respondent, C. B. Evans), Thomas Barrow Evans, born in 1791; Mary Caroline, born in 1792; Maria Augusta, born in 1794; Henry Barrow, born in 1796; Mary Ann, born in 1797; Lucia Maria, born in 1799; Edmund Barrow, born in 1800; and Catherine Sophia Evans, born in 1802. T. B. Evans, the second son, died previously to the date of the settlement; four of the other younger children, viz.: the said Mary Caroline, Mary Ann, Lucy Maria, and Catherine Sophia Evans, died in [48] the lifetime of their parents, under the age of twenty-one years, and unmarried. Their father died in 1819, leaving his said wife and the other four children surviving.

In 1820, certain deeds, to some extent resettling the estates, but still subject to the trusts of the term of 500 years, were executed by Mrs. Evans and C. B. Evans, the eldest son, and others therein named; and, in pursuance of these deeds, a sum of £10,000, in lieu of the £10,000 provided for by the settlement of 1794, was raised for the three younger surviving children.

Mary Caroline Evans, the widow, died in 1837, leaving the said eldest and two younger sons and a daughter surviving, and thereupon C. B. Evans, the eldest son, became tenant for life in possession of the estates comprised in the settlement. He died in 1841, leaving the respondent, C. B. Evans, his eldest son, who thereupon became the first tenant in tail of the said estates, subject to the charges affecting them under the said indentures.

In 1844, a bill was filed in Chancery, in the name of the respondent C. B. Evans, infant tenant in tail, by his next friend, against the respondent R. A. Scott, assignee of the term of 500 years, and against the appellants H. B. Evans, Edmund B. Evans, and Maria Augusta Evans, the surviving younger children of Charles Evans and Mary Caroline his wife.

By this bill, and the answers of the defendants thereto, the question was raised whether the sum of £7000, that is, £1000 for each child of Charles and Mary Caroline Evans, except the eldest son, living at the date of the settlement of 1794, or born afterwards, was raiseable out of the settled estates, under the trusts thereof, or only £3000, that is, £1000 for each of the three younger children who lived to attain the age of twenty-one years, and survived both parents.

The cause was heard before Vice Chancellor Knight Bruce, who, by his decree thereon, declared that in the [49] events which happened the principal sum of £3000 only became, and was raiseable for the portions of the surviving daughter and younger sons of Charles Evans and Mary Caroline his wife, under the indenture of February, 1794, in the pleadings mentioned, and that the same became so raiseable from the death of the said Mary Caroline Evans, with interest thereon from that time, at the rate of £4 per cent per annum.\*

\* The following extract is made from a short-hand writer's notes, which were furnished to the Lords, and admitted by the counsel on both sides to be correct:—

Vice Chancellor Knight Bruce.—“The good sense of the dispute involved in this case, if such an expression may be used, seems to be rather on the side of the plaintiff than on that of the defendants; but, of course, the question being one of mere law, must be decided on legal principles merely. The settlement to be construed—which is inartificially and inaccurately worded, and, as to the interpretation of which, it was scarcely possible to expect that differences should not arise—may, perhaps, be conjectured to have been prepared with the aid, if that is a proper term, of some precedent or form inapplicable to the case, either alone or together with some other precedent, which by itself might have been serviceable. However it may have been, it is not clear that a part of its provisions does not transgress the rules of law. That particular point, however, does not arise on the present occasion. The facts, with reference to which the Court has to interpret the deed, are these:—Mr. and Mrs. Evans, the settlors, are dead; there were nine children of their marriage; four only of them, three sons and one daughter, survived their parents, and they included the son, who, when the settlement was made, was the only son. The other five died in their father's lifetime, minors, without having been married. One of the five died before the date of the settlement. In this state of circumstances, the defendants contend, that the amount of portions raiseable under the term of 500 years, for the daughter and younger sons who survived the parents, is £7000, the plaintiff, that it is only £3000.

“The first question is, what are the meaning and effect of these words, ‘do and shall, after the decease of the survivor of them, the said Charles Evans,’ etc. [His Honour read the clause of the deed of settlement for raising £1000 for the portion of each of the younger children, as above, p. 44, and proceeded.] “What, I say, are the meaning and effect of these words, considered as standing alone, as not controlled or affected by any part of the context? Thus considered, I am of opinion, certainly, that they must be read as not showing an intention that any child should take more than £1000, and as not extending to any daughter or younger son who should die in the parents' lifetime a minor, without having been married; that is, as not providing a portion for any child so circumstanced. To hold otherwise would be to contradict the most clearly binding authority. The case is one of portions charged on real estate by deed. What, however, is the effect of the context? I am not sure that its effect is not so to restrict the words I have quoted, as to prevent them from extending to any child, who, at whatsoever age, should, whether married or unmarried, die in the lifetime of Mr. and Mrs. Evans, without leaving issue. This particular point, however, I think it not necessary to decide, and I leave it undecided. A question necessary, however, to be determined is, whether the second clause, that I mean immediately following the words that I have read, comprises or extends to younger children who should, in the lifetime of Mr. and Mrs. Evans, die minors, without

The surviving younger sons and daughter appealed against the decree.

Mr. Turner and Mr. Wigram (with whom was Mr. G. M. Giffard) for the appellants (December 20, 1844).

According to the true construction of the trusts of the settlement, the appellants are entitled to have £7000 [50] raised for them, with interest from the date of their mother's death. It is no objection to their claim that they thought for some time after their title accrued, that a sum of £3000 only, that is, £1000 for each, was raiseable, [51] and they were content to receive the interest of that sum; but, in 1841, they were advised that they were entitled to £7000. Upon due consideration of the clauses and provisions of the settlement, the meaning to be collected from [52] them is, that a portion of £1000 was to be raised in respect of each and every child, except the eldest son, and the portions of such of them as, being sons, should die under the age of twenty-one, or, being daughters, should die under that age, and without being married, were to survive to the others. There is no claim now made in respect of the child who died before the date of the settlement, but every child then *in case* (except the eldest son), and born afterwards, was entitled to an expectant interest in £1000, payable at the age of twenty-one, or on marriage, and after the decease of the parents. Four of the children having died before any of these events occurred, the portions that were chargeable for them became, by virtue of the clause of accruer, raiseable for those who survived, and who fulfilled all the

having been married, because if it does, it may be thought to defeat the plaintiff's case, or give weight to that of the defendants.

"That clause is expressed, 'and in case any of the younger son or sons of the said Charles Evans,' etc. [His Honour read the proviso for accruer, as above, p. 45.] "Whatever may be thought of the words 'survivors and survivor,' the words 'his, her, or their portion or portions,' and the words 'hereinbefore provided,' in this clause, seem to me not immaterial, in my judgment, combined with other parts of the deed, and particularly with the language of the provisions relating to maintenance and education, and interest, where the words are 'for and towards the maintenance and education of all and every the said younger son,' etc. [He read the trust to raise maintenance, as above, p. 46.] "They have the effect of showing that the second clause (the accruer) was not intended to comprise or extend to any younger child, who in the parents' lifetime should die a minor without having been married. Consistently with the first clause quoted, considered as standing alone, such a child could not be a child for whom a portion was intended, nor, of course, could such a child be within the provision as to maintenance, education, and interest occurring later in the deed to which I have already referred; but younger children who, after their parents' death, should die minors, without having been married, must, in every possible view of the settlement, be considered as children for whom portions were provided, although not become entitled to receive the capital, or to a vested right in the capital; for the interest is made a fund for their maintenance.

"On the whole, after reading this deed more than once, and attending to the arguments that have been addressed to me, and especially by Mr. Hodgson, upon the words, 'or before his, her, or their portion or portions should become vested,' and upon the mode in which the word 'payable' is used, I find myself unable to come to the conclusion that the context renders it necessary or fit to interpret the clause which I first read, as extending to any daughter or younger son who should die in the parents' lifetime a minor without having been married; that is, as providing a portion for any child so circumstanced; and looking at every part of the instrument,—but not saying whether, if either of the children who died in the parents' lifetime had so died after attaining majority, or had, after the deaths of Mr. and Mrs. Evans, died in minority without having been married, the amount raiseable for portions under the term would or would not, in my opinion, have been more than £3000,—I think that, in the events which have happened, I am rightly construing the deed before me, and acting in conformity with the spirit of such decided cases as can be considered of authority on this subject, in holding, that the whole amount of principal raiseable for portions under the term of 500 years, is £3000; and I do so declare. The directions consequential on this declaration will be much of course."

conditions. The raising of the portions were postponed by the settlement until after the death of both parents, but that did not prevent them being charges on the estates in the events that happened. The Vice Chancellor, in his construction, relied too confidently on the terms of the clause for maintenance and education, which, of course, must be held applicable to children who survive their parents, those who die before not requiring maintenance. That clause is quite independent, and should not be held to govern the construction of the other clauses. The material clauses are the first, for raising the portions, and the clause of [53] accruer and survivor, which, taken together, will not bear the Vice Chancellor's construction. The principle of construction applicable to them, is that which is found in the case of *Emperor v. Rolfe* (1 Ves., sen. 208).

There is no question as to the vesting of the portions in the present case; nor is there any doubt that the appellants fulfil the conditions upon which the settlement directed the portions to be raised, and to go over under the clause of accruer. The question is, has that clause come into operation? Let us take the case of only one of the deceased children, Mary Caroline, for instance, who died in 1812, under the age of twenty-one, and without having been married, it is clear that, in that event, the portion of £1000; raiseable for her, passed by the clause of accruer to the survivors who lived to fulfil the required conditions; upon the events mentioned happening, the clause came into operation.

Mr. Russell and Mr. Hodgson (with whom was Mr. J. B. Parry) for the respondents.

Courts of equity have gone far in struggling against and controlling the meaning of words contained in settlements for raising portions for younger children. It is admitted, on the part of the appellants, that the motive for this settlement, construed as they suggest, was to effect an extraordinary purpose. Their construction would lead to this, that only one younger child attaining twenty-one, and surviving the parents, would take all the portions, to the impoverishment of the eldest son. Disregarding the main scope of the settlement, they resort to the two first clauses for the purpose of giving a construction to the whole deed. Upon the true construction of the whole of this settlement, it is clear it was not the intention of the settlors that any portion should be raised for a [54] daughter or younger son who should die in the lifetime of the parents or the surviving parent, or at least for a younger son who should die in the lifetime of such parent under twenty-one, or for a daughter who should die in the lifetime of the surviving parent under twenty-one, and without having been married. The clauses of accruer and survivorship were not intended to apply to or as between children, who neither survived both parents, nor, being sons, attained the age of twenty-one, or, being daughters, attained that age, or married: And as to raising portions out of real estate, it has been the settled law ever since *Poulet v. Poulet* (1 Vern. 204, 321), that if a child dies before his portion becomes vested, that portion is not to be raised.

It is evident, upon the face of this settlement, that some mistake happened in drawing it, and putting together clauses which are inconsistent with each other and with the general purposes of the settlement. It was a conveyance to trustees to uses; there is no fault in the limitations of the freehold, but the confusion is in the clauses declaring the trusts of this term of 500 years, by which a sum of £1000 was to be raised—not for each and every child attaining twenty-one, or marriage—not a fixed sum of £7000 or £10,000 to be appointed or divided between such children in the usual way—but £1000 for each and every child born, except the eldest son, with clauses of accruer and survivorship carrying over the portions of such of the children as should die under twenty-one unmarried. Such a settlement is not known in practice. The case of *Poulet v. Poulet*, in which the Court refused to order the raising of a portion which was not wanted, has governed the construction of many settlements. As in *Hinchinbroke v. Seymour* (1 Bro. C. C. 395), Lord Thurlow said, "The meaning of a charge for children is, that it shall take place when it shall be wanted; it is [55] contrary to the nature of such a charge to have it raised before that time." And Sir A. Hart, adverting to that case in *Edgeworth v. Edgeworth* (1 Beatty, 328), says, "It has been said that Lord Eldon, in *M'Queen v. Farquhar* (11 Ves. 467), has impugned that authority by intimating that there was a circumstance of fraud, etc.; but I cannot think that Lord Thurlow would have been silent as to the fraud, if it had constituted the ground of his judgment. I imply from

his language that he decided the case upon a principle applicable to every power of that nature, and intended to lay down the law of the rule generally, and not to make that case an exception to a rule. Lord Thurlow's opinion is justified by the doctrines of preceding Judges in other cases." Sir A. Hart cites those other cases, as *Bruen v. Bruen* (2 Vern. 439), *King v. Withers* (Forrester, 121), and *Lord Teynham v. Webb* (2 Ves., sen. 198), in which last case Lord Hardwicke said, "the head of portions for younger children admits of a greater variety of determinations, and of judgment on circumstances, than perhaps any other head." The principle of construction of such provisions is to adjust the burdens on the estate between the eldest and younger children. The wording of the settlements must be struggled with, and so interpreted as to prevent their operating contrary to the intention of the parties. The reasonable interpretation of the clauses in this settlement is to hold that the £1000 was to be raised for such children as should live to want it. The provisions are of an anomalous kind; the dispositive part of the trust does not agree with the creative part; if the portions were payable at twenty-one, or marriages, there would be no doubt. Suppose there were twenty or more younger children born, to raise £1000 for each would leave the eldest no interest in these estates. The only construction that gives effect to all the clauses of the settlement, and [56] reconciles the authorities, is that which directs portions to be raised for those who live to the age of twenty-one—

[The Lord Chancellor.—*Cholmondley v. Meyrick* (1 Eden 77), is opposed to that construction. If the attaining the age of twenty-one be the contingency to entitle to portions, then if any child died under twenty-one, leaving children, they would be destitute.]

Not so: that event is expressly provided for, and the words "share and shares" in that proviso show the inaccuracy and inaptness of the settlement. To attain the age of twenty-one, or marriage, was not enough to entitle a child to a portion, but also to survive the parents, "if such ages shall be attained, or marriages had, after the decease of the survivor of" the parents, upon which event also, in the accruer clause, the portions were to become vested. The *cesser* clause also was most material to be considered, it being thereby declared that the term should cease after payment of the portions, "or in case there shall not happen to be any younger children, or the issue of any of them living at the time of the decease of the survivor of the said C. Evans and Mary Caroline his wife." The proviso for *cesser* has been the governing matter in those cases; *Powis v. Burdett* (9 Ves. 428). In *Howgrave v. Cartier* (3 Ves. and B. 79; Coop. 66), Sir W. Grant says, "If the settlement clearly and unequivocally makes the right of the child to a provision depend upon its surviving both or either of the parents, a court of equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child *stands in need* of a provision, usually as to sons at the age of twenty-one, and as to daughters at that age or marriage."

[57] [The Lord Chancellor.—But to reconcile the clauses in the present case with your construction, you must introduce some words, such as "after the death of the parents." Now, what words would you introduce? Lords Brougham and Campbell put the like question.]

None at all. We would only give their legal effect to the words that are found in the clause. [The learned counsel commented on some of the cases before referred to, and particularly on *Hope v. Lord Clifden* (6 Ves. 499), which has also been cited for the appellants.]

Mr. Turner replied.

The Lord Chancellor (March 30).—My Lords; it is a well established rule as to portions or legacies payable out of lands, that if made payable at a certain age, a marriage, or other event personal to the party to be benefited, and such party die before that time arrive, the portion or legacy is not to be raised out of the land; but if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of



which the portion or legacy is to be paid, such as the death of a tenant for life, then it will be raiseable after the death of the tenant for life, although the term out of which it was to be raised had not arisen in consequence of the party to be benefited not having been *in esse* at the time of the death of the tenant for life, as in *Emperor v. Rolfe* (1 Ves., sen. 208), *Cholmondley v. Meyrick* (1 Eden. 77; *id.* 85), and many other cases.

The portions in question were provided for children who died infants and unmarried, and would not, therefore, according to this rule, be raiseable for the benefit of such children, but the question is, whether the settlement has not in that event provided that the portions intended for such children, so failing as to them, should be raised for [58] the benefit of other surviving children; and in examining the settlement for the purpose of discovering the intention of the parties in this respect, it must be borne in mind that the vesting of the portions did not, according to the above rule, depend in any respect upon the portioners surviving the tenant for life, and, therefore, that the children whose portions were in question, would have been entitled to their portions if they had attained twenty-one years, or the other events specified had happened, although they had afterwards died in the lifetime of the tenant for life. The settlement providing for the event of children not becoming entitled to their portions in case of death under twenty-one, or the other events personal to themselves, after directing payment to those children who should attain that age after the death of the tenant for life, and not sooner, declared, "And in case any of the younger son or sons of the said Charles Evans, by the said Mary Caroline his wife, shall happen to die before he or they shall have attained his or their age or respective ages of twenty-one years, or shall happen to become an eldest or only son before he shall attain his age of twenty-one years, or if any of the daughters of the said Charles Evans, by the said Mary Caroline his wife, shall happen to die before she or they shall have attained her or their age or respective ages of twenty-one years, or have been married, or before his, her, or their portion or portions shall become vested, then and in such case the portion or portions hereinbefore provided for all and every such younger son or sons so dying, or becoming an eldest or only son, and for all and every such daughter and daughters so dying and unmarried before his, her, or their said portion or portions shall become payable as aforesaid, shall go, survive, and accrue to the survivors and survivor of such daughters and younger sons, equally to be divided between them, and to be paid and payable at the same time and times as his, her, or their original portion or portions is or [59] are hereinbefore directed to be raised and paid, or shall become payable as aforesaid."

This provision is clear and unambiguous. The portions were payable, that is, became vested in each child at twenty-one, or the happening of the other events specified. But the children in question died before any of those events, and upon such death, according to the plain words of the settlement, the portions to which they would have been entitled, had they lived until such event had happened, survived to the other younger children, and from that moment such surviving children became entitled to the accrued share as much as they were to the original shares, unless there could be found in the settlement, something to show that such was not the intention of the parties, notwithstanding those plain expressions.

After providing for the further accruer of accrued shares, we find a proviso which appears to me to be of some importance; for it provides for the death of a child, leaving children, before its portion became payable, and gives to such children the portion of such deceased child. Now, as the judgment is founded upon the supposition that as survivorship or accruer was intended upon the death of a child in the lifetime of the tenant for life, it is material to observe that, in this provision, the event of the death of a child in the lifetime of the tenant for life, is in terms provided for, and if this provision be considered as a limitation or restriction upon the generality of the survivorship before given, the allusion to the death of the child in the lifetime of the tenant for life, with reference to such survivorship, is strong to show that the survivorship was not intended to be confined to a death after the death of the tenant for life.

I am aware of a difficulty which might arise upon the construction of this provision if a child had died in the lifetime of the tenant for life, after the happening of the event upon which the portion was made payable, but as [60] this proviso must,

I think, have reference to the clause of survivorship interposing the child of a child before its brothers and sisters, the reference to the death of a child in the lifetime of the tenant for life, tends strongly to show that the survivorship was to take place upon the happening of such an event. It was argued that the reference to that event in this clause tended to show that it was not contemplated in the clause of survivorship, as there was no such reference in that clause. But the answer to that is, that the provision as to survivorship was complete without it.

The observations made upon the provision for maintenance and for the *cesser* of the 500 years' term, do not appear to me to be of sufficient weight to justify a construction contrary to the obvious meaning of the previous provision. Those, indeed, relating to the term would have been very strong and difficult to be answered, had not the case of *Emperor v. Rolfe* [1 Ves. sen. 208], and other cases, established, that they ought not to prevail against the intention of the parties as assumed in those cases.

Much stress was laid in the argument upon the circumstance that this provision was not as usual a trust to raise a certain sum, to be divided amongst the younger children, but a particular sum for each child, so that the burden upon the estate was to depend upon the number of younger children. This may not be so provident a provision as the other, but I do not see how that affects the argument, as it is clear that there was to be a survivorship with respect to those particular sums. In the ordinary case, the sum to be raised is generally made to vary with the number of children, and in this the provision is for so many thousand pounds as there should be younger children; and although that provision would be more burdensome than the other, if there should be an extraordinary number of younger children, it would probably be less so if the number should be less than the average.

The decree assumes, that all the provisions for survivor-[61]-ship apply only to deaths of children after the determination of the estate for life, but it cannot be disputed that the portions would vest in children attaining twenty-one, or the happening of the other events specified, although the tenant for life should then be living, and the survivorship is to take place upon the death of any child before attaining twenty-one, or such other events happening, without reference to the tenancy for life, whether it is continuing or not; but if the construction assumed by the decree should be adopted, no such survivorship would take place upon the death of any child in the lifetime of the tenant for life, which would be contrary to the expressed terms of the gift.

I am, therefore, of opinion that the decree is in this respect wrong, and that the survivorship includes the shares of every child born, who, if it had lived to attain twenty-one, or till the happening of the other events specified, would have been entitled to a portion. If your Lordships should agree in the opinion which I have now expressed, I apprehend the course to be taken would be to declare that, and then refer it to the Master to make the necessary inquiries.

Lord Brougham.—I entirely agree with my noble and learned friend in the principle which, in the outset of his argument, he stated to be the rule to govern such cases as this, and also in the opinion at which he has arrived, and at which I arrived in the course of the argument; that the decree cannot in this respect be supported, for that the survivorship applies to the children who should die, whether before or after the determination of the life estate. I do not find in the argument of the very learned and able Judge, from whose decision this appeal is brought, any sufficient reason to countervail the arguments, which appear to me, both upon principle and the true construction of the settlement, and also upon the [62] authority of the cases, to be entitled to govern the decision in this case. I do not find that the learned Judge has argued this case—if we are furnished with a correct note of what fell from his Honour—in such a manner as to convince me, that a judgment proceeding upon the reasons which he is said to have given, can be supported.

It is very material to consider, as my noble and learned friend has already remarked, that there is in this settlement, in express terms, a provision made for survivorship between children before the determination of the life estate. That is most material, for it shows that that was, at least in one part of the arrangement, in the contemplation—and expressed so to be—of the parties to this settlement, and that provision was accordingly made for that event happening.

I should observe, that the only ground upon which it is possible, in my opinion, to sustain this decision, and to hold that by survivorship you are here to mean only survivorship between children in being after the determination of the life estate—the only ground upon which it appears to me that this decree can be supported—is that which was most ably taken by the learned counsel for the respondent (I particularly allude to the able argument of Mr. Hodgson), that you have to consider the creation of the term as provided for at the beginning of the settlement, and that then the clause of accruer only disposes of that which had been called into existence by what may be termed the creative part of the settlement. But I have yet to learn that there is any such rule as this to govern the construction of such instruments; that if terms are created, you have then only to consider that what follows is to dispose of the term so created, and that you have no right to import into the first part—what I may term the creative part of the instrument or settlement—any argument derived from the dispositive part of that settlement. I have yet to learn that there is any such rule of law as [63] that. There clearly is not. I must take the whole together, and where it might remain doubtful, or even more than doubtful; where there might be an inclination against the construction which might afterwards arise from the dispositive part more clearly showing the meaning and intention of the parties; where an inclination might arise which might qualify the term created, it is perfectly clear that you might import into the first part, for the purpose of clearing a matter of doubt, or even of modifying the construction of that part, the clear meaning of the parties, by reflection and operation, as it were, backwards upon it, derived from the language which they have used in disposing of the term so previously created.

In this case I hold it to be clear, that, taking the clause of accruer together with the former, you gather the meaning of the parties to the settlement. When it is said that the case of *Emperor v. Rolfe* [1 Ves. Sen. 208] is one of the few cases which countenance this latitude of interpretation, I cannot go along with that remark at all. In the first place, I think that *Emperor v. Rolfe* is a considerably stronger case than this. It is a stronger case than this, because there the term was only to be created after the mother's death. The term was only by the force of the settlement to come into existence and be created after the mother's death. That was therefore, properly speaking, not a term created; and Lord Hardwicke, though he appears to have felt that there was some difficulty in the case at first, said it would be a very harsh construction to hold the contrary, and he gave the decision which was afterwards followed in the case of *Hope v. Lord Clifden* (6 Ves. 499). Lord Eldon there refers to *Emperor v. Rolfe*, and says it looks very like a new decision. It is a very ingenious, a somewhat elaborate and abundantly characteristic judgment which Lord Eldon gives. He does not decide the case the first day, [64] but in breaking it he goes very much at length into its merits, and he very much applies himself to *Emperor v. Rolfe*. He comments upon that case, and upon *Woodcock v. The Duke of Dorset* (3 Bro. C. C., 569), decided by Lord Thurlow; and he goes into the arguments of Lord Thurlow, and applies them to the case then before him. Lord Thurlow says, these words are very strong; their natural meaning is strong and difficult to manage. So Lord Eldon says that he felt the words before him in *Hope v. Lord Clifden* to be strong and difficult to manage; but nevertheless, considering that he is dealing with the case of parent and child, he must reckon a good deal upon the force of the natural feeling which it was likely to give rise to, and then referring to the words of Lord Hardwicke in *Emperor v. Rolfe* [1 Ves. Sen. 208], he says he thinks it would be a harsh construction to take an opposite view in the case then before him. Having gone much at large into the case, he says he should wish it might be afterwards again spoken to by the parties. He was frequently unwilling to decide in cases where he had little or no doubt, and, therefore, this wishing to have it spoken to again indicates, to those who knew that learned judge, nothing of doubt upon his mind, for he generally held by his first opinion very strongly, but it only indicates that he had a hesitation in giving out his opinion. It does not follow, to those who knew Lord Eldon and the character of his mind, that he had any doubt in following the cases of *Emperor v. Rolfe* and *Woodcock v. The Duke of Dorset*, but that he went entirely along with those cases, and that his mind was clearly made up from the beginning that he had put the right consideration on the settlement in the case of *Hope v. Lord Clifden*.

The authorities therefore, so far from not bearing out this view, or so far from supporting the decision of the [65] Court below in this case, or from not bearing out the reversal of it, appear to me to bear fully as strong, and even stronger, on this case than on the case of *Emperor v. Rolfe*. Having weighed, therefore, with the deference due to it, the decision of the learned Judge in the Court below, and having looked also to the plain meaning of the parties, and having regard to this, that there is no rule of law which prevents us from taking the accruer clause—or the dispositive clause, as it was called in the argument—together with the creative clause; having regard also to the leases, and to the arguments and comments used by the learned Judges in disposing of them, I have come to a very clear, and, I must say, a very unhesitating opinion, that the judgment of the Court below cannot be supported, and that it must now be altered in the manner which has been suggested.

Lord Campbell.—I likewise agree that this alteration should take place, which has been suggested, in the decree of his Honour the Vice Chancellor. I acknowledge that I feel regret that I come to that conclusion, because I should be inclined to say with his Honour, that the good sense of the dispute seems to be with the plaintiff in the cause, that is to say, that it would probably be a more desirable arrangement of the affairs of the family, that the sum of £3000 only should be raised instead of the sum of £7000, and I regret exceedingly that I should differ from any Judge whose judgment I have to review, particularly that I should differ in opinion from a Judge for whose learning and ability I have such profound and sincere respect as I have for those of his Honour the Vice Chancellor Knight Bruce. But, after having repeatedly read this settlement, and referred to the cases, I must say, that I come to the clear conclusion that the decree is, in this respect, erroneous.

It has been said truly, that Courts of Equity take con-[66]-siderable liberty in construing settlements with regard to the portions of younger children, but that is only in carrying into effect the probable intention of the settlor. A Court of Equity does not make a new settlement; it construes the settlement which has been made. Where it appears that the construction is at all doubtful, and that by putting one construction upon it, what must be supposed to have been the intention of the settlor will be defeated, and by putting another construction, although some violence may be done to the words, the probable intention of the settlor will be carried into effect, you will prefer the latter construction to the former. But where you cannot necessarily come to the conclusion that you defeat the intention of the settlor by putting their natural and grammatical construction upon the words, I know not that a Court of equity, any more than a Court of law, would consider itself justified in not doing so.

Now, looking at the two clauses of the settlement, which must be read together—you must read together what has been called the creating or charging clause, and the dispositive clause—I do not see that we are at all justified in wresting the natural meaning of the words, which is, that if any children shall die, whether in minority or after they have reached majority, their portion shall accrue for the benefit of the surviving children. That is clearly the natural and grammatical construction of the words. Then how are we justified in interpolating any words? The words you must interpose are, “if any of them die after reaching the age of twenty-one.” How are we justified in introducing those words into the settlement? I know that this may be considered a fantastical arrangement on the part of this settlor; it may or may not be that he might so intend; there is nothing absurd in it; there is no gross injustice that can be inflicted upon the eldest son, if it was the intention that he should have exactly the same portion, whether all the [67] children, all his brothers and sisters, that came into *esse* should reach twenty-one, or whether some of them should have died before reaching twenty-one. It is allowed that, if they reached twenty-one, however numerous the children might be, their portions would all be charged, and would accrue to the surviving children, if they died after twenty-one. Then, if that is so, how can I say that I am justified in interpolating the words which you must necessarily interpolate, namely, “if they shall happen to die in the lifetime of the said Charles Evans and Mary Caroline.”

Now, with the most profound respect for that learned Judge, I could have wished that, in his judgment, if we have an accurate note of it, he had given us a little more at length the reasons which influenced his mind, which I am sure would have been

regarded by all the members of this House with the deepest attention. But he seems to have considered it as rather doubtful, whether the portions of these children that reached twenty-one, and died in the lifetime of the parents, could accrue; but the case of *Emperor v. Rolfe* [1 Ves. Sen. 208], and that class of cases, appear entirely to dispose of that argument, and to shew quite clearly that the portions of the children who reached twenty-one, and died in the lifetime of the parents, must be considered as charged upon the estate, and must be raised for the benefit of the surviving children. If that be so, how am I to draw a distinction between the children that die in the lifetime of the parents having reached twenty-one, and those who die in the lifetime of the parents not having reached twenty-one? It seems to me to be a very arbitrary distinction, and I asked Mr. Hodgson, who argued this case with his usual ability, just to frame the settlement in the words which he, in his great skill, would introduce, so as to carry into effect the construction he put upon them; but he rather discreetly, I think, avoided doing that, because it would have thrown a considerable [68] difficulty even upon him. He would have been obliged to introduce words applicable to children that reached twenty-one, dying in the lifetime of their parents, and other words to apply to those that died under twenty-one in the lifetime of their parents. But is not this making a new clause altogether, and not construing the clause which we find in the settlement?

Upon the whole, I come to the conclusion that, in this case, we are not justified in departing from the natural and grammatical sense of the words; and that there is no authority calling upon us to do so, because those cases to which reference has been made do not go at all beyond establishing this, that to effectuate what must be understood to be the purpose of the settlor, you will put rather a different construction upon the words than their natural meaning. But there is no case which says that you can venture to do so, unless you are sure that you are thereby effectuating what must be supposed to be the intention of the settlor. In this case, I do not at all know that the settlor did not mean what he has said, namely, that with regard to all children that came into *esse*, and died in minority, or whether they died after reaching majority, either in the lifetime of their parent, or after their parents died, their portions should accrue to the benefit of the surviving children. It seems to me that the view taken of it by my noble and learned friend is correct, and that the decree ought to be reversed.

Lord Brougham.—I ought to have observed that there is one thing which has been too much taken for granted: the right of stretching the construction in a court of equity upon this ground, that provided we can suppose that it might have been the intention of the parties to mean a thing such as living at the death or surviving A. B.; provided it is possible the parties might have meant that, we have a right to say that they meant it. That is a most arbitrary view to take.

[69] Mr. Turner.—Your Lordships' declaration, I presume, will be that a sum of £1000 was to be raised for each of the younger children living at the date of the settlement, and each of the younger children born afterwards, and that that sum of £1000 is to be distributed among the surviving children; and that it be referred to the Master to enquire what younger children were living at the date of the settlement, and what born afterwards.

The Lord Chancellor.—And which of them have died, if any of them have died, and at what age they died, and whether married or not.

Mr. Russell.—Will your Lordships permit me to mention a circumstance which affects only the respondent, C. B. Evans, and which arises out of your Lordships' judgment? He filed the bill as an infant entitled to the inheritance of the estate, subject to this term, and the suit was instituted with the approbation of the Court, and with the sanction of the Master, and an amount of £8000 has been charged upon the estate. Now he may die in infancy, and he has no other property. What I should submit therefore to your Lordships is this, that your Lordships will add to your declaration, that his costs of this appeal will be a charge upon the term.

The Lord Chancellor.—He is a tenant in tail.

Mr. Russell.—Yes, subject to the term. He is defending the inheritance, with the sanction of the Master, and the approbation of the Court.

The Lord Chancellor.—We are not sure that the term will do more than raise the portions for the younger children.

Mr. Russell.—Let it be subject to raising the portions.

Lord Brougham.—That is if there is any surplus.

Mr. Russell.—There is no doubt an ample surplus.

The Lord Chancellor.—Is he of age?

Mr. Russell.—No ; if he was of age it would be immaterial. He is an infant about seven years of age.

[76] The Lord Chancellor.—Then I think it seems reasonable.

IT WAS ORDERED, etc., “that the decree complained of be varied in respect to the declaration therein contained ; that in the events which happened, the principal sum of £3000 only became and was raiseable for the portions of the daughters and younger sons of Charles Evans and Mary Caroline his wife, under the indenture of the 8th of February, 1794,” etc.

“And it is hereby declared, that under the said indenture a portion of £1000 was to be raised in respect of each and every younger child living at or born after the date of the said settlement, and that the portions of such of them as, being sons, died under the age of twenty-one years, or, being daughters, died under that age and unmarried, survived to the others or other of them.”

“And it is further ordered, that it be referred to the Master of the Court of Chancery, etc., to enquire and certify to the said Court what daughters and younger sons of the marriage between the said Charles Evans and Mary Caroline his wife, were living at the date of the said settlement, and what daughters and younger sons were born afterwards, and which of them have died, if any of them have died, and whether married or not.”

“And it is further ordered, that the costs of the appeal incurred by Charles Barrow Evans, the infant tenant in tail, entitled to the inheritance of the said estates, subject to the term of 500 years, created by the said indenture of 8th of February, 1794, be charged on the said inheritance and secured under the said term, subject to the payment of the said portions and the costs of the trustees of the said term, and any other costs that are or may become payable in respect of the said portions to any trustees or trustee, or person or persons, interested therein.”

“And it is further ordered, that the said cause be remitted back to the Court of Chancery, to do therein as shall be consistent with the judgment hereby pronounced, and that on the said Master making his report to the said Court of Chancery, and on the same being duly confirmed, etc., the said Court do make such order or decree on further directions, and as to subsequent costs of the suit, as to the said Court, consistent as aforesaid, may seem meet.”—Lords’ Journals, 30th March, 1847.

[71] JAMES ANDERSON BERRY,—*Appellant*; GEORGE MORSE and Others,—*Respondents* [March 22, 1847].

[Mews’ Dig. vii. 1416.]

*Guarantie—Costs.*

A., by a trust settlement, gave to his son “a like sum of £5000 sterling, payable, etc., after my decease, from which provision shall be deducted any sum that I have already advanced, or may still advance for him, to enable him to carry on his business.” A. entered into a guarantie for £2000 for the firm of which his son was a partner. A. was compelled to pay that sum, and the firm afterwards becoming bankrupt, he obtained from its assets a small dividend.

Held, that this was an advance to the son, which came within the description of money advanced to the son to enable him to carry on his business, and that the son could only claim the balance of the £5000, after deducting the sum thus advanced.

The practice of allowing the costs in such a case to be paid out of the estate, was disregarded.

Dr. Berry, who formerly belonged to the medical establishment at Madras, and on his retirement went to live in Edinburgh, had one son (the appellant) and three daughters. In 1825 he executed a trust disposition and deed of settlement, by which he conveyed his whole estate, heritable and movable, to the respondents, as trustees on trust, to pay each of his children the sum of £5000. The bequest in favour of the appellant was in the following terms:—"And my said trustees are hereby appointed to make payment to my said son, James A. Berry, now residing at Bahia, of the like sum of £5000 sterling, which shall be payable at the first Whitsuntide or Martinmas after my decease; from which provision shall be deducted any sum that I have already advanced, or may still advance for him, to enable him to carry on [72] his business." Dr. Berry did subsequently advance the sum of £1500 to the appellant; and in November 1826, he wrote a memorandum in the following terms:—"The sum of £1500 has been paid to my son James Anderson Berry, in part payment of the £5000 bequeathed to him in this second article of this trust deed." The appellant was a partner in the house of M'Farquhar, Hamilton, and Co., of Liverpool and of Bahia. At the solicitation of the appellant, Dr. Berry, in the year 1827, gave a guarantie in favour of that house to the amount of £2000. This guarantie was only executed for one year. Before the expiration of that period, Dr. Berry, at the request of one of the partners, renewed the guarantie. It appeared that the appellant, who was at that time at Bahia, afterwards expressed his assent to this renewal. M'Farquhar and Co. became bankrupts in 1829, and Dr. Berry was called on to pay the sum for which he had become responsible under the guarantie. He did pay it, and then claimed on the estate of the partnership, from which he received a dividend of 3s. 4d. in the pound, amounting to £338 6s. 8d. Dr. Berry died in August 1833, and among his papers was found a memorandum, dated January 1833, giving a summary of his assets. The amount paid to his son, £1500, was there stated, as were also the sums paid to his daughters in part or in full discharge of their shares as settled in the will; and there was indorsed on this paper a statement of "money lost," which set forth the sums lost, and the persons through whom they had been lost; but in this memorandum Dr. Berry took no notice whatever of the £2000 he had paid on the guarantie. The appellant, after his father's death, claimed payment of £3500 under the trust deed or will, relying on the paper last mentioned, as showing that his father did not intend that the money paid under the guarantie should be treated as "money advanced" to the son, and therefore to be deducted from the £5000 given [73] by the will. The trustees, on the other hand, insisted that the £2000 paid upon the guarantie, fell within the description in the will as "money advanced" for the son, "to enable him to carry on his business." The son instituted a suit in the Court of Session to have his claim declared valid; and the case came before Lord Cuninghame, as Lord Ordinary, who was of opinion that a cautionary engagement for a mercantile house in which the son was a partner, did not amount to an ademption of the legacy given in the will.

In a note appended to his judgment, the Lord Ordinary said, "I do not think that, according to any proper or sound construction of this clause, a cautionary engagement for a mercantile house, in which the son was a partner, can fall within it. Such an advance cannot be viewed as made peculiarly for the son, as he neither got the interest of it, nor any increased share of the profits in respect of the obligation, which he must have got had the sum been advanced peculiarly for his own behoof. Although it is probable that the circumstance of the son being a member of the company induced his father to give up the guarantie, it truly operated as much for the behoof of the other partners as of the son." This interlocutor was carried before the Lords of the First Division of the Court of Session, who reversed it. The appeal was against the reversal.

Mr. Bethell and Mr. Anderson for the appellant.—The money paid under the guarantie was not advanced to the son to enable him to carry on his business, and therefore does not fall within the words of the will. Nor was it intended by the testator to be so treated. This is shewn by several facts. In the first place the testator treated himself as a debtor of the house, and took from its general assets such satisfaction for his claim as he could get. He treated the whole affair, therefore, as one [74] of ordinary business with third parties, and not as one of personal favour

to his son. In the next place, the renewal of the guarantie was actually made when the son knew nothing of it; and when, therefore, the whole dealing was between the testator and a house of business in this country, without any personal interference by the son.

The principle of construction applied in Scotland to this kind of declaration of trust is very strict, and is in favour of the objects to the testator's bounty. *Watson v. Blair* (13 Shaw and D. 12). *White v. White* (3 Dunl. B. and M. 468) is a strong case to shew how that rule of strictness of construction is carried out. There a father in his will made a provision for his eldest and two other sons. He declared that they should all have the same advancement; and that what any one of them owed him at the time of his decease should be imputed to satisfaction of the bequest. He afterwards purchased some heritable property, and made these sons voters; and it was held that the value of what he had so purchased was to be taken as a donation to the sons in the lifetime of the father, and was not to be imputed in payment of their shares in the succession under their father's will.

It cannot be said that this was an advance, but merely that it was a contract which resulted in debt, and not in bounty. It was a contract carried out in the usual way of business, and on which Dr. Berry received full legal satisfaction in his lifetime. It was not therefore an open matter at his death, and the trustees have consequently no right now to examine into it.

It does not appear what was the interest of the son under his guarantie, or whether he was in the least degree benefited by it. Nor can it be said that it was in the terms of the will "an advance to the son to enable him to carry on his business." It was a liability incurred for a [75] partnership, but there is nothing to show to what extent, if any, the son received benefit from it.

Then as to the costs. The decree gives costs against the appellant. This is erroneous. In a case like the present, the costs ought to have come out of the estate. *Morrison v. Cavin's Trustees* (7 Sh. and Dunl. 810), and *The Earl of Strathmore v. Paul* (1 W. and S. 199; and on appeal, 1 Rob. Ap. Cas. 189-223). The practice as established by the latter case was, that the costs should come out of the estate, notwithstanding the attempt to set aside a deed by which that estate had been disposed of, was unsuccessful. This practice was there spoken of as clearly established by the law of Scotland (but the practice was there expressly recommended by Lord Brougham to be reconsidered; and the Lord Chancellor intimated his opinion to be unfavourable to the practice).

Mr. Gordon, who appeared for the respondents, was not called upon to address the House.

The Lord Chancellor.—The question is now reduced to a very narrow compass. It depends on the construction we are to give to the words of the deed, considered with reference to the evidence we possess of the nature of the original transaction. The question is, whether the sum paid by the father under this guarantie, is to be considered as a sum advanced by him to enable the son to carry on his business. It has been argued, that this is not to be considered as an advance to the son at all; that it was for the house of which the son was a partner; but that it did not bear the character intended by the father when he spoke of an advance to enable the son to carry on his business. Now what are the facts of the case? The father entered into a guarantie nominally [76] for the house, and for the benefit of the house; but as between the other partners and the son, the money thus advanced for the house was as much the son's money as if he had procured it from any other quarter. The father never contemplated the loss of the money. The time fixed at first in the guarantie elapsed before the money became payable. The father renewed the guarantie; he entered into no new contract, but prolonged the original contract for a year. That was for the advantage of the house, as the original guarantie had been given for the advantage of the house. The son was informed of this proceeding, and on the 18th November, 1828, before he received the information, he wrote to say, "In the event of my remaining here, would you remain guaranty for £1000 or £2000?" That shows that he was well disposed for his father to continue the guarantie for the house, that in fact he consented to the advance to him being made



in that form. In the result, the house became insolvent, and the father was obliged to pay the money. Then was not this money advanced to the son to enable him to carry on his business? I am of opinion that it was. It is the money of the father lost in the business of the son. What would be the difference between this and money advanced in the ordinary way I do not know. The money was advanced; the father actually paid it, and paid it in order to further the object he had in view in advancing the money which was to enable the son to carry on his business. Though I do not found my opinion upon the correspondence, yet that correspondence shows that the interests of the son were considered in this advance.

Lord Brougham.—I entirely agree with my noble and learned friend. I am surprised to find some of the Judges in the Court below speaking of this as a question of difficulty. I cannot say that I have entertained any doubt [77] at all about it. I cannot agree with those who look upon this as a transaction which was intended for the benefit of the other partners alone. As between them and the son it cancelled a debt due from the son to the other partners. It was, therefore, an advance directly for the benefit of the son. Was it not money advanced to James for the purpose of helping him to carry on his business? No doubt it was, and no doubt it did help him to do so. In what proportion did it help him? In that in which he was liable to contribute to the general funds of the partnership. In settling the accounts between the son and the partners he would be credited with this amount. I do not found my opinion on matters *dehors* the instrument, but on the instrument itself, and my knowledge of the facts as to the advance of the money. I am entitled to know these facts, and bound to take them into consideration. The renewal of the guarantie was an act adopted by the son, and there can be no doubt that he thought that renewal would be for his benefit.

Lord Campbell.—I am entirely of the same opinion. We have simply to see in the case what was the intention of the parties. James was to receive £5000 of his father's property, and no more. From that gross amount was to be deducted any sum of money which the testator had advanced to him to enable him to carry on his business. Has this money been advanced with that view? Though actually paid under the second or prolonged guarantie, it is the same sum of money which was secured, with the son's full concurrence, under the first guarantie, and though the son did not at the moment know of the second guarantie, yet when he came to know of it he recognised and adopted it. Then here is a guarantie given by the father, at the request of the son, for the benefit of the son. The son would have the benefit of this money in settling the partnership accounts, and the money may, therefore, be [78] truly said to have been advanced to enable the son to carry on his business. The intention of the settlor would be grievously disappointed by any other construction, for by it the son would get £7000, though by the terms of the will the benefit secured to him is expressly limited to £5000. I cannot doubt as to the intention of the testator, and as to the construction to be put upon his will; and I am of opinion that the judgment of the Court below must be affirmed.

The Lord Chancellor.—As to costs being claimed out of the estate, I am of opinion that that practice is erroneous. The appellant sets up a claim to obtain from the funds of the estate more than it appears he is entitled to. I think he cannot ask to have the costs of making that claim allowed him.

The Lords concurred.

Judgment of the Court below affirmed with costs.

# [79] IN THE MATTER OF MARTIN'S DIVORCE BILL.

[March 9, 30, 1847].

[Mews' Dig. vii. 952. In addition to cases cited, 1 H.L.C. 80, *n.*, see *Brooks' Divorce Bill*, 1 H.L.C. 159.]

*Action dispensed with—Lapse of Time.*

A petitioner for a divorce bill held excused for not having brought an action for damages against the adulterer, upon the statement of his witnesses, that they

did not find him until three years after the discovery of the adultery, and the petitioner was not able to pay the expenses of an action.

A lapse of sixteen years from the adultery not made an objection to the application for divorce at the end of that time.

The order of the day of the second reading of the bill, intituled, "An Act to dissolve the Marriage of Robert Montgomery Martin, Esq., with Jane Avis Frances Martin, his wife," etc., having been read, Mr. Austin, of counsel for the petitioner, opened the allegations of the bill, and said a copy of the proceedings for a divorce *à mensa et thoro* in the Ecclesiastical Court, was duly laid before their Lordships; but there was no proceeding at law, as no action was brought for the reasons which the witnesses would state. A witness having proved service of copies of the bill, and of the order of the House for the second reading of it, on Mrs. Martin, who was then known as Mrs. Sheridan, Miss Keith, the next witness, said she was sister to Mrs. Martin, and the marriage between her and Mr. Martin was had in Sidney, New South Wales, in 1826, according to the rites of the Church of England. They lived in that colony for about a year and then went to India. They had no child. Witness came to London in 1833, and found Mrs. Martin residing in Pimlico with Dr. Sheridan and bearing his name. They had one child, and a second was born soon afterwards. Witness did not see Mr. Martin from the time of his [80] leaving Sidney until the year 1839, when he returned from Canada. She did not know at what time Mr. Martin became acquainted with the elopement of his wife. Dr. Sheridan was not in good circumstances. He had since then been confined on account of derangement.

Two other witnesses proved that Mr. and Mrs. Martin came to England in 1830, and lived together in London for about a year. Dr. Sheridan was then a frequent visitor to them; but there appeared nothing to excite Mr. Martin's suspicions. After the elopement he was half distracted. From 1832 to 1836, Dr. Sheridan was in embarrassed circumstances, and so was Mr. Martin; he went to Hong-Kong after that, and had but lately returned. These witnesses proved that they had for some months after the elopement, which was in 1831, searched for Dr. Sheridan, by the desire of Mr. Martin, but did not see him till 1834; he was residing in Ebury Street, Pimlico.

Mr. Barron, the solicitor for the bill, said he became acquainted with Mr. Martin in 1839, and was professionally concerned for him in an action brought against him in 1840; and it becoming necessary to pay into Court £200 to abide a reference, which Mr. Martin was not able to pay, witness advanced that sum, which, with other sums, was still due to him. The reference went against Mr. Martin. He went to China in 1844, and returned in 1845. His circumstances were so bad from 1839, that he could not have paid the expenses of an action.

The bill was read a second time on the 30th of March, and passed this House on the 16th of April.

See Coode's and Lardner's divorces, Vol. 6 Clark and Finnelly, pp. 567 and 569; and Heaviside's divorce, 12 C. and F. 333.

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[81] JAMES GERAHTY, Esq.,—*Appellant*; JOHN ROBERT MALONE and Others,—*Respondents* [April 19, 20, and 22, 1847].

[Mews' Dig. ix. 1824; S.C., below, 3 Dr. and War. 239; 5 Ir. Eq. R. 549.]

*Evicted Lease—Equitable Mortgagee's Right to redeem—Parties—Costs.*

A lessee having been evicted for non-payment of rent under the ejectment statutes in Ireland, an equitable mortgagee of his interest filed a bill for redemption against the landlord:—

Held, 1st, that the mortgagee was entitled, under the earliest of these statutes (11 Anne, c. 2), to redeem the evicted premises; and, 2ndly, that trustees of a settlement, to whom the lease had been assigned, were not necessary parties to the suit.

Although the general rule is to make the party seeking a redemption pay the costs of the suit, the Court has jurisdiction to look to the landlord's conduct, and to throw the costs on him according to its discretion.

Two fields near Dublin, containing about ten acres, held by Mary Lyster from the Archbishop of Dublin, were demised by her, by lease dated in 1811, to Michael Frayne, for twenty years, at a rent of £56, with the usual *toties quoties* covenant for renewal. This lease was made the subject of a settlement by M. Frayne in February 1823, upon the marriage of his son John Frayne with Catherine Nowlan, and the premises were thereby assigned to trustees upon trust, after Michael Frayne's death, to permit John Frayne to receive an annuity of £60 for his life, and after his death, to permit the said Catherine and the children of the marriage, to receive the said annuity, share and share alike.

In December 1823 James Gerahty (the appellant), in whom Mary Lyster's interest in the premises became vested, granted a renewal of the lease to M. Frayne for twenty years more, upon payment of a fine of £235; and the renewed lease also contained a *toties quoties* covenant of renewal on the part of Gerahty.

[82] Michael Frayne died in 1830, having made a will naming an executor, who renounced, whereupon his daughter, the wife of James Gogarty, obtained administration with the will annexed.

John Frayne received the annuity from his father's death, and died in 1834, leaving the said Catherine his widow, and three children by her, entitled to the annuity. She (the widow) married Charles Duignan in 1837.

A year's rent having become due in March 1838 to Mr. Gerahty, he brought ejectment, and having recovered judgment, was put into possession of the premises. In 1839 John Robert Malone (the respondent), upon application from Michael Frayne, jun., one of the trustees of the settlement of December 1823 (and who was a son of the said Michael Frayne, deceased), paid Mr. Gerahty £85 ls. 6d. for rent and costs, in redemption of the premises, and obtained from the said trustees a deposit of the leases of 1811 and 1823, as security for repayment of the said sum. The rent having been afterwards allowed to fall a year in arrear, the appellant again brought ejectment, and got judgment, and executed his *habere* in May 1840. Malone again proposed to redeem, and he made a tender of £120 for the full rent and costs. The appellant declined to accept the money unless the consent of Mrs. Duignan (widow of John Frayne) was obtained, which being then obtained, the appellant required also to have a written declaration from Malone and her, with the consent of Charles Duignan, her husband, that the redemption was for the benefit of her and her children by J. Frayne. Some further negotiation took place between the parties, but without any result.

Under these circumstances, a bill for redemption was filed in the Court of Chancery, in Ireland, by Malone, as equitable mortgagee, and by Mrs. Duignan and her children by John Frayne, infants, by Malone, as their [83] next friend, against the appellant. Charles Duignan and Mrs. Gogarty and her husband were made defendants. The trustees of the settlement of 1823 were not made parties. Malone paid £130 into Court to answer the redemption money and costs.

The cause was heard and reheard, in 1843, by Sir Edward Sugden, Lord Chancellor of Ireland, who, after full consideration of all the circumstances, decreed for redemption, and ordered the appellant (the landlord) to pay the costs of the suit. (The case is fully reported in 3 Dru. and War. 239; and also in 5 Ir. Eq. Rep. 549).

The landlord appealed against that decree.

Mr. Gerahty, the appellant, and Mr. Edward Gerahty (both of the Irish bar), were heard for two days and part of a third, in support of the appeal. Their arguments were to this effect:—

The decree is contrary to the express provisions of the Irish Act, 8 Geo. I., c. 2, and to the uniform course of proceedings in Ireland regarding mortgages of leasehold interests, their liability to ejectment for non-payment of rent, and the corresponding rights of redemption. The bill sought to create a charge by mere deposit of the lease, which was previously conveyed by the marriage settlement of 1823, whereby the whole beneficial and legal interest in the then unexpired residue of the term was vested in the trustees to the uses of the marriage, and no conveyance from them to the

respondent Malone ever existed, nor was any privity or connection with the term alleged by him. His case was a mere parol transaction with Frayne, jun., one of the trustees, at whose request, and for whose personal advantage, and not for the advantage of the widow and children of John Frayne, the respondent advanced the money. The set-[84]-tlement being deposited with the respondent, he was informed by it of the extent of the term, of the trustees to whom, and of the uses for which, it was assigned; and yet, with such knowledge, he, a stranger to the term, filed his bill to redeem against the reversioner, who was re-possessed of the lands, by force of the ejectment under the statutes. The respondent's case was not to be compared to those of *Moores v. Choat* (8 Sim. 508), and *Robinson v. Rosher* (1 Younge and Col. C. C. 9), cited in the Court below; for in them the contracts of deposit were in writing, but in this case there was no writing, and no dealing at all with the parties who had power to encumber the term. The respondent was not even an equitable mortgagee of the term, nor had he any interest in the term, nor possession for a moment under any title. The Act 11 Anne, c. 2, expressly exempted from proceedings in ejectment all mortgagees of leases, not in possession. The first decision establishing a mortgage by deposit of deeds, made by Lord Thurlow in 1785, as stated by Lord Eldon in *Ex parte Mountfort* (14 Ves. 606), was a surprise on the profession and a departure from the statute. The fourth section of the Act 11 Anne, c. 2, "that in case said lessee or assignee, or other person claiming any right, title, or interest in law or in equity, of, in, or to the said lease, should, within the time aforesaid, file a bill for relief in equity, such person should not have or continue any injunction against the proceeding in such ejectment, unless within forty days after a full answer by lessor, he should bring into Court such sum of money as the lessor should set forth in his answer to be due," was, in this case, entirely misapprehended; it applied to the previously existing inconvenience of filing bills after ejectment brought and before judgment, and obtaining injunctions on pretence of equity to prevent the lessor from [85] recovering possession. The fourth section was a restraining and not an enabling clause, and, at all events, it had no bearing on a state of things after judgment and execution thereon, as in the present case. The right to file a bill to redeem after judgment, was annexed to the class of persons previously enumerated—persons who were ejected and had the right to redeem; and that enumeration did not comprise any person in the position of the respondent, nor was he in the least aided by the amending and explaining acts of 4 Geo. I., c. 5, and 8 Geo. I., c. 2 (Irish), which last act, by the fourth section, expressly empowers mortgagees and assignees of leases to redeem in the circumstances there mentioned. But the sixth section requires all mortgages and assignments of leases to be registered within six months. The mortgage alleged in this case by deposit of deeds only, was incapable of registration, and does not therefore fall within the provisions of the act, whose positive enactments, however, have, since 1721, regulated all mortgages of leases in Ireland in respect to ejectments for non-payment of rent. This and the two preceding statutes on the subject were fully considered and applied by this House in the case of *O'Reilly v. Featherstone* (2 Dow and Clark, 39).

The Lord Chancellor of Ireland seems himself to have apprehended that, in his judgment in this case, he was running counter to the statutes, for he laboured to establish a jurisdiction in the Court wholly independent of the statutes (see 3 Dru. and W., p. 264). But the statutes passed in Ireland, viz., 11 Anne, c. 2; 4 Geo. I., c. 5; 8 Geo. I., c. 2; 5 Geo. II., c. 4; 25 Geo. II., c. 13; and 17 Geo. III., c. 27, relating to ejectments for non-payment of rent, with successive amendments for pursuing and improving the ejectment remedy, being all *in pari materia*, are to be considered as one code, or different clauses of one law, in exclusion of all original anterior jurisdiction. The constitution of these [86] connected acts, therefore, contains every rule to be observed on the subject; and there is not a case reported, where several statutes on the same subject and of mutual dependence, all introductory of new legislation, however varying from prior usages, have been brought under the consideration of the Court, in which such combination of legislative acts has not been taken to shut out the common law and all prior rules, and to furnish the Judges with exclusive rules and principles for their administration. The express connection of these Irish statutes, and their remedial character, have been uniformly recognised in every case which has occurred since their enactment; and it

has been an universally accepted conclusion, from this series of statutes, that they did not contemplate the continuance of any former jurisdiction. In the case of a single statute, from shortness and imperfection in its construction, there may be ground afterwards to resort to anterior rights and usages as still allowed to prevail, either as not being recognized, or not expressly taken away by such statute; but no such inference appears ever to have been assumed where the subject has been regulated by several acts of Parliament. And even a single act introducing new legislation has been generally considered as an entire substitution for all ancient rules and usages. All the argument used in this case, in search of a jurisdiction, beyond the acts of Parliament, is taken, not from any decision on the statute of Anne, but from supposed decisions on the subsequent statute of 8 Geo. I., which leaves no room for doubt or argument; and it is extraordinary that in so referring to decisions on this statute, and dilating upon them, the statute itself was passed by, in the cause in hand, and no case, report, entry, pleading, or record of any kind, was referred to, to support this mode of dealing with the statute. The uniform rule on these statutes since their commencement, has never brought into doubt, that the right to file a bill for [87] redemption, within six months from the eviction of the lease by ejectment, belongs exclusively to the class of persons enumerated in the statute of 11 Anne, c. 2, as liable to eviction in the ejectment suit. Before the present suit, it was never known in Ireland that a person who never had possession, and never was ejected—who never was tenant, and could not be ejected, a perfect stranger to the landlord—ever made such claim; and since the enacting of these statutes in Ireland, and of the 4 Geo. II. in England, no case has occurred in either country of relief having been administered to any suitor from proceedings in ejectment for non-payment of rent, but under the express enactments of the statutes themselves, and in execution of their provisions: and it is alleged in the bill in this case, that the tender made to the appellant in 1840, was “to redeem the premises according to the provisions of the acts of Parliament in force in Ireland relating to ejectments for non-payment of rent.”

The respondent had been acting in concert with the trustee, Frayne, to exclude the widow and children of John Frayne from all benefit in the lease, and it was by his having obtained an improper influence over them that they consented to his being their next friend in the suit:—

[The Lord Chancellor.—That question cannot be raised now, between co-plaintiffs.]

There certainly was a misjoinder of parties and a conflict of interests. On the very statement in the bill, Malone had an interest entirely adverse to the other plaintiffs: he sought to establish a demand which would have priority over the annuity payable under the settlement, and without the sanction of the trustees; and moreover, when the notices, proved in the cause to have been served on Malone, offered him redemption on the terms of his declaring in writing a trust for the uses of the marriage settlement, he refused to comply with such requisition. There was plainly an opposition of inte[88]-rests and misjoinder of plaintiffs in this suit; and it was also to be observed, that Malone assumed to be next friend to the married woman, Mrs. Duignan, who had no distinct interest, whose husband was made a defendant, as being entitled during the coverture to the annuity provided for her by the settlement. It appears from the deposition of the witness Campion, that it was by his urgency that Malone was induced to make the advance of money; that he had no acquaintance with the widow and children of John Frayne; that his assuming to be their next friend was a mere pretence. When the insolvency of M. Frayne, the trustee, rendered it hopeless that he should repay Malone, then this suit was resorted to by Campion, who became the solicitor and witness for Malone under the pretence that Malone was a mortgagee by deposit of deeds, although without any one incident to such transaction; and, by these means, to seek repayment at the landlord's expense. This was the whole object of the suit. M. Frayne, the insolvent, was the only person who appeared to defend the ejectment.

But, supposing Malone was a mortgagee, and that the suit instituted by him for redemption was free from the objections before taken, it was still to be observed that there was a defect of parties, because the trustees of the settlement of 1823, to whom the term and its beneficial interest were conveyed for the uses of the marriage—although the interest so vested in them was to be charged with this supposed demand of Malone's—were not before the Court; that M. Frayne (who was one of them),

as the person for whose use the money was stated to have been advanced, and who could give some account of the transaction, being alleged to have been the mortgagor, was not made a party, neither as mortgagor in that alleged dealing, nor as the person who had the actual possession of the premises when the writ of *habere* was executed, and therefore entitled to be restored in case of redemption.

[89] It appeared from the notices served on the respondent that the term had expired in 1843, before the final judgment. The plaintiff below took no steps in the cause until the appellant applied by motion for leave to appeal:—

[The Lord Chancellor,—being informed by Mr. Humphry (of counsel for the respondents), that the documents just referred to were not noticed in the decree,—said they could not, therefore, be referred to. This House had to see whether the decree was right, but not whether the cause was properly managed. Any document or evidence that was before the Court below might be properly brought before the notice of the House, but no others.]

It was in evidence below that redemption was offered to all the parties that were entitled to redeem, but they all declined the offer because they had no interest worth redeeming, the lease having expired.

Under any circumstances the decree was erroneous in throwing the costs of the plaintiffs and of the defendant, Mrs. Gogarty, on the appellant. By the special provisions of the acts of Parliament before referred to, the appellant, as landlord, was entitled to his costs on redemption. The facts of the case did not justify the Lord Chancellor in overlooking the fixed rule of the Court, and depriving the appellant of his right to costs.

Mr. Humphry, for the respondents, was not called on.

The Lord Chancellor.—During the time this case has been in hearing—not entirely three days—we have had the opportunity of considering the judgment of the Lord Chancellor of Ireland, and the arguments and authorities; and I have not been able, either from the arguments or otherwise, to entertain the least doubt of the propriety of the judgment. The plaintiffs were John Robert Malone and Catherine Duignan, and her children by her former husband, Frayne. She was entitled to sue as interested in an annuity of £60; which gives her an interest in the lands [90] entitling her to relief. The title of Malone, as mortgagee, is clear, so far as it is necessary for maintaining this suit. The original lessee remained, under the settlement, seized of the lease to use his best endeavours to obtain a renewal, to give effect to the settlement; and it being afterwards necessary to renew, a renewal was applied for and granted to him by the appellant. The rent not being paid, the appellant, the landlord, seized and obtained possession. Malone then advanced the necessary money to pay the landlord, and received the title deeds, creating an equitable interest, as a security for repayment of the money advanced. There is an exhibit showing that the transaction was recognized by the widow as well as her trustee, and containing an undertaking to execute a mortgage. Such execution was not necessary, for there was a deposit of title deeds. Malone is therefore in the situation of a party having an equitable interest. The act of 11 Anne expressly provides for this; it provides for legal and equitable interests. The right to redeem given by that act has never been taken away by any subsequent statute. It was, therefore, quite right to associate Malone in a suit, the object of which was to obtain the benefit of the lease from the landlord. If he was not plaintiff, he must have been made defendant, for he was interested in the lease. The title, therefore, of the plaintiffs to sue is clear. The Lord Chancellor did not at first entertain any doubt, but he seemed to be pressed by the counsel at the bar upon the supposed difference between the practice in Ireland and in this country. He, therefore, very properly, delayed giving judgment, and took time to consider it. On rehearing the case he gave the matter great attention, and came to the same conclusion as on the former hearing. The statute of 11 Anne, c. 2, s. 4, clearly gives a right of redemption to an equitable mortgagee, the words of that section giving the right “to any person claiming any right, title, or interest in law or in equity, of, in, or to the said lease.” These plaintiffs [91] have an interest in the lease as against the landlord, and are entitled to redeem on paying the rent and costs up to the date of the tender of them to the appellant.

It is said that it was contrary to the rules of the court to give costs of the suit for redemption against the landlord, and that it was from a sense of that injustice that the petition of rehearing was dismissed without costs. It cannot be contended that whatever course the landlord may pursue, he is not to be made to pay costs. There is no rule of practice to justify this. The tenant was right, and all the expense had been occasioned by the landlord. Under these circumstances I cannot doubt that the Court below was right in giving the costs against the landlord.

There was also an objection taken on the ground of the absence of the trustees of the settlement, but they were not trustees of the legal estate, and the Court had before it all parties who were necessary.

There was likewise an objection taken to the course of the hearing below, but that too was without foundation. The judgment must therefore be affirmed.

Lord Brougham.—This case was very carefully considered by the Lord Chancellor of Ireland, not that he entertained any doubt, but being pressed by the argument that the practice in Ireland was different from that of this country, he properly used more circumspection where a legal title was affected. Thus, at the first hearing, and when the case was before him for the second time, when he was able to consider it further, he said he would not part with the case until a subsequent period; but at the same time, when the case was on rehearing, he stated his reasons, and all he subsequently said was to refer to these as his judgment, unless he should afterwards find any reason to differ from them. He, therefore, at the final consideration of the case, only stated shortly that there was no precedent found after a search which he directed, [92] and, consequently, that his former judgment, with the reasons, was to stand. Both with the reasons and the judgment I am well satisfied. Several arguments were urged below which were not urged here, and which could not be maintained at all.

His Lordship referred to the acts requiring registration of deeds in Ireland, and said the requirement of registration applied only to those matters which were capable of registry. The statute of 11 Anne, c. 2, had not been repealed by the subsequent acts on the same subject, it had only been extended. The statute of Anne contemplated equitable interests; it was as strong as words could be. (His Lordship read part of the fourth section.)

As to the matter of costs; an act of Parliament certainly might throw costs on any body, though a stranger, but to establish this it would be necessary to show it was clearly so intended. Such a case would be a little stronger than this contended for at the bar. The legislature might do an act like this, but unless it can be shown clearly that the legislature has so done, common justice, and common charity to the legislature, oblige us to assume that the legislature has not done so.

I am clearly of opinion that the judgment below is quite right on all the points, and so thinking I suggested to the Lord Chancellor that it was superfluous to hear the other side. The appeal must be dismissed, with costs.

Mr. Gerahty.—The term is gone, the lease having expired:—

The Lord Chancellor.—That is immaterial.

Mr. Gerahty.—There is a fund in Court as to the costs.

The Lord Chancellor.—Any application arising out of the judgment must be made to the Court below. We are only trying the propriety of the decree.

The decree was then affirmed, and the appeal dismissed with costs.

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[93] ANNE WILLOX and Another,—*Appellants*; ISABELLA FARRELL,—*Respondent* [May 6, 20, 31, 1847].

*Evidence—Interest of witness.*

To render a person incompetent in the Scotch courts to be a witness, he must have a direct and immediate interest in the result of the suit in which he is called to give evidence, or he must be able to give the verdict in that suit in evidence in his own favour in another proceeding.

An interest in the result of a suit, which is to render a person incompetent to be a witness, must be an interest of a substantial nature, and it must be the direct and necessary result of the suit.

The law was the same in England and Scotland upon this point previous to the passing of the 6 and 7 Vict., c. 85.

This was an appeal against an interlocutor of the Lords of the First Division of the Court of Session, by which they disallowed a bill of exceptions, presented by the appellants against a decision of Lord Robertson, pronounced by him in the course of a jury trial.

Alexander Wood, of Woodburnden in Kincardineshire, died, in September 1844, intestate. The respondent claimed to be nearest lawful heir to the intestate, as being a grand-daughter of a sister of James Wood, his father, and she caused herself to be served heir accordingly. To this service there was a regular retour, declaring her, in the usual manner, to be the nearest lawful heir to the intestate. The appellants instituted a suit to reduce this service and retour, and claimed to be nearest heirs to the intestate, as being the grand-daughters of George Wood, a brother of the said James Wood. A record was made up to try the question of pedigree thus raised, and the issue framed was, whether the appellants' ancestor, George [94] Wood, was or was not the brother of the said James Wood. If that question should be answered in the affirmative, then the appellants were, as descended from an uncle of the deceased, next heirs, and would be, as to his real estates, preferred to the respondent, who was descended from his aunt. In the course of the trial the appellants tendered as a witness Elizabeth Wood, their own paternal aunt. The respondent objected to the admissibility of this witness, on the ground that she had an interest in the issue of the cause, for if her evidence should establish the appellants' pedigree, she would thereby prove herself entitled to a share in the personal succession to the deceased. The Lord Ordinary refused to receive the evidence of the proposed witness. The objection was not made on the old ground of relationship, the law on that subject having been altered by the 3 and 4 Vict., c. 59, but upon the ground of interest, and was thus set forth in the bill of exceptions. The counsel for the respondent "objected to the admissibility of the said Elizabeth Wood, on the ground of interest, in respect that, if the appellants succeed in proving themselves heirs, the witness is one of the next of kin, and has an interest in the succession. The counsel for the appellants did not deny that in this view she would be one of the next of kin, but they denied that the proposed witness had interest in the issue in this cause, and, therefore, insisted that she ought to be received." This exception having been brought under the consideration of the Judges of the First Division of the Court of Session, the decision of the Lord Ordinary was confirmed by a majority of the Judges, consisting of the Lord Justice General, and Lords Mackenzie and Fullerton. Lord Jeffrey dissented. The case was then brought up, by appeal, to this house.

Mr. Wortley for the appellants:

The proposed witness was improperly rejected. This [95] was not a proceeding which concerned her interest, nor could she be directly benefited by the result. It was a proceeding to impeach the validity of a service of heir, and the truth of the retour to that service; Mrs. Elizabeth Wood could not claim as heir, and was neither benefited nor injured by the return to the service, which set up the title of heir in the respondent. She had, therefore, no interest in the suit, and was consequently admissible as a witness.

The judgment in the suit could not be given in evidence in her favour, or against her, for the suit related to the real estate of the deceased, to which it was not pretended that she had or could have any title.

The interest alleged on the other side, as affecting her admissibility, is too remote to be the ground of a legal decision. It merely amounts to this, that in a possible suit, to be instituted by her for the recovery of a share of the personal estate of the deceased, the fact that the issue in which she was called as a witness had been decided unfavourably for the respondent, and favourably for the appellants, to whom she was related as aunt, might operate to her advantage. This interest is not direct and immediate, which it ought to be, in order to disqualify this person as a witness (Tait's



Evidence, p. 349, edit. 1834; Stair, bk. iv. tit. 43, s. 7; Bell's Principles, ss. 2245, 2248). The same rule existed before the late statute, both in England and in Scotland; *Ralston v. Rowatt* (1 Clark and Fin. 424). That rule is, that the objection must be founded on an interest, not merely in the question under discussion, but in the event of the suit itself; *Bent v. Baker* (3 Term Rep. 27). The rule there laid down, has been acted on from that day to the present, Starkie (1 Stark. on Evidence, 19. Edit. 1842) and Phillips (Vol. i. p. 19). Here the witness could not be benefited by the [96] result of the cause; could not give the verdict and judgment in evidence in her favour upon another occasion; and had nothing more than a contingent interest in the question, and that, too, of a doubtful kind. Her testimony in this suit was therefore admissible, and the judgment of the Court below must be reversed.

Sir F. Kelley and Mr. Robertson (Mr. James Anderson was with them) for the respondent.

The object of the rules of evidence has, up to a very recent period, been directed to secure true testimony, by excluding witnesses who have a direct and personal bias operating on their minds. Generally speaking, it may be true that the rules of evidence are alike in England and in Scotland, but that proposition is not universally true, and was not so at the time when it was supposed to be so laid down in this House, for at that very moment the law of Scotland excluded from the witness box persons in a certain degree of propinquity to either of the parties in the suit, an exclusion wholly unknown to the law of England. Besides which, there is this distinction between the two cases—that in *Ralston v. Rowatt* [1 Cl. and F. 424], the proposed witness was called in a suit which, whatever might be its decision, was opposed to his interests, and must be got rid of before his claim could be enforced. Admitting, therefore, most fully the authority of that case, it may be contended that it does not govern the present.

The proposed witness had a direct interest in this case. If she could get rid of the heirship of the respondent, by which the respondent was to get the real estate of the deceased, she would, by the very same evidence, remove a bar to her own claim of relationship as one of his next of kin, and thereby sustain her own claim to a share of the personalty. So long as the retour, finding the respondent to be the heir to the deceased, was allowed to stand, there was an insuperable bar to the witness obtaining any part [97] of the personalty, and she had, therefore, a very strong interest to induce her to give evidence that would have the effect of annulling the service and the retour. She may, therefore, be said to have had an interest in the event of the very suit in which she was called as a witness. It was her interest to get rid of the service and retour; when they were out of the way, and not till then, she might hope to put in her claim. This is a sufficient interest to exclude her testimony—

[Lord Brougham.—That is but a contingent interest; must it not be a direct interest in the event of the suit itself? A man who had executed a deed might have an interest in getting rid of a witness who had attested it, but would that prevent such a man from giving evidence on an indictment for felony preferred against that attesting witness?]

The case supposed is hardly a test for the present. Here the interest of the witness is not to get rid of one of the means by which a possible liability may be enforced against her, but to get rid of an obstacle to her own claims, and at the same time to give a great degree of force, if not absolute conclusiveness, to those claims themselves.

The verdict on this issue might afterwards be given in evidence in favour of the person on whose evidence it was obtained. Suppose she had instituted a suit for her share of the personal assets of the deceased, the service and retour might be set up as obstacles to the success of her claim; these she would dispose of by showing the judgment which had declared them erroneous, and set them aside. She would then only have to prove her relationship to the person deceased, a proof which she had already given when called as a witness for the appellants, and in this way she would, by her own evidence, make out her own title to a share of the personalty.

Considerations such as these influenced the Court of Session in a case decided not long since, and which, it is submitted, is a direct authority in favour of the present [98] decision. That is the case of *Watson v. Watson* (15 Dunl. and B's, Cases in the

Court of Session, 753; 12 Fac. Coll. 719; 9 Scottish Jurist, 357). There a person tendered as a witness on an issue of propinquity, was objected to on the ground that she would thereby prove herself next of kin to the deceased, and so show herself entitled to her share of the personal estate. The same answer was made there as here, namely, that the verdict in that issue could not be used by the proposed witness in her own favour in any future proceeding, but that she must make out her title by other means. The Lord Ordinary held the person tendered to be incompetent as a witness, and the Court of Session, on bill of exceptions to this direction, confirmed it. The law in Scotland is, therefore, clear on this point. And when it is considered that in Scotland it is a presumption of law, that where a verdict is in accordance with the evidence of a witness, such verdict must be considered to have passed on that evidence, there can be no doubt that the decision in *Watson v. Watson* was correct. It is submitted that the Scotch law alone must be consulted on this case, and that the English decisions are not of authority upon it, and consequently that, in accordance with the decision just quoted, the judgment of the Court below must be affirmed.

Mr. Wortley, in reply, contended that the rule of law had been authoritatively laid down by this House in *Ralston v. Rowatt* [1 Cl. and F. 424], and that the case of *Watson v. Watson* being inconsistent with that decision, it was erroneous, and could not form any justification for the judgment now the subject of appeal.

The Lord Chancellor (May 31), after stating the circumstances of the case, said,—The question now is, whether the witness stood in such a situation as to make her incompetent to be examined upon the issue which had been directed.

[99] If the Scotch law upon this subject was the same as the law of England, the point would not require much argument, because it is quite clear that the result of the trial of the issue could not directly affect the interests of the witness, the issue to be tried being, whether the pursuers were the nearest heirs of the deceased. The only way in which the witness can be connected with the property is, that in the event of a certain pedigree being established, she will be entitled to a share of the personal property.

We had several cases referred to, and there is one to which I am particularly anxious to call your Lordships' attention, because it seems to me that, even if it is not directly applicable in point of fact, it clearly establishes the principle upon which this case ought to be disposed of. I mean the case of *Ralston v. Rowatt* (1 Clark and Finnelly, 424), which came to this House from the Court of Session. There the suit was instituted for the purpose of reducing a deed of settlement on the ground of deathbed by persons claiming to be heirs. A witness was called, who stated that the pursuer was not heir, but that he, the witness, was heir, upon which the objection was taken, that he could not be examined, and that objection prevailed in the Court of Session, but the judgment of that Court was reversed when the case came to this House.

When the case came here, the opinion of this House assumed that, upon a subject of this sort, there was no distinction between the law of Scotland and the law of England. It would, indeed, be very strange if there could be any such distinction, for the rules of evidence are not mere matters of local practice, but are rules adopted for the purpose of better ascertaining the truth upon subjects under investigation in courts of law, and I see that in the opinions of the learned Judges in the Court of Session, both in that case and the present, they, in arguing upon [100] the law, refer to English authorities, and that all of them, whichever view they take, recognise the principle that the same rule of evidence is operative, and ought to prevail in the two countries, I mean so far as regards the question under discussion, how far a witness is incompetent on the ground of interest. If that is so, it would lead to the clear conclusion that there certainly can be no objection to the admissibility of this witness upon the ground of interest, for no such objection would exist against her in this country. I am not now speaking of the late act of Parliament, but of the law as it stood anterior to that act, the act itself not being applicable to Scotland.

In order to see how far this question of interest applies to this witness, we must consider what the course of proceeding was in which the witness was called. The suit being a suit to reduce the service of the party claiming as heir, as a preliminary step; not for the purpose of deciding the question, but for the purpose of ascertaining

whether the appellants were in a situation to raise the question at all, an issue was directed to inquire whether the appellants are, or are not heirs, that is to say, whether they were in a situation to entitle them to challenge the service obtained by the respondent. I have before said, that the result of that trial could not by possibility be used for or against this witness, she having nothing to do with the heirship, though she might ultimately appear entitled to claim a share in the personalty of the intestate, on account of the pedigree on which the appellants sue in this action being the same as that which would entitle the witness to set up that claim. It is not attempted in argument to show that the result of the trial of that issue, in which the witness was proposed to be examined, could be used directly for or against her, but the argument stands thus: although the result of that trial could not be used directly for or against the witness, it would lead probably, and perhaps certainly, to this result in the suit itself, it would [101] reduce the service of the respondent, and though that would not at once operate for or against the witness, it might come circuitously into operation for the witness in this way; if, after the service had been reduced, the witness should institute a suit under a different jurisdiction for the purpose of establishing her kin to the deceased, so as to entitle her to a portion of the personalty, that would raise a question as to the pedigree under which she claimed being the same as that under which the appellants in this issue claimed. Then, it is said, if she sought to establish her title, it is clear that though this would not be direct evidence for her in proof of her own case, yet, should the service and retour, obtained by the respondent be produced as evidence to rebut the pedigree under which she claimed, she might, in order to get rid of the effect of that retour, produce the judgment obtained in the suit in which the issue had been directed. So that the result is that the effect of the verdict which might be obtained, if it should be obtained by means of the evidence tendered, or, at least, which the evidence tendered would contribute to obtain, would be ultimately and circuitously to make the testimony of this person a piece of evidence available for her own benefit, which, when the original service stood, it could not by possibility be. It is quite clear that that is not a species of interest which would prevent this person from being a competent witness. But then we are referred to the case of *Watson v. Watson* (15 Dunl. and B.'s, Cas. in the Court of Session, 753; 12 Fac. Coll. 719; 9 Scottish Jurist, 357), which, it is said, raises very much the same question. I do not enter into that case; it is a very recent decision of the Court of Session, and if the Court of Session has in this instance come to an erroneous conclusion in one case, there is not much wonder that it should have come to a similar conclusion in a case which occurred but a very few years [102] antecedently. In fact the conclusion to which the Judges in the Court of Session came in *Watson v. Watson* has probably led to the very error into which they have fallen in the judgment upon which we have now to pronounce our opinion. The case of *Watson v. Watson* is not a case of sufficient standing to show that the law of Scotland upon this subject is different from the law of England. But with respect to the other case, that of *Ralston v. Rowatt* (1 Clark and Finnelly, 424), I think that we are bound by the principles laid down there, from which I have no disposition to depart, and which places the law of Scotland on the same footing as the law of England in a matter of this sort as to incompetency of witnesses upon the ground of interest. If there was any balance between the two cases, the decision in the case of *Ralston v. Rowatt*, being a decision of this House, reversing a decision of the Court of Session, which involved the same objection as the present, would settle the question; and, therefore, I cannot think that the case of *Watson v. Watson*, which was relied upon by the Court of Session, ought to induce your Lordships to depart from the principle laid down in *Ralston v. Rowatt*, which establishes the principle necessary to decide this case, and declares that the law which prevails in this country upon the subject is also applicable to Scotland.

I therefore move your Lordships, that the judgment of the Court of Session be reversed, and that a new trial be directed.

Lord Brougham.—I am of the same opinion. It appears to me that the Judges in the Court below have been misled, partly by the case of *Watson v. Watson*, and partly by their Lordships not having formed a perfectly clear and accurate notion of the objection of interest in the question, as distinguished from interest in the

[103] result, which ought to exclude, and in England would have excluded, a witness prior to Lord Denman's late Act (6 and 7 Vict., c. 85), and which in Scotland is still an objection to the competency of a witness.

When I say that the Judges did not seem to me to have formed a perfectly clear notion of the objection raised, I go upon this, that the three learned Lords who chiefly refer to the case of *Watson v. Watson*, and even Lord Jeffrey (though he differed from the judgment of the rest), all consider, that, but for that case, it would have been a question of difficulty. I see no difficulty in it whatever. When I use that expression, my meaning is this:—The interest must be not only in the result, in the event of the trial of what their Lordships call the issue of the cause (and not simply an interest in the question), but it must be a direct and immediate interest; and it will not do to say that it removes out of the way, in another case which may probably arise, or may not, a difficulty at that time in the way of the party. That is not an interest which disqualifies a witness. It must be such a direct and immediate interest, that he may be said to be swearing for himself, or swearing against an adversary to himself, in any evidence which he gives.

The case which I put to the learned counsel in the course of the argument, I do not think was got rid of by observation at all. The argument here is, that the propinquity of the party giving the evidence might come in question in another suit, possibly in another Court, touching the personality, and, therefore, if the witness objected to, and upon whose evidence the question arose, gave evidence one way, namely, against the service, the result would be, that the service could no longer be given in evidence against her claim in the other suit; consequently, it was said that she had an interest in giving evidence against the service, inasmuch as she was removing, by her testimony, a possible obstacle out of her way in a possible [104] suit which she might maintain elsewhere, or in another Court, and *alio intuitu*, this being a suit respecting heirship, that being one respecting personal estate.

Nothing can be more clear than that a party may have an interest in getting rid of a witness, as well as in getting rid of documentary evidence, or a legal proceeding, such as a service and retour. If I am the obligor in a bond, and A. B. is the attesting witness to that bond, and there is no other witness, and it is a bond under twenty years old, and consequently must be proved by the testimony of a living witness, nothing can be more clear than that I should have an interest in disqualifying A. B. as a witness. Now, before the late act of Lord Denman, which is an excellent remedial act, and which removes the objection to the competency of a witness arising from a conviction for felony, nothing can be more clear than that, prior to that act, if A. B. had been convicted of felony, he could not be examined as a witness to prove any thing, even the execution of the bond. Suppose I had been called as a witness upon the indictment of A. B. for felony; can any body suppose that I could not have been examined as a witness, because the bond was produced in order to prove that he was an attesting witness, and that, therefore, I had a direct interest in removing him out of the way? "No," the Court would have answered; "this is an indictment for felony, and that question is a totally different one; it is a question respecting the possible interest which you may have in removing out of your way an instrument which is capable of being given in evidence against you. No such remote, possible, or contingent interest can be allowed to satisfy the demand of the law, which requires a direct, immediate, and certain interest in the party sought to be disqualified thereby."

The case of *Watson v. Watson* occurred in the year 1837, and their Lordships in the Court below seem to have been very much moved by that case. In the Court [105] below they seem to have considered themselves bound by it, but coming before us, we are not bound by it. Besides which, there is the other case of *Ralston v. Rowatt* [1 Cl. and F. 424], which is much stronger in favour of receiving the evidence, and against the conclusion at which their Lordships have arrived, than that of *Watson v. Watson* [15 Dunlop, 753] was for rejecting the evidence, and in support of their conclusion. The two cases cannot stand together. *Ralston v. Rowatt* is material, as showing not only what the English law would be upon this subject, but it is most material to show that there was no difference between the two systems of jurisprudence in this respect, because the English law principles were recognized in that case fully and conclusively.

But there is also another ground, besides the argument stated by my noble and

learned friend—it is not a matter of positive law, but it arises from the old and long established rules as to the reception or rejection of evidence which governed in this country—there is another reason for saying that the Scotch law is very much the same as the English law in this respect. When we look to old authorities in both systems of law—to Stair and to Bracton—we find that they adopt, almost in terms, the rule which in modern times is so clearly stated in that very well known case of *Bent v. Baker* (3 Term. Rep. 27), and which distinguishes interest in the event from interest in the question. That case had ever since been held to be the governing rule upon the subject, until objections, on the grounds of interest in the event and interest in the question, were all abolished by the salutary and remedial act of Lord Denman. One can hardly conceive a more direct interest, as far as bias upon a man's mind goes, than that was which existed in the case of *Bent v. Baker*. It was thus: the witness was called to prove circumstances tending to show that the underwriters to a policy, which he had pro-[106]-cured to be signed, were not liable to pay the loss upon it. He had himself, after getting the policy underwritten by others, subscribed his own name to it for a sum of £200, and on that subscription an action had been brought against him. He expressly stated that he expected to contribute to the expense of resisting the claim, and that he had, together with the other underwriters on the same policy, filed a bill of discovery against the assured. Yet he was held to be a good witness. Every one knows that where there is no consolidation rule, when there is a question between one underwriter and the assured, or between one party upon a policy and the assured, the evidence of another underwriter, or another party to the policy is admissible, upon the principle that, in such a case, there is only a bias arising from an interest in the question, and not in the event. If there had been a consolidation rule, it would have been different, for the proposed witness would have been, under that rule, a party in the cause, and the objection would then have assumed a very different and much stronger shape.

The Scotch law lays down the rule in words which are rather remarkable; it uses the expression, that it is not enough that the parties “fovent consimilem causam” (that is the expression of the old lawyers), but they must have an interest in the event itself, and so far, therefore, the principle of the Scotch law is precisely the same with the doctrine in the case of *Bent v. Baker* [3 T. R. 27]. I am, therefore, of opinion that, viewing this case both upon principle and upon precedent, there is no difficulty in it. I differ from their Lordships in the Court below, who think that there would have been a difficulty but for the case of *Watson v. Watson* [15 Dunlop, 753], which, in my mind, occasions none at all. If any case was cited such as *Watson's* is supposed to have been, on the one side, there is the case of *Ralston v. Rowatt*, which is a very strong and decisive case, on the other. By that we must be guided.

[107] Lord Campbell.—I am of the same opinion. I think that this person was a competent witness for the appellants upon the trial of this issue. With respect to the question of incompetency on the ground of interest, I apprehend that the law of England and the law of Scotland are exactly the same as the law of England was before Lord Denman's Act. It appears from the authorities in the institutional writers, to which my noble and learned friend has referred, that they very distinctly anticipate the rule laid down in *Bent v. Baker*, they show that interest in the question is not enough to disqualify, but that there must be an interest in the event of the suit.

When a witness is objected to on the score of interest, it must be on one of two grounds, either that the verdict, in accordance with the evidence which he gives, may afterwards be produced in evidence for the witness, or that the witness will, from the result of the suit, directly obtain a benefit, if the verdict shall be according to his evidence. Both of those grounds of objection have been made in this case, but it seems to me that neither of them is supported.

With regard to the objection that the verdict which may be pronounced for the appellants might be given in evidence in favour of the witness, I take it to be quite clear that that is untenable. Independently of any legal objection to the reception of such evidence, nay, even assuming that the verdict on the issue given on the testimony of this witness might be evidence in another case, the single circumstance of it being shown to have been obtained upon her evidence, would be enough to

prevent any weight being given to it; that, however, is not the ground upon which I rely. For it is quite clear to me that that verdict could not be given in evidence by Elizabeth Wood. In the first place, the verdict, *per se*, clearly could not be given in evidence, because the verdict would be merely upon the issue, "whether [108] the pursuers were cousins, and nearest lawful heirs portioners of Alexander Wood, the deceased," which, it is quite clear, could not be evidence to prove the title of the witness.

Then what could be given in evidence? The judgment? No. Supposing that the service is set aside upon the verdict pronounced upon the issue, what would be the consequence? The consequence would be that the service of the retour would be annulled, would be cassé, would be annihilated, and would be as if it had never had an existence. There would be no occasion to resort to the circuitous process of allowing the retour to be given in evidence, and then to give the judgment in evidence, whereby it had been cassé and destroyed. I take it that no professional man would venture to give the service in evidence with a knowledge of the fact, that it had been set aside by the solemn judgment of a Court. In no point of view then can the objection be maintained that the verdict, or the judgment upon the verdict, might be given in evidence in favour of the witness, if she should afterwards bring an action or institute some proceeding for the purpose of recovering a share of the personality of Alexander Wood.

The question then is reduced to this—whether Elizabeth Wood has any direct interest in the result of this suit; and it is stated in this way, that the result of this suit will be, that the service and the retour, which are a bar in her way, if she should set up her claim to a share in the personality, would be destroyed by the evidence which she gives. But let me suppose the necessary consequence of this verdict upon that issue to be that the service shall be set aside (I am not clear that that follows, but I suppose it to follow), what will be the consequence? It is merely that she, by her evidence, will get rid of a piece of evi-[109]-dence which would stand in her way if she should seek to recover a share of the personality. That is the strongest manner in which it can be put, that she is to get rid of a piece of evidence against her which would not be at all an insuperable objection to her claim, but which would simply stand in her way, and might be given in evidence if she should institute a process for the purpose of recovering a share of the personality. It would be very strange if that could disqualify the witness; because, supposing that the service is evidence upon a proceeding brought by her in respect of the personality (which the Judges below have not said), but supposing it was evidence, it would not weigh a feather, because these services, though they are receivable, are utterly immaterial; but, supposing that it could be treated as substantial evidence, it is only a piece of evidence, and is not conclusive proof. Although the service should be set up, she may yet be able to make out her claim to the personality, and, on the other hand, though the service should be set aside, she still may not succeed; therefore, the service, standing or being set aside, does not necessarily lead either one way or the other to her recovering or not a share of the personality. She merely gets rid of a piece of evidence which perhaps might otherwise, in addition to other more important evidence, turn the scale against her. That is the whole.

There is no case in England in which a Court has held that such an interest will disqualify a witness. The interest in the result of the suit must be an interest in the nature of something substantial—something in the shape of lands, or goods, or money—which shall come to the witness, or shall be lost by the witness, as the direct and necessary result of the suit upon the trial of which the person is called as a witness.

I think that the objection is untenable on either ground, [110] and that the judgment of the Court below ought therefore to be reversed. With regard to the case of *Watson v. Watson* [15 Dunlop, 753], I do not think it at all necessary to consider whether it differs or not from the present case, because even if it was on all fours with it, there are other cases laying down the opposite rule, which are equally in point, one of which, that of *Ralston v. Rowatt* [1 Cl. and F. 424], was decided by this House.

I am therefore of opinion that the decision of the Court below must be reversed. The interlocutor was then reversed, and a new trial directed.

[111] THE TAFF VALE RAILWAY COMPANY,—*Appellants*; WILLIAM NIXON and Others,—*Respondents* [May 3, 6, 1847].

[*Mews' Dig.* i. 48; xv. 1806, affirming 7 Hare 136. Considered in *South-Eastern Ry. Co. v. Martin*, 1848, 5 Rail. Cas. 478, 484; *Dabbs v. Nugent*, 1865, 13 L.T. 397.]

*Railway Contracts and Works—Complicated Accounts—Bill or Action.*

N. and S. contracted with a railway company, jointly and severally, to execute railway works, according to specifications and prices contained in a former contract between N. and the company. S. was to advance the money necessary for the execution of the works, and to receive from the company all monies accruing due from them in respect of the works, and apply them in discharge of N.'s liabilities under his contracts. S. became a bankrupt at the completion of the works, and the company, after paying him and his assignees part of the monies due from them, refused to account with N. for the balance, whereupon he filed a bill for an account against them and S.'s assignees:—

Held, that although the case against the company consisted of matters cognizable at law, yet as there were complicated accounts between them and the other parties respectively, a court of equity was more competent to take them, and to dispose of the whole case, than a court of law, and the bill was sustained accordingly.

This was an appeal from a decree of the Vice Chancellor of England, directing certain accounts to be taken, as hereinafter mentioned; and the question in substance was, whether an action at law was not a more appropriate course of proceeding than a bill in equity.

The appellants were a railway company, incorporated by act of Parliament. The respondent Nixon was a railway contractor, and by an indenture dated the 6th of April, 1838, and made between him and the appellants, being a railway contract in the ordinary form, he contracted to do certain works mentioned in the specification annexed thereto, for the sum of £7395 15s., subject to deduction or increase as in the contract [112] stated, and with a provision for payment for extra works, at prices particularly specified. Nixon having to some extent proceeded with the execution of the works, was under the necessity of procuring advances of money, and for that purpose applied to David Storm, who was also a railway contractor, to advance him sufficient money to complete the works, which Storm agreed to do, and accordingly an agreement was entered into,\* and a power of attorney, dated 8th December, 1838, was given by Nixon, which, after reciting the said contract and application to Storm for the advance of money, constituted him the lawful attorney of Nixon, to direct and carry on, in his name, the works comprised in the contract, and to demand, sue for, and receive from the company all sums of money which from time to time might become due from them to Nixon under the contract, and to give them discharges, and to compromise or refer to arbitration all disputes that might arise respecting the performance of the works, and also to pay for Nixon, out of the monies to be received from the company, all debts and just demands which might accrue to Storm or others, against Nixon during the progress, and until the completion, of the said works, and generally to do and perform all acts which Storm should judge necessary in and about the premises, and to retain to himself, out of the monies to be received from the company, £5 per cent. for interest on all his advances and £300 at the completion of the contract, for his care and attention in directing and carrying on the works.

Notice of the agreement and power of attorney was sent to the appellants, together with a letter from Nixon, re-[113]-questing them to pay to Storm all monies becoming due to Nixon on account of the contract.

In March 1839, an arrangement was come to by Nixon and Storm and the appel-

\* The agreement was a separate memorandum, explanatory and restrictive of the power of attorney, viz., that the same should not be acted on as regarded the managing and conducting of the works by Storm without Nixon's consent.

lants, by which a new contract between the appellants and them, as joint contractors, was substituted for the first contract with Nixon, and he and Storm, by the new contract, jointly and severally covenanted for the performance of the contract; and the appellants covenanted to pay them as well for the works then done and not paid for, as also for the works to be done by them jointly.

The works were proceeded with under this contract, Nixon having the management of the working part, but the appellants transacting all money matters connected with the contract with Storm.

In December 1840 a fiat in bankruptcy was issued against Storm, under which he was declared a bankrupt, and one Nicholas and two others were appointed creditors' assignees. There was also an official assignee.

In May 1842 Nixon filed his bill against the appellants and the said assignees, and thereby, after stating the instruments before stated, he made the following case, viz.:—That notwithstanding the last mentioned contract, the works were carried on by Nixon in the same manner as before; and he continued to carry on and execute the same from that time until both the specified works and the extra works were completed; that in January 1841 all the works were completed pursuant to the contract, and the extra works so performed amounted to the sum of £9133 2s. 1d., according to the schedule of prices annexed to the contract, and the specified works amounted to the sum of £7395 15s., making together the sum of £16,528 17s. 1d.; that during the progress of the works, and at the completion thereof, and before the 16th of December, 1840, Nixon and Storm had received various [114] sums of money on account of the contract and extra works, amounting in the whole to £9204 12s. 6d., and no more, so that there remained a balance of £7324 4s. 7d. due from the company to Nixon; that in the month of December 1840 Nixon had reason to believe that Storm was in embarrassed circumstances, and he requested his solicitor to give notice to the company not to pay Storm any more money in respect of the contract, and the solicitor wrote and sent a letter to the then secretary of the company, stating that Nixon had consulted him upon the situation of his affairs with Storm and the company, and his inability to obtain from the company an account of the monies paid by them upon the contract since the 11th of April last; that the consideration for the power of attorney from Nixon to Storm was Storm's engagement to advance Nixon all sums of money he might require, and inasmuch as Storm had not fulfilled his part of the engagement, Nixon requested that the company would not pay him any further sums on account of the contract, and also that they would furnish forthwith an account of the monies paid by them in respect of the contract since the 11th of April, 1840.

The bill next set forth a letter sent to Nixon by the solicitors of Storm's assignees, dated in May 1841, applying for authority to use his name as plaintiff in an action to be brought against the company, to recover balances due to Storm's estate in respect of works, money, and materials provided by him in execution of the contract and extra work thereon, up to the time of his bankruptcy; that Nixon declined to comply with that request; that after the works were completed, he sent to the company the particulars of his demand on them, and requested payment of the balance of £7324 4s. 7d., and the company then, and ever since admitted, that the whole of the work amounted to the sum of £16,528 17s. 1d.; and that Nixon alone, or he and Storm, were entitled to receive that sum, but they alleged that a much larger sum than £9204 12s. 6d. [115] had been paid by them to Nixon, and to Storm and his assignees, and a very small sum only remained due, or that the said balance, or the greater part thereof, had been in some manner settled or accounted for with Storm or his assignees, whereas he, Nixon, charged the contrary; and that if any further or other sum than £9204 12s. 6d., before mentioned, was paid by the company to Storm, the same was paid since the company received the notice of December 1840, or in respect of some other work done for the company, with which Nixon had nothing to do, and which was not connected with the said contract.

The bill further stated, that, in April 1842, Nixon's solicitor sent a letter to the company's secretary, demanding payment of the said balance, £7324 4s. 7d., and intimating, that unless some immediate arrangement was made for its payment, they would institute proceedings for its recovery; that the secretary to the company sent an answer by letter, which, after stating the effects of the first and substituted contracts, the power of attorney to Storm, and his bankruptcy, etc., concluded by saying the



settlement of the accounts was to be submitted to the arbitration of Mr. Robert Stephenson, and if Nixon had any claim on the company in common with Storm, the whole affair would be settled by the arbitrator; that after receipt of this letter, Nixon's solicitors inquired and discovered that the company and the assignees of Storm had agreed to refer all the matters of the said contracts, and many questions of account between the company and Nixon and the assignees, and other questions between the assignees and the company, to Mr. Stephenson, who was in fact proceeding to arbitrate thereupon, without the authority or consent of Nixon, and that it was the intention of the company to pay to the assignees whatever balance the arbitrator should find due; that all the money that was due from Nixon to Storm, in respect of his advances, had been paid to him or his assignees.

[116] The bill prayed that accounts might be taken of all sums paid by the appellants to Nixon and to Storm and his assignees, in discharge of the said sums of £7395 15s., and £9133 2s. 1d.; and of all monies advanced and properly laid out by Storm, on account of the works; and that the sums so received by him and his assignees might be set off against the sums so laid out by him, and the balance ascertained, etc.; and that the company might be restrained from paying any sums to the said assignees; and that they, the assignees, might be restrained from instituting any action or other proceeding against Nixon, in respect of the matters aforesaid.

The appellants, by their answer, submitted that the suit was improperly framed, that they had no connection or privity with the dealings and accounts between Nixon and Storm, and ought not to be parties to any suit in respect thereof; that Nixon was not entitled to any account or relief against the appellants in respect of the said contract and extra works, and the mixing up of such account with the pecuniary transactions between Nixon and Storm was multifarious, and they claimed the same benefit of such objection as if they had demurred to the bill; and they further said, that they and the assignees had agreed to refer all the matters of the contract to Mr. Stephenson, and he had made his award thereon.

The other defendants to the bill having also put in their answers, the cause came to be heard before the Vice Chancellor of England, who, in giving his judgment, observed that "he did not see in the case anything to distinguish it from the ordinary case of a person making a mortgage of his debt; and, that being so, it followed as a matter of right that Nixon ought to be a party to the settlement of that sort of double account, which would, first of all, have to ascertain what was due from him to his mortgagee, and then what was due from his debtors to him, in order that it might be seen what was the true state of the accounts [117] between the parties." His Honour, accordingly pronounced a decree, referring it to the Master to take the following accounts, viz.:—

An account of all extra works performed by Nixon for the Taff Vale Railway Company, under the said contract. An account of all sums of money paid by them to Nixon and to Storm, or either of them, on account of such extra works. Whether anything, and what, then remained due from the appellants in respect of the said extra works, having regard to the said payments. An account of all sums of money paid and advanced by Storm, to or on account of Nixon, to carry on the said works, as well extra as specified. An account of the corn, hay, and all other materials supplied by Storm, to or on account of Nixon, in carrying on such works. An account of all sums of money paid by the company to Storm on account of the contract: And whether any, and what, sum of money then remained due from Nixon to the defendants, the assignees, in respect of such advances and supplies of hay, corn, and other materials made by Storm on account of Nixon, and in respect of interest on such advances and monies chargeable for such supplies.

The appeal was against that decree.

Sir F. Kelly and Mr. Stuart (with whom was Mr. W. M. James) for the appellants:—

All the matters in dispute in this cause might have been easily disposed of at law if Nixon had allowed his name to be used in the action proposed by the assignees of Storm to be brought against the appellant:—

[The Lord Chancellor.—It may be a question whether matters so complicated as these accounts appear to be, were not fitter for a suit in equity than for an action.]

The only case made by the bill against the appellants was that of legal liability

to pay a legal debt under a contract for railway works in the ordinary form; and no case of account or other ground for equitable relief is stated by [118] the bill. If the contract was not under seal, the simplest form of action, an action for work and labour done, would settle the dispute as against the appellants. Then why should they be dragged into a suit in equity? As between them and Nixon, and Storm, these latter were joint contractors, having a joint interest in the contract, and it is wholly without precedent, and against the established principles of courts of equity, that, where there is a contract between an individual (or company) and a partnership, the mere occurrence of disputes between the partners, requiring the interposition of a court of equity as to partnership concerns, the individual who has entered into a contract with them, or any other debtors of the partnership, should be liable to be made defendants to a suit in equity for settling the partnership disputes. But even if there were some accounts to be settled with the appellants, it is not quite clear that a Master in Chancery would settle them better than a judge and jury. The only question raised against the company on the bill, was whether £9204 claimed by Nixon was due from them. That was a question for a court of law or for an arbitrator; and on the refusal of Nixon to lend his name for an action, an arbitrator, a most competent one for this purpose, was appointed, with the consent of all the parties except Nixon. A view of the works, necessary for the proper settlement of the accounts, was taken by the arbitrator, which a Master in Chancery would not do. The Master's Office is not a proper place for taking accounts of works under a contract, and of payments thereunder; and if any relief at all ought to have been given against the appellants, it should have been by giving such directions as would have enabled the question and amount of their legal liability to be tried in an action at law.

The complaint and case made by Nixon was twofold; first as between him and the company, secondly as between him and Storm and his assignees. This second case might be a fit subject for a suit in equity, but there [119] was no reason for dragging the company into that suit. Even if the Vice Chancellor was right in considering the case as to the appellants as the case of a mortgage of a debt due from them, it is without precedent, and would be of most dangerous results, to hold that a creditor, by his own act in mortgaging his debts, might transfer the jurisdiction as to all his debts to a suit in equity, and to an account in the Master's Office. The appellants ought not, in any view of the case, to have been made parties to a suit for taking the accounts between Nixon and the assignees of Storm. Such a suit is irregular and multifarious.

The state of the case was this:—Nixon and Storm contracted to do certain works for the company at specified prices, amounting to £16,000 odd; they admitted that the company paid £9000 odd, and the bill was filed for the alleged balance. Was not that a proper case for an action to recover the balance? If a suit in Chancery be held to be a more appropriate course of proceeding in this case, then every builder's bill of charges may be fit for a suit in equity:—

[The Lord Chancellor.—And properly so, if there be complicated accounts. It is here admitted that there are accounts between Nixon and Storm proper for a suit in equity, and that the money to answer these accounts, when taken, are in the hands of the railway company. Are they not in the position of stakeholders?]

The bill does not state a case of that nature—it does pray an injunction against the company's paying Storm; but they are not about to pay him, or his assignees, and no injunction was necessary, nor was it applied for. The reference to Mr. Stephenson was not impugned by the bill, which only seeks to restrain payment of what should be found due by his award: and the decree, while directing accounts generally as against the appellants of all the works and payments, omits to make any declaration as to the reference and the award made under it.

[120] It is of great importance to preserve the distinction between cases which are proper for a suit in equity, and those which may be disposed of by an action at law. That distinction was properly taken by Lord Chancellor King, in the case of *Dhegetoff v. The London Assurance Company* (Moseley, 83), which was affirmed in this House (*Nom. Marino de Ghettoff*, 4 Bro. P. C. 436), and in *Fall v. Chambers* (Moseley, 193). In both cases his lordship allowed demurrers to the bills, saying in the latter case, "If I should give way in this attempt, no action would ever be brought upon a policy, and a bill might as well be brought for payment of a bond, on suggestion that the witnesses

were abroad, etc. The jury will take the account, and consider of salvage, and all proper allowances, and do it in all such trials." It is not the practice of a court of equity to draw matters under its jurisdiction; and the question for the House to determine is, whether this case, though somewhat complicated as between Nixon and Storm, is not, as to the appellants, a case of simple facts, in which they were to make payments for certain works done for them according to contract. The demand against them is not to be split and apportioned between the joint contractors. It is desirable that some intelligible rule should be laid down by the highest tribunal for withdrawing cases like this from courts of equity. It is impossible for the respondents to put their case higher than that it is one of concurrent jurisdiction; but the appellants do not grant that. In a case in the Exchequer, *King v. Rossett* (2 You. and Jerv. 33), it was held that the further ingredient of the relation of principal and agent was not sufficient to entitle the plaintiff there to relief in equity if the account could be fairly taken at law, and a demurrer was allowed on that ground.

[The Lord Chancellor.—You did not demur.]

No; but the objection was raised in our answer, and we craved the benefit of it as if we had demurred. Our an-[121]-swer, having brought the award before the court, took the objection properly. How is that award to stand with Nixon's case? He should have first got rid of the award, which, if his bill be sustained, must be treated as a nullity.

[Mr. Bethell, of counsel for the respondents, said the award was not made when the bill was filed.]

It was made before answer put in, and no application was made to the court to stay the award by injunction or otherwise.

Mr. Bethell, Mr. Stinton, Mr. Peacock, and Mr. Whitbread, appeared for the various respondents, but were not called on.

The Lord Chancellor.—My Lords, having fully considered the arguments urged on behalf of the appellants in this case, it appears to me to be unnecessary to hear the counsel on the other side, and that, according to all the authorities, the decree is fully justified by the facts as they appeared before the Vice Chancellor.

There were some cases cited in order to show that there are instances in which a court of equity refuses to exercise any jurisdiction upon any matter of law. I have no doubt that is so; but the question is whether this is one of those cases.

Now I think the rule is very well laid down by Lord Redesdale in the case of *O'Connor v. Spaight* in which he says (1 Sch. and Lef. 309), "The ground on which I think that this is a proper case for equity, is, that the account has become so complicated that a court of law would be incompetent to examine it, upon a trial at *Nisi Prius*, with all necessary accuracy, and it could appear only from the result of the account that the rent was not due. This is a principle on which courts of equity constantly act, by taking cognizance of matters, which, though cognizable at law, are yet so involved with a complex account, that it cannot pro-[122]-perly be taken at law, and until the result of the account, the justice of the case cannot appear. Matter of account may indeed be made the subject of an action; but an account of this sort is not a proper subject for this mode of proceeding. The old mode of proceeding upon the writ of account shows it. The only judgment was that the party 'should account,' and then the account was taken by the auditor. The court never went into it."

That, my lords, is the rule applicable to questions of this sort; and it is quite obvious from the rule so laid down, that each case must be decided according to the peculiar circumstances belonging to it. It is, therefore, nothing to the purpose to show that there are cases where the court will not entertain jurisdiction, because it is a matter of law. Each case must be investigated, in order to see whether it comes within the rule laid down as that upon which a court of equity exercises its jurisdiction.

A very short reference to the facts of this case will show, beyond all controversy, that this is one of those cases. Here a contract was originally made by William Nixon with the railway company. A specification of the works to be done was appended to the contract. That certainly is complicated enough, as indeed all specifications of contracts are. It appears that he wanted money to carry into effect the contract which he had entered into, and he then applied to the other party, Storm, to assist him with

money, and he assigned to him, as security for repayment of the money so advanced, the payments which he might have to receive under his contract.

This went on for some time, and afterwards a new scheme was adopted for the purpose of giving to the party who so advanced the money the security of the payments which might become due from the company in respect of the original contract with Nixon. To this contract all three were parties. It was made in the shape of a joint contract, by which both the liabilities and the rights [123] arising out of the former contract were given up. The company on the one hand gave up their claim against the parties, and the parties gave up their claim against the company. The whole resulted in a new contract between the company on the one hand and these two parties on the other, by which they became joint contractors for the works which were to be performed under the contract originally entered into by Nixon with the railway company.

Now although that is in the form of a joint contract, and therefore gives to each party a right, independently of the other, to deal with the railway company, yet it is admitted, on all hands, that it was adopted for the purpose of adding to the security which Nixon was to give for the money to become due under the contract. But it appears that the other party was not only himself a party to the joint contract with Nixon, but that he himself executed work independently of Nixon. By this means there was an account between him and Nixon, and the company, on account of the contract in which Nixon was a joint contractor; and there was also an account of payments that became due in respect of the contract which he had formerly entered into. The company, however, as they admit in their answer, dealt with these as payments on account generally, and they say that they are unable to say whether those payments are to be referred to the one account or to the other; the payments were made by them as the monies became due, without reference to the particular works in respect of which they were made.

Then, not only is the account of this complicated nature between Nixon and the company, but as between the three there is the duty of ascertaining to what contract and to what works the payments made are to be referred; a question of account utterly impossible to be investigated at *Nisi Prius*, not only from the complicated nature of the original account of receipts and payments, but from [124] the mode in which the appellants, the company themselves, have dealt with the several contracts, not keeping distinct those payments in which Nixon was interested, but making them as payments on account generally, some of which might be referred to one account and some to another, but which they have not distinguished.

Under these circumstances Nixon files his bill, and asks for an account to be taken of what is due from this company in respect of the contract in which he was originally interested; and also for an account to be taken as between himself and the other party who had become interested in the account as security for the money advanced.

Looking at the rule laid down by Lord Redesdale, and looking at the facts of this case as they are developed in these papers, it appears to me clear that if ever there was a case which was quite unfit for a trial at law, and which necessarily became the subject of investigation in a court of equity, the facts of this case come within that rule; and that is the point for our consideration here. The appellants say, "You have no right to direct this account to be taken in equity; it is entirely a matter of law; let us go to law to try the question between us." I think that the Vice Chancellor was entirely right in the course that he took, and that the case ought to be investigated at equity.

I have therefore to move your lordships that the decree appealed from be affirmed.

Lord Brougham.—I have no desire to take any part in this deliberation, for this reason, that I did not hear the whole of the arguments for the appellants; but what I did hear, and my examination of the printed cases, have led me to the conclusion at which my noble and learned friend has arrived, that this is clearly a case for a court of equity, and one that is not fit to be sent to trial at law. [125] At the same time, as I did not take any active part during the argument, I shall decline entering further upon the case except to say that I entirely concur, as far as I have heard the case, in the observations which my noble and learned friend has made.

Lord Campbell.—My lords, having heard the whole of the argument for the appel-

lants in this case, and having considered it very carefully, I have come to a clear conclusion that this decree ought to be affirmed. I have great satisfaction in doing so, because if there really had been any technical rule whereby a bill in equity could not have been filed in this case, it would have amounted to a very great defect. For if an action at law were the only remedy in such a case, it really would amount, in my opinion, to a denial of justice.

I do not proceed merely upon the ground, which is stated in the case as having been taken by his Honour the Vice Chancellor; I proceed upon this ground, that here is a complicated account that could not by possibility be taken by a jury. The facts of the case, as stated by my noble and learned friend on the Woolsack, very clearly show that it would be mere mockery to bring such an action before a jury. What would be done if such an action were brought at *Nisi Prius*? I know that within five minutes from the opening of the case by the leading counsel for the plaintiffs, the judge would say, "If we sit here for a fortnight we cannot try this sort of case, and therefore it is indispensably necessary for the sake of justice—not to save us from the trouble of trying the case, which we are perfectly willing to take—but for the sake of justice, that there should be a reference to an arbitrator who will take accounts between the parties."

My Lords, in ninety-nine cases out of a hundred, that recommendation would at once be acceded to. Sometimes there is a wrong-headed client, who is fool enough [126] to resist such a recommendation, and to whom, according to a well-known saying that we have in Westminster Hall, it is necessary to use "strong language" to induce him to listen to the recommendation of my Lord the judge.

But, my Lords, it is quite clear that trial by jury never was meant for such a case, and it is wholly incapable of doing justice in such a case. Although a demand may resolve itself into a legal demand, still if there is such a complication of accounts that it is not a fit case for a trial at law, then according to the rule laid down by that most eminent judge, Lord Redesdale, a bill in equity is the remedy. That, if properly pursued, will be effectual, because that is followed by a reference to the Master, and the Master takes the account, and he does justice between the parties; he at once doing properly what, after great expense incurred by an action at law in bringing the case before a jury, would at last have to be attempted by arbitration.

My Lords, I may be allowed at this point to say that I think some important improvement might be made even with reference to this remedy of a bill in equity in a case of this sort; because I think it is an enormous hardship upon parties coming into the Master's Office, taking out warrant after warrant for months and years, and sitting an hour a day in a very complicated account. But if there were to be means taken, which I hope we may see taken in cases of this sort, first of accelerating the proceedings for bringing it into the Master's Office, and then, when it is in the Master's Office, going on continuously until the account is taken, speedy and ample justice would be done. This decision to which your Lordships are prepared to come, certainly will tend to facilitate these further improvements; and I only hope that after it is fully established that a bill in equity will lie in cases of this sort, the practice of bringing an action at law and incurring enormous expense, and then referring the matter to arbitra-[127]-tion will fall into disuse, and that at once, in a case of this sort, the remedy which is afforded by a bill in equity will be resorted to, and that then by some improvement in the mode of taking the account in the Master's Office, speedy and effectual justice may be done.

Under the circumstances of this case, it is quite clear that the account is of a very complicated nature, which could not by possibility be taken before a jury; and therefore I am very glad to find that according to the authorities and the established doctrine of a court of equity, a bill in equity may be brought in such a case, and on this ground I entirely concur in the motion of my noble and learned friend, that the decree of the Vice Chancellor be affirmed.

Lord Brougham.—My Lords, I rise only to mention a circumstance which my noble and learned friend reminds me of, that it was formerly so much a matter of course, when cases of this sort came before us at *Nisi Prius* upon the Northern Circuit, to refer them to arbitration, that we invented a phrase for it at consultation, the meaning of which was, that it could not be tried, and that the leading counsel for

the plaintiff would, what is commonly called, "open a reference." Now, the course ought to be a bill in equity; that is clearly the best remedy: and with my noble and learned friend I entirely concur, in the hope that we may live to see such an improvement in the practice as would eradicate all the abuse and stop all complaints against the Master's Office, and almost against the Court of Chancery—that of parties being obliged to go on, not *de die in diem* merely, but *de hora in horam*, as they do at *Nisi Prius* after due notice.

Lord Campbell.—I may remind your Lordships that the inadequacy of a jury to try such a case was felt so [128] strongly by the Common Law Commissioners appointed some years ago, that, to meet the case of an obstinate party who stood out against the recommendation of a reference, they recommended that an act of Parliament should be passed giving the judge power to force a reference; and such a bill was brought in, but it was opposed by high authority. There was, however, a great improvement made in the most preposterous rule of the common law as to revoking the appointment of an arbitrator. That improvement was introduced, but it was thought that it would be improper to give the power of compulsory reference. The bill therefore, after a good deal of deliberation in both Houses of Parliament, was dropped. I only mention that, in order to show the opinion that was then entertained of the extreme impossibility of a jury trying a case of this description. But if it could be taken speedily to the Master's Office, and the Master were then to sit continuously to dispose of it, I am sure that it would be a very great improvement in the administration of justice in such cases.

The decree was then affirmed, with costs.

[129] MARY WORDSWORTH and GEORGE WORDSWORTH, infants, by WILLIAM GILLETT, their next friend,—*Appellants*; FREDERICK WOOD and Others, —*Respondents* [May 17, 18, and 20, 1847].

[*Mews' Dig.* xv. 974. Contrary view to that taken by Lord Campbell in this case (1 H.L.C. 156), supported by long list of authorities collected in Williams, *Exors*, 9th ed., vol. 2, 1330, note (k); and see *Corneck v. Wadman*, 1868, L.R. 7 Eq. 80; *Marriott v. Abell*, 1869, *ib.* 478.]

*Will: Construction of the word "surviving;" to what period referable.*

A testator, after various bequests, gave to his wife, for her life only, all his remaining estates, and also gave her all his capital in trade, with the three quarters of the profits arising therefrom, for her life; but nevertheless, in trust, at her death, for his then surviving children, share and share alike, "independent of the rental of his said estates, which he gave and bequeathed to his surviving female children," to be paid to them as he directed. The testator then proceeded thus: "On the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, and from my last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them." One of the testator's daughters, after his death, married, and died in the lifetime of his widow, leaving children:—

Held, that such children did not take any interest under the will, the word "surviving" having reference to the death of the testator's widow, and not to his own.

The question in this appeal arose on a clause in the will of Mr. Joseph Wood, the maternal grandfather of the appellants, by which—after directing payment of his debt and funeral expenses, and an abstract to be made of all his property, estates, freehold, leasehold, ground rents, etc., as the property he had to bequeath—he gave and bequeathed to his son, Joseph Carter Wood, one quarter part of the profits of his

brewery in Westminster, and the [130] house adjoining the brewery, rent and tax free, so long as he should reside on the premises in the said house, to conduct the business; the brewery, store-houses, and other premises, to pay to his general estate £400 per annum rent for the same, net, and clear of all taxes; and he nominated and appointed his wife, Mary Wood, and his said son, his sole executors.

After other directions for renewing leaseholds held by the testator under the Dean and Chapter of Westminster, "so that the estates may be always kept renewed, that the younger children may have an equal benefit of time, and so to continue to be provided for, for ever;" and after gifts of freehold cottages to each of his sons, to give them votes for the county of Middlesex, the will proceeded as follows:—

"And now I do give and bequeath to my dear wife, Mary Wood, in trust for her life only, all my remaining estates, freeholds, leaseholds, ground rents, and reversions, rent charges, plate, linen, and the household furniture in the houses at Westminster, and Park House, parish of Hayes, county of Middlesex, with the pictures, and any particular articles she may be desirous of from my estates in Devonshire: As also, I leave, give, and bequeath to my said dear wife, all my capital in trade, with the three quarters of the profits arising therefrom, for her life; but nevertheless, in trust, *at her death, for my then surviving children, share and share alike, independent of the rental of my said estates, which I give and bequeath to my surviving female children*, to be paid them as follows, by my executor, J. C. Wood, or his heirs and assigns; that is to say, the whole rents and produce, share and share alike, of all such freeholds, leaseholds, ground rents and reversions, rent charges, plate, and household furniture, as before mentioned, but to have no power to sell, mortgage, or in any way whatsoever encumber the same; on the contrary, the rents of which I direct may be received by [131] my executor, J. C. Wood, and paid by him to them one month after each quarter day, that is, on the 25th of January, etc. On the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but *should they marry and have children, then their share to go to the said child or children*, and from the last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them. But, be it remembered, that my dear daughter, Mrs. Eliza Johnstone, is exempt from any benefit arising from this my will, the said Mrs. Johnstone having had her share of my property at her marriage, namely, an annuity of £200 per annum, which I do hereby likewise provide for, to be paid quarterly, from my share of three-quarters of the profits of the Westminster brewery; but I should recommend my executors to make a sinking fund immediately after my death, to raise a sum of £4000, which, when raised, I desire may be paid to Captain Hope Johnstone, and so redeem the annuity, that the estate may be free to fulfil my desires and requests, in this my last will and testament contained."

A memorandum, signed by the testator, at the foot of the will, contained the following:—"If my executors should think proper to buy up Eliza Johnstone's annuity, the £4000 so paid must be secured by trustees to the said Eliza Johnstone, for her whole and sole use and benefit, independent of her husband, and at her death to her children."

The will was dated the 23d of October, 1827; \* the [132] testator died soon afterwards, leaving Mary Wood, his widow, Joseph Carter Wood, his eldest son and heir at law, and four younger sons and seven daughters.

The testator, at the date of his will and at his death, was owner of a brewery in Westminster, and seized of a freehold farm and lands in Devonshire, a dwelling house and some land at Hayes, Middlesex, both in his own occupation, and divers tenements and ground rents in Westminster and at Bermondsey: also, possessed of divers leasehold public houses, and other tenements and ground rents in and about Westminster, some holden on lease for years, absolute or determinable on lives, from the Dean and Chapter of Westminster. Of the properties in and near Westminster,

\* The will being found not to have been attested so as to pass real estates, Mr. J. C. Wood, the testator's eldest son, in whom they consequently became vested, executed, in conjunction with others of the children and their mother, certain indentures, dated in 1831 and 1832, in such manner as to effectuate the testator's intentions.

part was held in connection with his trade of a brewer, and was treated by him as part of the capital employed in the trade; other part was not so connected, but held by himself or by undertenants, and forming part of his estate, independent of his trade.

Georgiana, one of the testator's daughters, married Mr. Charles F. F. Wordsworth, in 1834, having previously attained the age of twenty-one years; no settlement or agreement for a settlement was made, and she died in April 1837, during the lifetime of the testator's widow, leaving her said husband, and the appellants, her only children, surviving her.

In March 1839, the appellants, by their next friend, filed their bill in Chancery against the widow and J. C. Wood, and the other sons and the daughters of the testator, and other parties, stating (amongst other things) to the effect hereinbefore stated, and praying that the trusts of the will might be performed under the direction of the Court; and that the rights and interests of the appellants might be declared and ascertained, and that the usual accounts might be taken, etc.

To that bill the respondents, three of the testator's [133] younger sons, demurred for want of equity, and for multifariousness.

The Master of the Rolls, before whom the demurrer came to be argued, allowed it for want of equity, the counsel for the respondents having abandoned the demurrer for multifariousness (2 Beav. 25).

The Lord Chancellor, upon appeal, affirmed the order of the Master of the Rolls, but gave no costs (4 Myl. and C. 641).

This appeal was against both orders.

Mr. Hodgson for the appellants:—

This appeal is entitled to indulgence, although brought against two consecutive judgments of the Master of the Rolls and the Lord Chancellor. It arose on the construction of a will more than ordinarily obscure, being drawn unfortunately in language peculiar to the testator, of whose intention, however, to make provisions for all his daughters, transmissible to their children, there can be no doubt—as was observed by the Master of the Rolls. The appeal was advised by Sir W. Follett, of whose assistance the appellants are unhappily deprived.

It appears by the will that part of the testator's large property, freehold and leasehold, was held by him in connection with his trade of a brewer, and was treated by him as part of his capital employed in that trade; other parts, held by himself or his tenants, were considered by him as distinct from and independent of his trade; he calls them the rental of his estates—probably to denote that they yielded a rental which he spent—and it is with these that the appeal has to deal. The chief difficulty in the case is to determine the meaning of the words “my surviving female children,” which closely follow the words, “my then surviving children.” These last words clearly mean such of the testator's children as should be living at the death of his widow. The first step in our [134] argument is, that the two forms of expression being read separately, and contrasted with each other, the words “surviving female children” cannot have the same meaning as the words “then surviving children,” and consequently ought not to be construed “living at the death of the widow.” The next step is to show that the words, read in connection with the context of the will, lead to the same conclusion as when read separately.

The testator, in the first place, gives his freehold house in Bermondsey, and the Duke's Head, Westminster, to his eldest son, and one of his smaller houses at the back of the Duke's Head, to each of his younger sons (to give them votes), and the remainder (if any) of this estate (meaning, as it would seem, the estate at the back of the Duke's Head) to J. C. Wood. He then gives to his wife all his remaining estates, freehold, leasehold, ground rents, etc., for her life; and then he divides his property into two parts—one of which he describes as his “capital in trade, with the three-quarters of the profits arising therefrom,” and the other of which he calls “the rental of his estates”—meaning, probably, his estates yielding a rental. The former of these (the trade property) he gives, after his wife's decease, to his “then surviving children.” This, he says, is to be “independent of the rental of estates,” which he gives to the surviving (omitting the word “then”) female children. With reference to the trade property, there might be good reasons existing in the testator's mind for confining that gift to children living at the time of the devolution



of the property to them in possession, and for giving them absolute interests in it, in order to secure efficient management; but there was no such reason in regard to his estates unconnected with the trade, and the question therefore is, whether Mrs. Wordsworth's taking any share in the property yielding a rental, was to depend on the accident of her surviving her mother.

[135] The testator, in speaking of "the capital of his trade" and "the rental of his estates," does not keep them separate and distinct in all parts of the will, but sometimes mixes them together, so as to make it difficult to determine to what point the line of separation extends: but with all this confusion and obscurity, he appears to have a scheme in his mind including provisions for every member of his family—for all of them in classes. After the gifts of houses to his sons, to make them freeholders, and a quarter of the profits of the brewery to the eldest, he then makes provision for his widow and for all his children, male and female, who should be living at her death. There cannot be a question that the words "*then surviving*," are to be referred to the widow's death. The testator, at that part of his will, recollecting that, besides that general provision for all his children, he had previously given bequests to every one of his sons, seems to ask himself, what am I to do for my daughters? He then gives the rental of his estates to them, but not absolutely, as he had given the brewery property to his sons and daughters, but only for their lives, with a remainder—which, in the arguments in the courts below, was treated as a substitutionary clause—for their children.

Assuming, in the first instance, that it was a remainder, the first question is, whether it is clear and necessary to conclude that the testator has given his widow any interest in this "rental." There is a contradiction upon the face of the will certainly, but it is open to your Lordships, looking at what comes after the words "independent of the rental of my said estates," to say this, the rental of his estates was that part of his property which he had assigned for the surviving female children. If that could be established, then your Lordships would see there is no life estate, to the termination of which the word "*surviving*" can, with any propriety, be applied; and the words "*surviving female children*," must mean those female children [136] who were living at the time he made his will, or who should be living at the time of his death. That is a doubtful point, but it is worth consideration.

In giving the brewery property, at the death of his wife, to his "*then surviving children*," he took care to use words plain enough to express his meaning, but in the gift of the rental of his estates, he did not say "*my then surviving*," but "*my surviving female children*." When the testator made so marked a difference in his language, it is not unfair to conclude that he had something different in his mind, and that he did not mean the "*then surviving female children*," but some other class of his female children, and he describes them as "*surviving*."

This word in wills was, for a long period of time, considered to refer to the testator's death, as it does now sometimes, especially with regard to real estates; and it is to be observed, that this is, to a large extent, real estate. However, the testator has made a marked distinction between the two expressions, first saying, his "*then surviving children*," and immediately afterwards, his "*surviving daughters only*,"—the words are, "independent of the rental of my said estates, which I give and bequeath to my surviving female children, to be paid them as follows by my executor, or his heirs or assigns." Then he gives directions for quarterly payments to these daughters, some of whom were under age, without saying when the payments should commence; but there is nothing to lead one to the conclusion that he did not mean them to commence upon his own death. He does not positively say "*from my decease*," but neither does he say "*from the decease of my wife*," which one would have expected he would have said if he had so intended. The gift to the surviving female children is followed by a provision, that, "on the decease of any of these children," their shares should go to their children, or in default of such children, to the other females, daughters of the testator; and in [137] default of all of them, to the males, his sons. The context shows plainly that he intended this clause to apply only to that provision of which female children were the first objects—to those objects which were designated by the word "*surviving*," and not to those denoted by the words "*then surviving*." He gave their shares, if they should marry and have children, to such children, who were to stand in the places of their mothers,

and to take their shares; but if they should die without issue, then the shares were to go over from female to female, and, after the exhaustion of the females, to the males.

The obvious meaning of such a clause was to provide for the accident of a daughter dying, leaving children; and the words of the clause are general, importing the death of a daughter at any time—therefore in the widow's lifetime as well as after her death. But it is to be recollected that daughters are not excluded from the former gift to the *then surviving* children; it may therefore be inferred, that the testator had in his mind the probable event of a daughter dying in his widow's lifetime, leaving children; if not, why should he not have extended the clause to both devises; for (treating it as a clause of remainder or gift over) it was equally applicable to both? There were several reasons why such a provision was most needed, and most important, with reference to daughters who might die in the widow's lifetime. Yet, if the preceding gift—of which this was a qualification—was applicable only to such daughters as should survive their mother, this provision would be confined to those cases in which it would be the least necessary; which would be to impute to the testator an intention both contrary to the context of his will, and in itself improbable; for it is to be observed, that there is no provision in the will, unless this be one, for the children of a child dying in the widow's life, and no power given to the widow to provide against [138] such an accident. This provision was called in the courts below a "substitutionary clause." It is submitted that it was a clause in the nature of a remainder; that it would operate as a substitution in the case of a daughter dying in her mother's lifetime leaving children, but would equally operate in the case of a daughter so dying after her mother's death; and being confined by its language to the gift in which the objects are called "surviving female children," in contradistinction to that in which they were called "then surviving children;" the more proper construction is to consider the clause as pointing first and mainly to the very case which happened—the death of a daughter leaving children in the widow's lifetime.

The distinction between a substitutionary clause and a remainder, is, that under the former each party would take the same quantity of interest—supposing the testator's children not to take vested interests until the death of their mother—if one of them die leaving issue, which issue is in existence when the mother dies, then the grandchildren take their parent's share. The effect of a remainder would be, that, at whatever time the daughter dies, if she leaves issue, the issue succeed to her share. It is necessary to observe the language of the will. It is not "*in case of the decease of the children,*" but "*on the decease of these children,*" importing that at whatever time the decease might happen, then the child should take the share of the mother. That affords a very strong argument that the testator intended to give vested interests, during his widow's lifetime, to be enjoyed by the daughters after the death of their mother; to be enjoyed by them during their lives, and, upon their death, to go, by way of remainder, to their children.

The language of the will is, that the previous gift to the "then surviving children," is "independent of the rental of my said estates." The word, "independent," [139] there must mean, "with the exception of" the rental; it cannot mean that the same persons are to take both the gifts. It is sometimes said, "I give such an estate, independent of another estate," meaning an addition, and that both estates should be held together. But here, it is obvious, from the terms used, that the testator intended the word "independent" to be in the sense of "except." He excepts, out of the generality of the preceding gift, these estates, which he meant to go to his daughters. One part of the property was to go to the widow for her life, and afterwards to the children living at her death, but the other part, "the rental of his estates," he gave to his "surviving female children," a difference of language which was intended to establish a difference in the nature of the bequests. "Surviving" is not a conclusive expression; however, it has been held in many cases to mean, surviving at the testator's death, as in *Doe v. Prigg* (8 Barn. and Cress. 540), in which Mr. Justice Bayley said, "where you can give a vested interest, it is the habit of the law to give it as early as possible, and therefore to make a vested interest in such children as are living at the testator's death, and not to wait until the death of the tenant for life."

The terms in which the annuity to Mrs. Johnstone is mentioned, "which I do hereby likewise provide for, to be paid quarterly," indicate an intention to give present gifts to the other daughters, to take effect on the testator's death, and not on his widow's. The clause making provision for the children of the daughters, "on the decease of any of these children," not "if," or "in case of the decease," shows that the testator did not intend the event to be a condition, such as the survivorship of his widow, but that the provision for each donee should, on her death, go immediately to her children, and that construction applies to the children of Mrs. Wordsworth, on whose [140] death, without reference to any other event, it is submitted, they became entitled to her share of the rental of the testator's estates.

There is no head of the law on which there is a greater number of conflicting cases, or in which more nice distinctions have been made than on the term "surviving," as applicable to real and to personal estates. For a long time, words of survivorship, as applicable to both species of property, were held to refer to the death of the testator. That doctrine was subsequently broken in upon, with respect to personal estate, but is not yet entirely abandoned as to real estate, though there are conflicting decisions. In *Rose v. Hill* (3 Burr. 1881), a devise of real estates to the testator's wife for life, and after her decease, to his five children, by name, and to the survivors and survivor of them, was held to carry the property to such of the children as survived the testator. There is no reason for putting a different construction on the words used by the testator in the present case. Probably some of his daughters had died before the will, or he might contemplate the death of some afterwards during his own life. This view is supported by the case of *Wilson v. Bayly* (3 Bro. P. Cas. 195), in which this House, reversing a decree of the Irish Chancery, adjudged that each of the daughters surviving the testator took a vested interest in a third share of leaseholds, which, on her death, before the contingency—the death of two brothers without issue—happened, was transmissible to her representatives. It is evident that the House in that case considered the words of survivorship to refer to the death of the testator. It is most material to contrast that case with *Cripps v. Wolcott* (4 Madd. 11), in which Sir J. Leach held the survivorship to refer to the death of the tenant for life, the period of distribution. It does not appear that Sir J. Leach had the advantage of having [141] the case of *Wilson v. Bayly* brought to his attention. Nor does it appear that it was cited in this case, in either of the Courts below, which therefore, as well as Sir J. Leach in *Cripps v. Wolcott*, have unconsciously overlooked that solemn decision of this House.

The cases on this point are very numerous, but there cannot be a stronger authority for the appellants' construction than the case of *Doe v. Prigg* (8 Barn. and C. 231), in which many of the previous cases are brought together and reviewed in the judgment of the Court, delivered by Mr. Justice Bayley.

Suppose the parts of the clause were transposed thus:—"I give the rental of my estates"—no matter whether in possession or after the death of his wife—"to my surviving female children, independent of the profits of my brewery and the property connected with it, which I give, at my wife's death, to my then surviving children;" would not the words "surviving female children," brought to the attention in that way, clearly mean such female children as were living at the time the testator, made his will, or, at all events, at his death? The opinion of the Lord Chancellor, that the contrast and juxta-position of the words "then surviving," and "surviving" repeated in the next line without "then," showed that the same event was referred to in both the passages, was founded on the judgment of Sir W. Grant, in *Daniell v. Daniell* (6 Ves. 297). It may be said of that case, first, that it was certainly a strong decision; and, secondly, that it was very different from this, in which a fair comparison and contrast of the two portions of the gift lead to the inference, that the word "surviving" in the second portion was not intended to express "living at the widow's death," which was the meaning of the words "then surviving" in the first portion. And as it is not probable that the expression "surviving female children," with the clause of substitution, or rather of remainder, added to it, was used with [142] reference to such female children as should survive the widow, but rather to such as should survive the testator, but die in the lifetime of his widow; that construction ought to be given to it, and then it would take in the appellants' mother. It was not argued in the Court below, nor is it necessary

to contend here, that the widow did not take a life interest in "the rental," although the will on the face of it makes that a doubtful point; but, in either way, whether the daughters were to take in possession or in remainder, they were to take a vested interest for their lives, with remainder to their children. The object of the provision carrying over the shares of the daughters on their death to their children, was to provide for the accident of the death of a daughter at some period contemplated by the testator, most probably within, and not after, the widow's life time. The word "surviving" did not cause the vesting of the legacies in the children or female children to be contingent on their outliving the testator's widow, but pointed out when that interest should become one in actual possession, and did not prevent these legacies having vested previously to the widow's death, and consequently passing to the issue of these children or female children, supposing them to die in the lifetime of the widow. There is sufficient in the will to show an intention that these legacies should so vest.

There are authorities and principles which fully justify the adoption of the construction contended for by the appellants. It is material to remember, that the decision in *Cripps v. Wolcott* [4 Madd. 11], which is supposed to have turned the current of authority, was pronounced in ignorance of the decision of this House in *Wilson v. Bayly*, which is a governing authority, not to be overturned by a decision of an inferior court.

Mr. Rolt on the same side:—

The principal question is, to what period is the survivorship to be referred in the gift to "my surviving female children." There is a manifest difference between the words "my surviving children" and "the survivors and survivor of my children." If the former words be read without reference to the context—which is a proper and legitimate mode of construing a will—they mean my children who shall survive me; the period to which the survivorship refers is inherent in the very words, that is, the death of the testator; and so it was held in *Doe v. Prigg* (8 Barn. and C. 231), as already stated. The only other case in which that form of expression is found, is *Taylor v. Beverley* (1 Collyer, 108), which has no other application to the present case. The usual words in wills are "the survivors and survivor" of the class, as in *Roebuck v. Dean* (2 Ves., Jun., 265), *Brograve v. Winder* (2 Ves., Jun., 634), *Maberly v. Strode* (3 Ves. 450), *Perry v. Woods* (3 Ves. 204), *Russell v. Long* (4 Ves. 551), *Daniell v. Daniell* (6 Ves. 297), *Broune v. Bigg* (7 Ves. 279), *Newton v. Ayscough* (19 Ves. 534), *Cripps v. Wolcott* (4 Madd. 11), *Gibbs v. Tat* (8 Sim. 132), and *Williams v. Tatt* (2 Collyer, 85). (He stated and commented on these cases, and showed why some of them received a construction adverse to that contended for by the appellants).

It is apparent on the face of the will that the testator intended a separation of his trade property from his general property, which last produced "the rental;" and supposing, for the sake of the argument, that he gave his wife a life estate in both—but not abandoning Mr. Hodgson's argument, that she took no interest in "the rental"—and reading the words "my surviving female children" in connection and contrast with the preceding "my then surviving children," do we not find a manifest difference between the two gifts, the second being an exception of part of the property first given? "Independent of the rental" must be held to mean "excepting the rental;" so that there are two distinct gifts in different forms of expression. It cannot be said that the words "my surviving children," naturally and necessarily mean "my then surviving children." Why should it be inferred that a testator in using different forms of expression in gifts to different classes of persons, intended limitations of both on the same event? Is not the contrary the more natural inference, especially when the event expressed in the one gift is omitted in the other? We have no right to supply in the second gift an expression which the testator omitted. In *Daniell v. Daniell* (6 Ves. 297), the leading authority cited in the court below for construing two gifts in different forms of expression to be to the same class, the same expressions could not be applied to both gifts, one being given under a power, the other a gift of the testator's own property, which was a sufficient reason for the difference of expression in respect to gifts in all other respects identical. That case therefore is quite consistent with the construction for which the appellants contend, and also with the case of *Perry v. Woods* (3 Ves. 204), in which,

there being two gifts to different classes, as in the present case, the Court held that the period of survivorship fixed for one of them was not necessarily the period to which the survivorship in the other was to be referred. The authority of *Perry v. Woods* is recognised by Sir W. Grant in *Newton v. Ayscough* (19 Ves. 537), saying, "In *Perry v. Woods* the testator had by his will furnished evidence of his own intention with regard to the meaning of the word 'survivor.' Where he meant the survivorship to refer to the death of the tenant for life, he expressly declared that intention in two instances; and the omission of that reference in another in-[145]-stance, is an indication of a different intention." That observation is expressly in point here. Where two expressions occur in a will, each relating to survivorship, one pointing to a survivorship at a definite period, the death of the tenant for life, the other not referring to any period; is the juxtaposition of the expressions to have the effect of controlling the latter expression, and supplying words which the testator did not use? When we find the testator has used a clear and definite expression in the one gift, which exactly measures his meaning, and has omitted that expression in the other, is it not compulsory on us to say, that as he used language so different, we are not to alter it or supply the deficiency? So far as this juxtaposition has any effect, it has this only, that the one gift is to be considered different from the other, because, in fact, the language is different. Where the testator meant survivorship to refer to the death of the tenant for life, he expressly declared that intention, and the omission of that reference in the limitation of another gift is an indication of a different intention.

It is necessary to impress on the House that there are two distinct gifts to different classes; there are two species of property—the trade property, and the general property—and the wife is the tenant for life of both—let that be supposed. The parties who are to take in remainder are different; the trade property is given to the surviving *children*; sons are let in for that as well as daughters: that is one class of persons. The general property is given to the surviving *female children*, to daughters only, that is the other class. The testator intended the survivorship with respect to the one class, his children, sons and daughters, to refer to the death of the tenant for life. The distinct property which he gave to the other class, his daughters, he limited to them to be vested in them at his own death. It is idle to speculate on his motives; the question is whether he has not given to two distinct [146] classes of persons, and whether he has not used distinct language in his gifts to those two classes? We find the trade property given to the sons and daughters; the general property given to the daughters only. We find the trade property given to the sons and daughters living at the death of the wife; we find the general property given to the surviving daughters, that is, surviving himself, for he says, "my surviving female children." When your Lordships find two distinct species of property thus given to two distinct classes of persons, you will, if you affirm the order under appeal, unquestionably overrule *Perry v. Woods* [3 Ves. 204], overruling at the same time what Sir William Grant said of it in *Newton v. Ayscough* [19 Ves. 537], "that it is a sound rule of construction, if you find two gifts to two classes of persons, and the form of expression in the one gift is different from the expression used in the gift to the other; you are not to say that, because they are in some respects alike, they are the same in each; but the effect of the contrast is to lead you to conclude that the testator meant a different thing when he said a different thing: that in the one case he meant to give to the children living at the death of the wife, and in the other he did not mean that, because he did not say it." But we find other differences between these two gifts, the one gift being a gift absolute to the children generally, while the other, the gift of the general property to the daughters, is a gift to them for life only. That is a material difference, and when we find the testator making an entirely different series of limitations in the property given, we may naturally suppose that he intended different periods or events upon which they were to vest. There is no limitation over of the gift of the trade property, for the testator, after giving the general property and capital in trade to his wife, then says, "but nevertheless in trust at her death for my then surviving children, share and share alike, independent of the rental of my said estates which [147] I give and bequeath to my surviving female children." So that the gift of the trade property to the then surviving children is an absolute gift. There is nothing more said to cut down the interest

to the children surviving at the death of the wife, to a life estate—it is an absolute interest; not so with respect to the general property; “the rental of my said estates,” that is given to his surviving female children, to be paid them as follows: he fixes the times of payment, and then says, “on the decease of any of *these* children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child.” That limitation, or remainder, as it may be more properly described, shows that a life estate only in the general property was given to the female children. One may easily conceive reasons for giving the trade property absolutely to the survivors of the children after the wife’s death, excluding the children of such of them as should die in the lifetime of the tenant for life. It would be inconvenient to let infants come into the management of that property. But that would not apply to “the rental,” the general property which he gave to his daughters, and, on the decease of any of them, to her children. That property could be as well enjoyed by infants as by adults.

By the construction put by the appellants on the terms of the gift of the general property, every part of the context is in harmony; the remainder over—which was erroneously argued in the Courts below, as a substitution—fits in exactly with that construction; so that the circumstances of the case—the force of the words and of the context—enable the House to dispose of it without reference to the doctrines discussed in *Cripps v. Wolcott* [4 Madd. 11]. That case, however, is directly opposed to the decision of this House in *Wilson v. Bayly* [3 Bro. P.C. 195], and has not been unreservedly adopted by any judge. Sir J. Leach there said, he “considered it to be settled that if a legacy be given to [148] two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, the survivorship is to be referred to the period of division” (4 Madd. 15). How and when was it “settled?” In all the prior cases, as *Stringer v. Phillips* (1 Eq. Cas. Abr. 292), *Roebuck v. Dean* (2 Ves., junr. 265), *Maberly v. Strode* (3 Ves. 450), *Perry v. Woods* (3 Ves. 204), *Brown v. Bigg* (7 Ves. 279), and many others, the survivorship was held to refer to the death of the testator: those cases, in which it was referred to the death of a tenant for life, were distinguished by a direction to trustees, after the death of the tenant for life, to sell the property and divide the money arising from the sale among persons named, and the survivors of them; *Brograve v. Winder* (2 Ves., junr. 634), *Newton v. Ayscough* (19 Ves. 534), *Hoghton v. Whitgreave* (1 Jac. and W. 146). In *Russell v. Long* (4 Ves. 551), and *Jenour v. Jenour* (10 Ves. 562), to which Sir J. Leach referred for the principle of his decision, there was no question as to the death of the parties in the life time of the tenant for life, and they were not cases applicable to *Cripps v. Wolcott*, or to this case. Some cases subsequent to *Cripps v. Wolcott*, decided the same way, did not add to its authority, as *Pope v. Whitcombe* (3 Russ. 124), *Gibbs v. Tait* (8 Sim. 132) and *Williams v. Tarrt* (2 Collyer, 85), and they are opposed to *Doe v. Prigg* (8 Barn. and C. 231), which followed *Wilson v. Bayly*. The only difference between that case and this is, that that related to realty, this to personalty. In *Bindon v. Lord Suffolk* (4 Bro. P.C. 574), the House of Lords found a special intent in the will, and then referred the survivorship to that period.

[149] Mr. Turner and Mr. Bethell [with whom was Mr. Craig] for the respondents, in the course of their arguments;—which it is unnecessary to report, as they coincide with the two judgments reported in 2 Beav. 25, and 4 Myl. and C. 644—cited and commented on the cases there mentioned, and also *Hawes v. Hawes* (1 Ves. senr., 14), *Batsford v. Kebbell* (3 Ves., jun., 365), *Rose v. Hill* (3 Burr. 1881), *Leaming v. Sherratt* (2 Hare, 14), *Taylor v. Beverley* (1 Collyer, 108), and insisted that the case of *Wilson v. Bayly* (3 Bro. P. C. 194), so much relied on for the appellants, would, upon examination of it, be found in favor of the respondents, and that the judgment in *Doe v. Prigg* was founded on a misconception of that case.

Mr. Hodgson, in reply, contended that the bequest of the rental to the surviving female children was an absolute gift for life to such of them as should survive the testator, even if it must be held that it was not to take effect in possession until the widow’s death.

Lord Brougham (May 20).—This case comes before your Lordships upon an appeal from two consecutive orders of the Court of Chancery, one pronounced by the

present learned Master of the Rolls, and the other by my noble and learned friend on the woolsack, on an appeal from the order of the Master of the Rolls. These orders allowed a demurrer to a bill which was filed to establish the trusts of a will, the demurrer having been for multifariousness and for want of equity. I see by the printed cases that the parties demurring abandoned the demurrer on the ground of multifariousness; but so far as it went upon the want of equity, it was allowed; the result of which is that a construction has been put upon the clause of the will which has been before your Lordships in argument, [150] and to dispose of which construction now only remains for your Lordships.

The clause was, "As also I leave, give, and bequeath to my said dear wife, all my capital in trade, with the three-quarters of the profits arising therefrom for her life; but nevertheless in trust, at her death, for my then surviving children, share and share alike, independent of the rental of my said estates, which I give and bequeath to my surviving female children, to be paid them as follows"—omitting the word "then" which had been introduced into the preceding part of the clause, to qualify the words "surviving children," and which created an undoubted relation between the survivorship there referred to, and the determination of the life estate immediately preceding, given to the widow in the capital, with the three-quarters of the profits arising therefrom given for her life.

The question, therefore, is the shortest and the plainest in its terms that can well be imagined, for it only is, whether we are to take the words in the latter part of the clause, "my surviving female children," with or without the word "then," which had been prefixed to the words "surviving children" in the preceding part of the clause. Both the Master of the Rolls in allowing the demurrer, and my noble and learned friend in affirming that allowance, considered that the words "my surviving female children" in the latter part referred to the same period to which were referred the words "the then surviving children, share and share alike," in the former part of the clause; and, upon the best consideration which I have been able to give to the construction of this clause, and to the very able argument before us on the part both of the appellants and of the respondents, I feel no hesitation in arriving at the same conclusion to which both of the learned judges in the Court below came, namely, that the period of survivorship referred to in connection with the gift to the female children in the latter part of [151] the clause, is the period given to the survivorship of the children in the first part of the clause, that is, the determination of the life estate given to the widow.

I consider in the first place, that it is impossible for your Lordships to separate this into two distinct clauses or parts of the will, as if dealing first with one matter, and then with another unconnected matter. I cannot so read the clause as to consider that there is this difference between the two branches, and that you are to take it as if the testator first dealt with one subject matter in one way, and afterwards, without any immediate connection with the preceding matter, wherewithal he had dealt, that he was dealing with another separate subject matter. I take this to be one and the same clause, and it being so, very much aids the construction; because when a person has already specified his intention clearly, and in a manner to leave no doubt or difficulty, and upon which no dispute can be raised, he, in the same clause, in the continuance of it, in the remaining part of that portion of the provision of his will, naturally applies himself in the same manner to the subject matter, although he may not use precisely the same expression, and the close juxtaposition of the two clauses making one, accounts for his not repeating in the second, the very same words of which he has made use in the first part.

Then I think that upon all principles—not only the principles uniformly adopted in such cases, not only the principles upon which the Courts have always proceeded in dealing with such questions, but upon the plain principle of common sense—the last conclusion which you are apt to come to in considering what a testator meant when he talked of surviving persons, of surviving children, or of other surviving parties; the last construction which you adopt, and which you only come to when there is something that drives you to it in the words, is that he meant [152] the survivorship to refer to the period of his own decease, because every gift to a legatee, whether a child or other person, assumes, *ex vi termini*, that the party to take is a party surviving the giver of the gift, the testator. If in my will I give a legacy to

A. B., I need not say "at my decease," because it is, of course, that my will is to operate only at my decease; otherwise it would be a gift *inter vivos*. I need not say when I give to A. B., "I give to A. B. in case he survives;" that is assumed, because my will is to speak at the time of my decease. It is then, and then alone, that it can begin to have any effect, and, therefore, it is with a view to that period alone that I must be taken to apply myself in whatever expressions I use indicating the party who is to take, because I am supposed to be speaking, as it were, at the time of my decease, and to be arranging that which is to happen upon my decease. If, therefore, I mean that A. B. is to take in case he survives me, which no doubt I do mean, I assume that he is to survive me, and accordingly in all the cases (there are some exceptions to be pointed out, but they were altered upon appeal), in all those cases the presumption is that when "surviving" is mentioned, the surviving the testator is not the kind of survivorship which is meant, unless it is clearly shown that the testator did so mean, and that he used words which were totally superfluous. Otherwise in talking of survivorship he must mean some survivorship after another person than himself, or some survivorship relating to another period of time than his own decease [4 Madd. 11].

The case of *Cripps v. Wolcott* was referred to, which has never been overruled, which has never been materially doubted, though, indeed, there is found one decision of the same learned judge, that is incompatible with it (see *Home v. Pillans*, 2 Myl. and K. 15). That contradictory decision was overruled, and it was over-[153]-ruled very mainly upon the ground of its being totally at variance not only with all the other cases, but with *Cripps v. Wolcott*, and I agree with those who say that when Lord Eldon in the latter end of 1827, sent to the registrar his written judgment deciding a case (*Pope v. Whitcombe*, 3 Russ. 124) in which *Cripps v. Wolcott* had been cited in the argument, if he had disapproved of *Cripps v. Wolcott*, if he had held a totally different opinion upon that case he would have said so; but the case of *Cripps v. Wolcott* was referred to in that case, was argued upon mainly in that case as supporting the decision, and Lord Eldon does not appear to have taken any unfavourable notice of it in the argument which he used in support of the decision which he then gave and sent to the registrar.

I therefore take it to be clear, that we are not, without the most plain and manifest necessity, to be driven to consider that the testator, when he uses the words "surviving children," means children surviving himself. If indeed, there is no other period pointed out, either in that part of his will or in any other part of it, to which the word "surviving" can be referred; if it is clear that you can find no other period of time to which that word "surviving," or other words indicating survivorship can refer, then, going upon the common principle of giving effect to all the words which a man uses in his instrument, you must, whether you will or no, be driven to that conclusion, but, undoubtedly, it is not a natural one, and it is not one to which we should willingly come.

Now, is there, in this will, another period to which the words "surviving," etc., can be referred? Not only is there another period in the subject matter connected with the words in question, but there is another period in the same clause, immediately preceding the words in question, and giving the same parties an interest—a period already taken, [154] during which the estate, namely, the "capital and the three quarters of the profits arising therefrom," is given to the widow for her life, "but, nevertheless, in trust at her death for my then surviving children, independent of the rental of my said estates, which I give and bequeath to my surviving female children." I take it then that this refers to the immediately preceding period of time mentioned by the word "then," that is, surviving at the determination of the life estate, at the widow's death, the period immediately preceding, and which is referred to by the word "then" being admitted, in the whole argument on both sides, to be connected with her death, and with no other period.

A case was referred to of *Doe v. Prigg* (8 Barn. and Cres. 231), and the reasons given by the very learned judge who pronounced that decision do not appear very clearly to support it: I believe it is pretty certain that the reasons have not given satisfaction in Westminster Hall. I do not say that the arguments on the part of the appellants here cannot stand without the case of *Doe v. Prigg*, nevertheless, both



here and in the Court below, that case, it must be observed, was very much relied upon for the construction against the demurrer, which was allowed.

I have no doubt that a sound view has been taken in the Court below of this clause in the will, that it is one and the same clause, and that the demurrer proceeding upon that ground was properly allowed, I therefore move your Lordships that you affirm the orders of the Court below, and with costs. And my reason for saying "with costs," is this: the case was held to be doubtful enough in the Courts below, to justify the learned judges in both those Courts, not to fix the costs upon the party against whom they decided; but I do not consider that we should do well if we adopted in this House, which is the last resort, anything like a rule of disallowing the costs of [155] appeal, when we have no doubt on the grounds of our decision, merely because there were doubts sufficient to induce both the learned judges below in giving their judgments, to refuse the costs. I think it would be a perilous principle to lay down, and it is one upon which we never proceed, having really no doubt. On the question of costs it is to be observed that, as it stood below before the Lord Chancellor, there was then only the opinion of one judge; the Master of the Rolls was appealed from, and as there might be doubts there sufficient to justify an appeal to my noble and learned friend on the woolsack, he did not allow costs. But that argument fails when there are two judges consecutively of the same opinion; and I beg to observe that I cannot find in the judgment of my noble and learned friend, affirming the judgment of the Master of the Rolls, that he expressed any material doubt, except in so far that he thought there had been doubt enough in the Rolls Court, before the case came to him, to justify him in refusing the costs. When there are two consecutive judgments in this way I do not think that we ought to have any hesitation in abiding by the general rule, and giving the costs of the appeal. I therefore, in moving that your Lordships should affirm the order of the Court below, move also that it be affirmed with costs.

Lord Campbell.—I regret very much that I feel myself bound to come to the same conclusion. I should have been very glad, if consistently with the rules by which wills are to be construed, we could find any ground upon which these children should have a provision made for them, and probably the testator would be very much surprised if he found that they were wholly unprovided for; but as he has expressed his intention only by the words which he has used, we must construe the will which he has made, and we cannot make a will for him.

[156] It seems to me that the doctrine of the case of *Cripps v. Wolcott* [4 Madd. 11] does not arise here. When the same question does arise at your Lordships' bar, I think it will be for your Lordships to determine whether that case is or is not consistent with the former decisions of this House, upon which I will not now give any opinion. It seems to me that neither *Cripps v. Wolcott*, nor any of the cases that have been cited, throw any light upon this case.

With regard to the first part of this clause, no question arises, because the word "then" excludes all notions of our looking to the death of the testator as the period when the survivorship is to be ascertained. Therefore we need not at all refer to any authorities to construe that part of the clause, because the words are "for her life, but nevertheless in trust at her death for my *then* surviving children," which language certainly means, the children surviving at her death. But the real question is, whether, according to the language used, it is a new class to whom a benefit is afterwards given, or whether it is only a portion of the preceding class. Now, it appears to me upon the natural and best construction which I can put upon these words, that they do not introduce a new class, but that they only limit the benefit of the estates which are here mentioned. The words are, "independent of the rental of my said estates, which I give and bequeath to my surviving female children." There it seems to me that the testator only means a portion of that class whom he has before described. If that be so, the class whom he had before described are those who are to survive the mother. That therefore excludes those who are to die in the life time of the mother. We want therefore, no canon of construction, except that you are to put upon words the natural and grammatical meaning, unless there be something to show that a different meaning is to be attached to them. I think therefore, looking at the word "then" that it is necessarily implied, and that the effect of it is carried [157] on to the "surviving female children." Upon that part of the case I

have a very strong opinion. I own that I was at first struck with what might be the effect of what is called the substitution clause, and that it is possible in a will so very inartificially drawn, although there was to be no vested interest in the daughters until the death of the mother, that upon the death of a daughter in the life time of the mother leaving children, an interest might be given to those children. That depends upon whether "the children" shall mean *all* the children, or only the children to whom an interest was before given. I certainly at first, had some doubt on that subject, but on further reflection it seems to me that this is not a substitution clause, placing the children in the place of the parent, but that it is rather in the nature of a remainder clause, that of those who died having a portion, their portion was to go over to the children. We must of course look to the record and see how the will is set out. This coming on upon demurrer, we must consider in our judgments the words which the testator has used according to the bill, but I cannot help in my own mind considering that there is a word in the will which would exclude all doubt and all argument, because in the will it is "these," and not "the."\* But supposing it to be "the," I think the proper construction upon that word to be the same which was considered by the Master of the Rolls and by the Lord Chancellor, and therefore I think it must be limited to those children in whom an interest is vested, and as no interest vested in the daughter dying in the lifetime of the [158] mother, her interest is determined and therefore the appellants are not entitled to her share.

With regard to the costs, I very reluctantly coincide with the opinion of my noble and learned friend. It seems to me that as this was a will of a very inartificial nature, and that as doubts arose upon the construction of a will so inartificially drawn, it was very fair that the opinion of the Lord Chancellor should be taken as well as the opinion of the Master of the Rolls; but really I think the appellants ought to have been satisfied with that, and I therefore feel myself obliged to come to the conclusion, that this order should be affirmed with costs.

The Lord Chancellor.—This being an appeal from a decision of the Court of Chancery at the time when I presided in that Court, I was very anxious to hear the opinions of the noble and learned lords before I expressed an opinion of my own. Having heard those opinions, and having very carefully attended to the arguments at the bar, I do not see any reason to alter my former opinion upon this case, and with respect to the question of costs, I agree with my noble and learned friends that the judgment should be affirmed, with costs.

The orders appealed from were accordingly affirmed, with costs.

#### [159] BROOKS' DIVORCE BILL [June 1, 1847].

[Mews' Dig. vii. 952. See *Martin's Divorce*, 1 H.L.C. 79; *Heneage's Divorce Bill*, 1 H.L.C. 496.]

#### *Divorce—Action for damages—Lapse of time.*

The wife's general bad conduct admitted as an excuse for the husband's omitting to bring an action against the adulterer.

A lapse of eight years from the discovery of the wife's adultery till the petition for a divorce was presented, sufficiently accounted for by the husband's inability to bear the expenses of a divorce bill.

It appeared, from the evidence taken on the second reading of this bill, that the

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\* A doubt arose in the course of the argument whether, in the clause, "on the decease of any of *the* children," etc., "these" was not the word used by the testator; and so it appeared on production of the original will; but the bill, copying the clause from the probate, had "the;" and their Lordships held that, as the question came before them on demurrer to the bill, they should take the word to be "the."

parties were married in 1834, and lived together till 1838, when an alteration was observed in the wife's conduct, in consequence of "her unfortunate propensity to drinking wines and spirits." It was suggested that she might derive some benefit from a sojourn at Gravesend, and her uncle, who was also her husband's uncle, accompanied and left her there. It was soon afterwards discovered that she carried on an adulterous intercourse with a Mr. M., a person of substance, living at Gillingham, in Kent, whom, according to her own admission, she met in the boat that took her to Gravesend.

The husband on that discovery ceased to live with her: he commenced immediately a suit for a divorce *in Doctors' Commons*, which he obtained in due course; but did not bring an action against the adulterer, because it was the opinion of his brother and solicitor that the wife's "general conduct was so bad, that it would not be advisable to bring an action." His circumstances from that time (1830) to this (1847), would not bear the expenses of a divorce bill.

The bill was read a second time, and afterwards passed.

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[160] HENRY TOMMEY,—*Appellant*; JAMES WHITE and Others,—*Respondents*  
[July 8, 1847].

[Mews' Dig. xi. 620, 630. See 6 Cl. and F. 786; 3 H.L.C. 49; 4 H.L.C. 313.]

*Bill of review.*

To sustain a bill of review proceeding on facts discovered subsequent to the decree complained of, it must be shewn that leave of the court to file it was regularly obtained.

To sustain a bill of review for error apparent on the decree complained of, it is not enough that it contains allegations that the decree is erroneous, but error must be shewn on the face of it.

The appellant commenced the business of an hotel-keeper in Dublin in 1832, in a house and premises held by him from a Mr. Milliken, one of the respondents, for a term of thirty years; and in 1833, being indebted to several persons, he demised the hotel, and assigned the furniture, plate, linen, etc., to James White and two others, respondents, upon trust for the benefit of the creditors. The trust deed contained covenants to the effect that the appellant should continue for five years and eight months to manage the hotel (on the assumption that the debts would be paid in that time); and in case he should not pay due attention to the business, the trustees might, after giving him three months' notice, sell his interest in the term, dispose of the furniture, plate, etc., and divide the proceeds among the creditors. Differences soon arose between the appellant and the trustees, who, in April 1834, filed a bill against him, charging various breaches of his said covenants, and praying that they might be at liberty to sell the hotel and trust property, and for a receiver and an account, etc. The cause came to hearing in January 1835, before the Lord Chancellor, who made a decree according to the prayer of the bill. The appellant [161] then filed a cross-bill, or bill of review and supplement, against the trustees, besides other proceedings (6 Ir. Eq. Rep. 303); and against the orders made on them, he, in 1839, brought an appeal to this House, which dismissed the same, and remitted him back to the Court of Chancery in Ireland (6 Clark and Fin. 786).

It did not appear by the appellant's printed cases what proceedings, or whether any, were taken by him from 1839 till 1844, when he filed a new bill against the trustees and Milliken, the landlord, purporting to be "a bill of review and reversal," in which he stated the said bill by the trustees, his answer thereto, the decree, and the Master's report in pursuance thereof, and the decree on the merits, also stating the intermediate and subsequent proceedings in that cause, by way of supplement, and with leave of the court, and alleging and charging many irregularities all through them, and various errors in law and fact in the decree of January 1835, and that it was based on fraud, corruption, collusion, and misrepresentation of the

trustees, aided by the co-operation of the appellant's law agents, but which he did not discover until 1837.

One of the errors charged by this bill was that the decree directed a sale of the hotel and effects therein, "whereas the appellant faithfully performed his covenants:" another was, that as by the deed of 1833, it was stipulated that the appellant should have the management of the hotel for five years and eight months, for the purpose of paying his creditors out of the profits, the Court had not in 1835 acquired jurisdiction over the property, so as to vary the said deed and direct a sale. And finally, the appellant submitted and insisted "that error is apparent upon the face of the said decree, inasmuch as it thereby appears that only a portion of your suppliant's evidence was read on the hearing of the said [162] cause; and that the said decree recites that such decree was pronounced by your Lordship upon full debate of the matter, which was not the case, as a great portion of your suppliant's evidence was not read, and which practice is contrary to all principles of equity; and your suppliant charges, that the said decree is further erroneous, inasmuch as, if the whole of your suppliant's case had been submitted to your Lordship at the hearing of the said cause, the same does not appear on the face of the said decree." The bill prayed for a rehearing of the cause, and a reversal of said decree.

The respondents, White and the other trustees, put in a demurrer to the bill, for want of equity and other causes, and the respondent Milliken put in a like demurrer.

Both demurrers were heard by the Master of the Rolls, and allowed, with costs, by an order dated the 30th January, 1845; which was affirmed on appeal by the Lord Chancellor by an order dated the 14th February, the same year.

The present appeal was against these orders, and also against the decree of 30th January, 1835.

The appellant undertook to argue his own case.\*

[163] There was no counsel or agent for any of the respondents, nor did it appear that they lodged cases or put in answers to the appeal.

The Lord Chancellor.—It is much to be regretted that the appellant, not appearing by counsel, has not been able to put your Lordships fully in possession of the facts: [164] your Lordships can only judge of them from the proceedings which are brought under your consideration by the printed cases. Certain proceedings took place in the Court of Chancery, under which property, to which the appellant was entitled, was decreed to be sold for the purpose of payment of his creditors. By that decree, made in 1835, the rights of the creditors, as they were supposed to exist, were enforced. The appellant brought that decree before this House in the year 1839, irregularly and without advice; the result of which was, that the House was under the necessity of dismissing that appeal. What has taken place from that time to the present does not appear. But ultimately he filed, what has been called a bill of review, the bill appearing on the face of it to be a bill of review; but the appellant on being asked

\* It was impossible to arrange the appellant's statements into the form of an argument. The reasons subjoined to his case, signed by Mr. C. P. Cooper and Mr. Bilton, were, "1st., because the decree of January 1835 is contrary to the terms of the trust deed May 1833; and, in particular, that no sale ought to have been directed to be made of the hotel and trust property until the failure of a certain income within a given time, which time had not arrived when the decree was pronounced; and because, if such time had arrived, and such income had not been produced, no such sale should have been directed to be made, unless such failure had been caused by the act or misconduct of appellant; 2d., because it was provided by the said deed, that if the time should have arrived when the trustees might claim to sell the hotel and property, then three months' notice in writing of their intention to sell should have been served on the appellant, whereas no valid notice had in fact been served, or if it had, the same had since been waived and made void by the subsequent acts and agreement of the respondents; 3rd., because the deed gave the appellant five years and eight months to carry on the business in the hotel; and if even he had committed a breach of the covenants, but which he submitted he had not, no penal provision was contained in the deed to the effect that a breach of covenants

at the bar what kind of bill of review it was intended to be, whether he intended it as a bill of review proceeding upon facts discovered since the decree complained of, or as a bill of review upon error apparent on the face of the decree, his answer was that he proceeded on both. I do not say that it is incompetent to a party to unite both those matters in one bill, but a party cannot file a bill of review upon facts discovered since the decree, without first submitting those facts to the consideration of the Court, and obtaining an order from the Court giving him liberty to file such a bill. It does not appear that such a proceeding has been adopted, or that any such order has been obtained, consequently he is necessarily confined to the other part of the case, namely, to showing that this was a bill of review upon error apparent upon the face of the decree.

When that part of the bill, which alone proceeded to bring forward error in the decree, came to be investigated, it appeared that the allegations were not allegations of error apparent on the face of the decree, but complaints made of the decree itself being erroneous, that is to say, [165] that the decree ought to have been different from what it was, being in fact that which can only be discussed on appeal, and not being the subject matter of a bill of review.

In order to satisfy the appellant that this was the rule, and that in confining him to that species of error, the House was only following a rule laid down in other cases, I referred him to the case of *Haig v. Homan* (8 Clark and Fennelly, 321), which, amongst other things, decided that "the mere propriety of a former decree cannot be questioned by a bill of review, it is only where error is on the face of it that such a bill can be sustained." All the allegations therefore complaining of a former decision as having been erroneous, not showing that the errors appeared upon the face of the decree itself, were of course matters which the House could not attend to in this appeal. I observe that in moving the judgment of this House in *Haig v. Homan*, I stated, "I have been induced to enter fully into an examination of the proceedings in this case, not from any difficulty in the order to be made, but because many of them, particularly that which has been called a bill of review, show that there has been a want of that precision in these pleadings, and of that accurate view of the principles and practice of Courts of Equity, which is essential to the proper administration of justice" (*id.*, p. 373).

My Lords, such being the rule of practice, and the appellant having had ample time allowed him to point out allegations in this bill; for the purpose of showing that there was error in the decree, apparent on the face of it, it is a matter of necessity, in order to preserve a uniformity of practice, that the rules laid down for the benefit of suitors, and which cannot be departed from—although the person appealing, on account of his poverty, states his own case—should be adhered to. It is necessary to adhere to the ordinary forms of proceeding; those [166] forms have not been adhered to, and he has not brought forward such a case by bill of review as would give the Court of Chancery in Ireland jurisdiction to investigate the matter. The Court of Chancery was of that opinion, and has acted upon the established practice

should deprive the appellant of the possession of the hotel, which was secured to him for that period by the deed."

The reasons against the orders allowing the demurrer were, "1st., because the bill of review distinctly stated and charged that the jurisdiction assumed by the Court of Chancery in January 1835 was erroneous in law and equity, and that error in law is apparent upon the said decree; and the bill of review made out a case of fraud and collusion, which called for an exercise of the jurisdiction of the Court, in un-kennelling matters of fraud; 2d., because all the proceedings in the cause, wherein the said decree was pronounced, were vexatious, unnecessary, and in direct violation of the terms of the trust deed, and were had by surprise, and were the result of fraud, covin, and misrepresentation; and were instituted by the respondents, plaintiffs in that suit, acting in collusion together and with Milliken, co-defendant of appellant in that cause; and the bill of review contained statements and charges to that effect, and, also, further statements and charges, from which it clearly appears, that the appellant was entitled to the discovery and relief thereby prayed, which statements and charges ought to have been taken to be true for the purposes of the demurrers.

of the Courts of Equity. I therefore move that the judgment of the Court below be affirmed.

Lord Brougham.—I entirely concur with what has fallen from my noble and learned friend. Although a person who is not possessed of the means of obtaining the assistance of counsel is permitted to appear in person as a suitor, yet it is necessary to adhere, both in the Court below and in the Court of Appeal, to those rules which have been adverted to by my noble and learned friend: else the utmost confusion would take place, and the greatest mischief would result to suitors. Those rules have been framed not for the convenience of the Court, but entirely for the benefit of the suitor. It is necessary that such rules should be laid down, and that when they have been laid down they should be enforced; and to say that, because a man is poor, he should be set free from those rules, would just lead to this, that the rules would soon cease to exist, for every party would be at liberty to plead poverty.

The decree and orders appealed from were then affirmed.

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[167] The Honourable RICHARD BOOTLE WILBRAHAM,—*Appellant*; CHARLES SCARISBRICK, Esq., and Others,—*Respondents* [May 14, June 24, 1847].

[Mews' Dig. xv. 1844. Discussed and adopted in *Meredith v. Treffry*, 1879, 12 Ch.D. 173; and see *Sandeman v. Mackenzie*, 1861, 1 J. and H. 628.]

*Will—Shifting Clause—Younger Son.*

In construing a will, the words "younger son" used by the testator in a proviso for the shifting, in certain events, of an estate thereby devised, are to be taken in their plain and ordinary sense, as meaning "younger in order of birth," unless it satisfactorily appears from other parts of the will that they were used by the testator in another sense.

This was an appeal against a decree of the Chancellor of the Duchy Court of Lancaster upon the construction of a shifting clause contained in Mr. Eccleston's will (the subject of a former appeal) (see 5 Clark and Fin., 398), and the question was whether the words "younger son," should be construed as meaning "younger in order of birth," or "younger," that is, "posterior" in order of limitation.

The testator, at the date of his will, had seven children living, born in this order:—Thomas, Ann, Mary, Elizabeth, Catherine, William, and Charles (the respondent); and being seised of or entitled to large real estates in Lancashire and elsewhere, he devised them all to Edward Bootle Wilbraham and another, on trust, as to those which he called his Scarisbrick estate, to convey and assure the same (subject to a term) to the use of his eldest son Thomas, for his life, and his first and other sons in tail male, with remainders to William and Charles, and every subsequently born son of the testator successively, and [168] their respective first and other sons in tail male; remainder to the first and other sons of Thomas in tail general; with like remainders to the first and other sons of William and Charles, and every subsequently born son of the testator; remainders to the first and other daughters of Thomas, William, and Charles, and of every subsequently born son of testator, respectively and successively in tail; remainder to the use of testator's daughter Ann, for life, and her first and other sons successively, first in tail male, then in tail general; remainder to her daughters as tenants in common in tail, with similar remainders to the use of Mary, Elizabeth, and Catherine, and every subsequently born daughter of the testator in the order of her birth, and their respective sons and daughters in succession, with other remainders not material to state; and with proviso that Thomas and every person becoming entitled to said estate should take and retain the name and arms of Scarisbrick only.

And as to those estates which the testator called his Wrightington estate, he directed the trustees to convey and assure them (also subject to a term) to the use of his sons and daughters born and to be born, and their issue, in the same manner as the Scarisbrick estate, except that William, the second son, and his issue, were to

take first and Thomas last, of the sons, and Thomas's second and other younger sons before his first; and also that Mary, the testator's second daughter, was to take first of the daughters, and Ann last. The settlement was to contain a shifting clause to the effect, that if William or Charles, or any subsequently born son of the testator, or his daughters, Mary, Elizabeth, or Catherine, or any subsequently born daughter, or any issue of his said sons or daughters, should become entitled to the Scarisbrick estate, under the limitations before stated, and any younger son or daughter of testator, or any issue of such younger son or daughter should be then living, the uses of the [169] Wrightington estate to the child, who or whose issue should so become entitled, should cease; but if that estate should have shifted to Charles, or any of the testator's subsequently born sons, or to Elizabeth or Catherine, or any of his subsequently born daughters, or any issue of the respective bodies of his said sons or daughters, and should there be failure of issue of all his sons or daughters, younger than the son or daughter from whom, or from whose issue, the same should have shifted, then the Wrightington estate should return and remain to the uses to which it would have gone if there were no proviso for shifting. This settlement also was to contain a proviso that every person becoming entitled to the Wrightington estate, except Thomas and his issue, should take and retain the name and arms of Dicconson.

And as to the testator's other estates, which he called his Eccleston and Sutton estates, he directed his trustees by sale or mortgage to raise out of them sums sufficient for paying his debts, legacies, etc., and for securing provisions for his subsequently born sons, and for his daughters: and in case the residue of these estates should not exceed the value of £15,000, he declared that his trustees should stand seised thereof in trust for his son Charles, or any subsequently born son first attaining twenty-one, etc., his heirs, executors, etc., respectively for ever; and in case the testator should leave only two sons, in trust for the eldest of them, his heirs, executors, etc. But if such residue should exceed the value of £15,000, the testator directed that the estates should go and remain to the use of his third son, Charles (the respondent), and every other subsequently born son of the testator successively in the order of his birth, for his life, and after his decease to his respective first and other sons successively in tail male; remainder to the use of testator's eldest son, Thomas, for life, and after his decease to his first and other sons successively in tail male; remainder to the use of testator's [170] second son, William, for life, and after his decease to his first and other sons successively in tail male, with remainder to the testator's first and other sons in tail general, the son or sons of the eldest of them, and their issue, to take before the son or sons of the younger of them; and their issue; remainder to the sons' daughters successively in tail in the like order, remainder to testator's daughters, Elizabeth, Catherine, and every subsequently born daughter of testator, for life, and their issue in tail general, remainder to testator's first and second daughters, Ann and Mary, for life, and their respective issue, in such order and for such estates as were before expressed in their regard, as to the Scarisbrick estate.

The shifting clause directed to be inserted in the settlement of the Eccleston estate, upon which the question in this appeal turns, was to this effect, "that if by virtue of the settlement the said Charles, or any of the testator's subsequently born sons, or his daughters, Elizabeth and Catherine, or any subsequently born daughter, or any issue male of the respective bodies of the testator's said sons or daughters, should become actually entitled to the possession, or to the receipt of the rents of the Wrightington estate; and any younger son or daughter of testator, or any issue of such younger son or daughter should be then living, then, and as often as the same should happen, the uses to be limited in the settlement in the hereditaments at Eccleston and Sutton to the son or daughter who or whose issue should so become entitled as aforesaid, and to his or her issue, should absolutely cease; but that in the proviso for shifting it should be declared that if by virtue thereof the said hereditaments should have shifted to any of testator's other sons or daughters, or issue of their respective bodies, and there should afterwards be a failure of issue of all testator's sons or daughters, who should be younger than the son or daughter from whom, or from whose issue the same should have so shifted as aforesaid, then the said hereditaments at Eccle[171]-ston and Sutton should return and remain to the uses, and be held in the manner in which the same would have gone and been held if the proviso for shifting the same were not inserted."

The testator directed various provisions and powers, not material to be here mentioned, to be contained in the settlement; and he appointed the trustees to be his executors. He afterwards made five codicils, by the second of which, dated the 27th October, 1809, he bequeathed an additional annuity of £200 to his wife for her life, chargeable, as the annuity given to her by the will was, on the Scarisbrick estates; and he gave each of his four daughters an annuity of £100 for their lives, chargeable on the same estate, in addition to the provisions made for them by the will; and he gave his wife a legacy of £200, and confirmed his will in all respects so far as the same was not "altered by the recent death of his son William."

The testator died in November 1809, leaving his two sons Thomas and Charles and four daughters surviving. William the second son died shortly before, without issue. Thomas, the eldest, upon his father's death, took the name and arms of Scarisbrick, and entered into possession of that estate. Charles at the same time took the name of Dicconson; he was then of the age of nine years. The residue of the Eccleston estate, after answering the purposes mentioned in the will, considerably exceeded the value of £15,000, and therefore became subject to the provisions in the will for settling the same.

The trustees filed a bill in 1815, in the Court of the County Palatine of Lancaster, against Thomas Scarisbrick and the other surviving children of the testator, praying that the will might be established and carried into execution under the decree of the Court. A decree to that effect was accordingly made, and subsequent proceedings were had in the cause.

[172] In 1822, Thomas Scarisbrick presented a petition in said cause, stating that Charles, the second son, had then attained his age of twenty-one years, and became, by the death of William without issue, entitled to the Wrightington estate for his life; and praying that the Eccleston and Sutton estates might be conveyed to the use of the petitioner and his issue. The Vice Chancellor of the said Court, by his order, made the 9th January, 1823, upon the hearing of the petition, declared that the estates given by the said will to Charles and his issue, in the residue of the Eccleston and Sutton estates, never took effect; and that Thomas, in the events which happened, became entitled to the same for his life. It was by the said order referred to the registrar of the Court to make the inquiries necessary for carrying the will into execution, and for proper settlements. No settlement was made.

Thomas Scarisbrick died without issue in 1833, having by his will bequeathed his personal estate to his wife, and appointed her and the appellant and another, executors. He had previously charged the Eccleston estate with a jointure of £1000 a year for his wife.

Upon the death of Thomas, Charles took the name of Scarisbrick, and entered into possession of that estate; and thereupon his sisters, Mary and Elizabeth, filed a bill in the Chancery of England against the trustees of the will and Charles Scarisbrick, insisting that under the provisions of the will, and in the events that happened, the Wrightington estate had gone over to Mary for her life, and the Eccleston, to Elizabeth. The final decision in that suit was, that neither of the estates went to a daughter while a son was living; and that Charles was, from the death of Thomas, entitled for his life to both those estates, and to the Scarisbrick estate (5 Clark and Finnelly, 398).

[173] Soon after that decision, Charles Scarisbrick revived the suit in the Duchy Court of Lancaster, and then presented a petition to that Court, praying a reversal of the Vice Chancellor's declaration of January 1823, that the estate given to him by the will in the Eccleston and Sutton estates never took effect. That petition was heard in May 1840, by Lord Holland, Chancellor of the Duchy Court, assisted by Mr. Justice Maule and Mr. Baron Rolfe, and an order was made thereon, by which the said declaration of the Vice Chancellor was reversed; and it was ordered and declared that upon the death of the testator, the petitioner became and was still entitled to the Eccleston and Sutton estates.\*

\* Mr. Justice Maule delivered (May 28, 1840) the judgment of the Court, which, so far as is material here, was to this effect:

The object of the appeal is to vary so much of the order of the Vice Chancellor of the County Palatine, dated 9th January, 1823, as declares that on the death of the testator in the cause, Thomas Scarisbrick, his eldest son, became entitled for his life



Against that order the surviving executor of Thomas Scarisbrick brought this appeal, which was argued in presence of the Judges (Chief Justice Wilde, Justices Coleridge, Maule, Wightman, Erle, and Barons Alderson, Rolfe, and Platt).

[174] Mr. Turner and Mr. Prior for the appellant:—

to the Eccleston estate. The respondents contend, first, that considering the length of time which has elapsed since the order complained of was made, this Court cannot, or, at all events, in the exercise of its discretion will not interfere; and, secondly, that the order complained of is not open to objection.

On the first point we are of opinion that the petitioner is not barred by lapse of time, and that there is nothing to warrant the Court in refusing to entertain the appeal on that ground.

It was pressed in argument by the respondents, that the present proceeding is to be regarded rather as a rehearing than an appeal, as something therefore which the petitioner is not entitled to *ex debito justitiæ*, but which he can only obtain as an indulgence to be conceded or withheld at the pleasure of this Court. There is, undoubtedly, some obscurity as to the precise nature of the equitable jurisdiction exercised by the Duchy Court in reviewing the decrees of the Vice Chancellors of the County Palatine. In *Addison v. Hindmarsh* (1 Vern. 443), it is said in a note, that an appeal lies, by act of Parliament, from the Equity Court at Lancaster to the Duchy Court. The act there referred to, is probably the act of 1 Edw. IV., printed in the appendix to Ruffhead's Statutes, and cited in the case of the Duchy, reported in Plowden, p. 218. (He stated the act.) It is not easy to say from the statute whether, when the Chancellor of the Duchy reverses or varies the decrees of the Vice Chancellor of the County Palatine, he does so in exercise of a jurisdiction strictly appellate, or merely as rehearing that which has been already heard by another judge of the same court. In *Ormerod v. Hardman* (5 Ves. 725), it appears, that that case which had been heard and reheard by the Vice Chancellor of the County Palatine, was again heard by the Chancellor of the Duchy. This would have conclusively shown the jurisdiction of the Duchy Court to be in the strictest sense appellate, if the doubt suggested by Lord Eldon, in *Brown v. Higgs* (8 Ves. 562, 566), as to the power of the Lord Chancellor to rehear a cause which had been heard and reheard at the Rolls, was well founded; but it is clear that such is not the case, as appears from the course pursued by Lord Eldon, not only in that case of *Brown v. Higgs*, but also in the subsequent case of *Blackburn v. Jepson* (2 V. and B. 359); so that nothing can be deduced from the report of *Ormerod v. Hardman*, which will throw light on the present question. It appears, however, that when a decree of the Vice Chancellor of the County Palatine is brought before the Duchy Court, the whole record is remitted. This is a circumstance strongly indicative of a jurisdiction strictly appellate; and, on the whole, we incline to the opinion that such is the true nature of the functions of the Chancellor of the Duchy, when reviewing the decrees or orders of the Vice Chancellor. The question, however, is not free from doubt; and if the decision of this point was important in the present case, we might have desired further information before we gave our judgment. Whether the proceeding be strictly an appeal, or merely a rehearing, we think, in either case, the petitioner is entitled to have his case heard, and to have the judgment of this Court on the merits.

It remains now to consider the question on its merits; that is, whether the Vice Chancellor was right in his construction of the Eccleston shifting clause. That estate is, by the will, given to Charles, for his life, and afterwards to his issue; and the declaration of the Vice Chancellor, in the order of 1823, is founded on the assumption that the effect of the shifting clause was to carry the estate away from Charles to Thomas. By that clause, the testator directed that if, by virtue of the settlement which was to be made pursuant to the trusts of his will, his son Charles should become entitled to the possession of the Wrightington estate, and any younger son of the testator's body should then be living, then the uses and trusts of the Eccleston estate, in favour of Charles and his issue, should cease. Two events were thus to concur in order to make the interest of Charles and his issue in the Eccleston estate cease; namely, first, he was to become possessed of the Wrightington estate, and secondly, at the time of his so becoming possessed, there was to be in *esse* a younger son of the testator, or the issue of such younger son.

The first of these events happened at the testator's death; for William, the second

The Vice Chancellor of the County Palatine, by his order of January 1823, put the true construction on the [177] words "younger son" in this shifting clause; and after so long an acquiescence of all parties in that order, the Chancellor of the Duchy Court—assuming that he had [178] appellate jurisdiction, ought not to have reversed

son, having died without issue, in the testator's lifetime, Charles, on the death of his father, became entitled at once to the Wrightington estate. The question is, whether the second event also happened, that is, whether there was, in *esse*, at the death of the testator, any son of the testator "younger" than Charles, according to the true meaning of the word *younger*, as used in the Eccleston shifting clause. If there was, then the order of the Vice Chancellor is right; if there was not, it is wrong.

Now there certainly was no younger son in *esse*, taking "younger" in its ordinary acceptation; for the testator left only two sons, Thomas and Charles. But the respondents contend that, although there was no younger son properly so called, yet that Thomas, though an eldest son in point of age, was, as to the Eccleston estate, subsequent in limitation to Charles, and so a younger son within the meaning of the shifting clause. This was the construction put on the will by the Vice Chancellor; but after giving the subject our most anxious attention, we feel bound to say that we cannot concur in that construction. The safe rule of construction in general is, to interpret the words of wills, as well as of deeds, according to their plain natural import, unless by so doing some manifest absurdity or inconvenience would follow, which is sufficient to satisfy the judge that the person using the words must have used them in some sense different from what would be their ordinary meaning. It does not appear to us that any such absurdity or inconvenience will result from holding, that the testator used the word "younger" in this case in its ordinary sense. He had three estates and three sons. He gave the Scarisbrick, the principal estate, to Thomas, his eldest son, and his issue; he gave the Wrightington, the estate second in point of value, to William, his second son, and his issue; and the Eccleston, which was the smallest estate, to Charles, his third son, and his issue; and he certainly contemplated the possibility of his having other sons to be afterwards born. The great object of the testator was to found three families in the persons of three sons, and to secure one estate to each family; and the will, both in the limitations of the estates and in the shifting clauses, was evidently framed with a view to that leading object. Construing the word "younger" in the Eccleston shifting clause to mean younger in point of age, according to its natural import, that clause is still quite sufficient to carry out the testator's leading intention of founding three families, so long as any three sons, or the issue male of any three sons, should be in existence. By the death of William without issue, and the death of the testator, without having any after-born son, the leading intention, that of founding three families in the persons of three sons, was defeated. It became impossible to found more than two families; and the limitations, with the Wrightington shifting clause, were quite well adapted for that purpose, securing the Scarisbrick estate to the principal branch, and the Wrightington estate to the other, now become the second branch. What then is to become of the third estate, originally destined to support a distinct line, the carrying out of which original destination has become impossible? Is it to remain with the youngest son, to whom it was originally given? or is it to go over to the eldest son? There can be no doubt but that, construing the words of the will literally, it would remain (according to the original gift) with the younger son; and we see no reason to justify us in saying that such construction could not have been the testator's meaning. He evidently considered the Eccleston estate as being a subject of very inferior importance when compared with his other estates. He might think the son who was to take the Scarisbrick estate was already so amply provided for, as to render any shifting clause in his favour altogether unnecessary; and in such case the word "younger" may have been used intentionally, with the very object of excluding the claim on the part of Thomas, now insisted on by the respondents; or, which is the more probable supposition, the case which has occurred may not have presented itself to the mind of the testator, or of those who framed the will. In either of those cases it would be manifestly unjust to construe the language of the testator in any other than its natural sense; in the former case, because such a course would actually defeat the intention, though expressed in unambiguous language; and in the latter, because the Court would be altering the plain meaning of the words, in order to fix on the testator a meaning which, according to the hypothesis, he never entertained.

it, or at all adjudicated on the respondent's petition. The question, however, in this appeal is confined to the mean-[179]-ing that is to be put on those words. It is to be observed that the devise of the estates is executory, but even if the testator had actually devised the Eccleston estate, which [180] alone is here in question, to the uses upon

It is, however, said, that there are circumstances on the face of this will indicating a probable intention, that in the events which happened, Thomas, and not Charles, should take the Eccleston estate. If, it is said, the value of that estate had been less than £15,000, then, as the testator in fact left only two sons surviving him, it would have gone to Thomas, the eldest son, and not to Charles. This is undoubtedly true; that is a case which did present itself to the mind of the testator, and for which he has made express provision. In such a state of things Thomas would have taken, not by any forced interpretation of the word "younger," but by a plain gift in his favour, on the construction of which no doubt could have arisen. On the other hand, if all the three sons had survived the testator, and the Eccleston estate had been under the value of £15,000, Charles would have taken it absolutely; and on the death of William, without issue, would have taken the Wrightington estate, when there would clearly have been no shifting clause as to the Eccleston estate; so that Charles would have kept both. Very little reliance, therefore, as to intention, can be placed on this gift of the Eccleston estate, in case it had turned out to be below the value of £15,000. In such case, if William died the day before the testator, Thomas would take it; if he died the day after, then Charles would take it. The argument of the respondents is, that the testator probably meant, that if he left only two sons, the Eccleston estate, if above the value of £15,000, and therefore the subject of settlement, should go to Thomas, because if it had been under that value, and therefore not the subject of settlement, it would clearly have gone to him; and in order to carry this intention into effect, it is proposed to do violence to the ordinary meaning of the word "younger" in the shifting clause, by construing it to mean posterior in limitation. The answer is, that by similar reasoning it must be presumed that the testator meant, in case he left three sons, and the second son should die without issue immediately after him, that the youngest son should take the Eccleston estate, if above the value of £15,000, because he would, in such case, certainly have taken it if it had been under that value. And yet this intention would be entirely defeated by the proposed forced interpretation of the word "younger," and would be perfectly carried out by giving to that word its plain ordinary meaning.

Then it is said, that the testator, after the death of William, made a codicil, whereby he increased the amount of provision for his wife and daughters, and thus cast an additional burthen on the estate of Thomas; and it is suggested that he must have done this on the supposition that the property given to Thomas would be augmented by the Eccleston estate coming to him in consequence of the death of William; and this is supposed to furnish an argument that he must have intended to use the word "younger," in the Eccleston shifting clause, in such a sense as should carry that estate to Thomas. All we can say to this suggestion is, that it may be true, but it is mere conjecture. The additional provision for his wife and daughter is just as consistent with the supposition that he thought the former provision inadequate with reference to the then value of the Scarisbrick estate, as that he supposed Thomas would take the Eccleston. And further, it is to be observed that the testator certainly looked to the probability of Eccleston being of a value under £15,000, in which case Thomas would have taken it in addition to Scarisbrick. At all events, as the testator is entirely silent as to the motive for the additional gift, it is impossible for any court to fix on a particular state of circumstances as to what must be supposed to have influenced him, and then to put a forced construction on plain words, in order to make that state of circumstances exist.

It is contended in support of the order of the Vice Chancellor, that in construing the word "younger" to mean "posterior in limitation," little or no violence is offered to its ordinary interpretation. "Younger," it is said, does not necessarily mean "younger in point of age." It is suggested that a person is said to be a "young member of Parliament," "young at the bar," "young in office," and the like. No doubt that is so. The word is, in such cases, used metaphorically, whereas, in speaking of children, the word, unless controlled by the context or by circumstances, is plainly

which he directed the conveyance of it to be made; that is, if the trusts of the will had been executed, and not executory; [181] still it is submitted that the word "younger," in the Eccleston shifting clause, must be construed as meaning "younger or posterior in order of limitation," and not [182] "younger in order of birth." And therefore,

used in its direct, and not in any figurative, sense. We say unless controlled by the context or by circumstances, because there are, undoubtedly, many cases in the books in which the courts have felt themselves warranted in saying that the word "younger" must receive a construction large enough to include children not strictly younger, but standing in the same situation as younger children properly so called; and the respondents rely much on those cases as authorities for the construction adopted by the Vice Chancellor in the order now appealed from. We have consulted all those cases, but we cannot think they bear out the proposition of the respondents. (He then stated the grounds of the decisions in the cases which were cited in the argument; *Beale v. Beale* (1 P. Wms. 244), *Butler v. Duncombe* (id. 448), *Teynham v. Webb* (2 Ves. sen. 210), *Mead v. Cave* (1 Rep. in Chan. 224), *Bretton v. Bretton* (3 Chan. Rep. 1), *Chadwick v. Doleman* (2 Vern. 528), *Duke v. Doidge* (2 Ves. sen. 203 n.), *Heneage v. Hunloke* (2 Atk. 456).

All these cases proceeded on the intelligible principle, that from the nature of the deed or will under which the question arose, it must have been the meaning of the parties to provide for all the children, and in order to carry out this intention, it was necessary to understand by the words "younger children," all the children other than an eldest or only son: in other words, all the children except the *haeres natus* or *haeres factus*. The Court has felt itself warranted in thus putting on the words a construction not strictly according to their literal meaning, in the same way as it does with the words "heirs of the body" in marriage articles. In both cases, the nature of the provision intended clearly shows that the words must have been used in a sense different from that which they ordinarily had been; and the Court therefore construes them in the sense in which, from the nature of the instrument, they must have been understood by the parties. What analogy then do these cases furnish towards enabling us to construe the word "younger" in the will now before us? What is there in the very nature of the provisions of this will showing that the testator must have used the word "younger" not in its obvious sense? When the intention of founding three distinct families in the persons of three sons became impossible, by the death of one son without issue, there is no more incongruity with the presumable intention of the testator in uniting the two mesne estates in the person of the younger son, than in giving one of them to the elder. The only guide as to intention in such case must be found in the language of the will itself, and there does not appear to us to be any thing in that language to give to the word "younger" any other than its ordinary meaning. [He then stated the case of *Hall v. Luckup* (4 Sim. 5), also referred to in the argument, and shewed that it had no application to the present case.]

It was pressed at the bar that this is a case of an executory trust, and not a trust executed; and therefore it was said the Court will direct a conveyance so as to obviate any omissions or errors on the part of the testator, so as to effectuate the real intention. Undoubtedly it will. But the question still arises, what is the intention? How is that intention to be ascertained? It can only be obtained by looking to the language used, and if we are right in our opinion, that there is nothing to show that the testator meant to use the word "younger" in any other than its ordinary sense, it matters not whether the trust is executed or executory. In either case the ordinary sense must be adhered to.

On the whole, therefore, there does not appear to us, either in the nature of the provisions or the presumable intention of the testator, or in the context of the will, any thing which can justify us in saying that the word "younger," in the Eccleston shifting clause, means any thing else than younger in point of age. It follows that so much of the order of the Vice Chancellor of the County Palatine as declares that, on the death of the testator, Thomas, his eldest son, became entitled to the Eccleston estate, was erroneous, and that it must be varied by declaring that Charles, on the death of his father, became entitled to that estate for his life. We have come to this conclusion on a full consideration of the case, and without resting on what was said by the late Mr. Justice Park, in delivering the opinion of the Judges in the House of

after the Wrightington estate devolved on Charles by reason of the death of William without issue, the Eccleston estate [183] shifted from Charles to Thomas, who, as to that estate, was then a "younger" son than Charles in order of limitation, there being then no son living, or issue of a son younger in the order of birth.

[184] This question was not involved in the decision of the House on the former appeal, which was brought by the present respondent. That decision proceeded on the ground that both the Eccleston and Wrightington shifting clauses were to be read distributively as to sons and daughters, and that they did not cause either of the estates to shift to a daughter of the testator, as long as any son, or the issue of any son, was living. The respondent was the only son then living, and there was no issue of any other son. The question which had arisen and been decided in the affirmative by the Vice Chancellor of the Court of the County Palatine in 1823, was, whether, under the shifting clause of the Eccleston estate, that estate would shift in the event of there being living a son, as there then was, or issue of a son, elder in birth, but posterior in limitation, to the respondent, the son on whom the Wrightington estate had devolved. That question is now, for the first time, before this House. The Vice-Chancellor decided that the word "younger," in the Eccleston shifting clause, meant "younger in order of limitation." The decision of the Chancellor of the Duchy Court, reversing the Vice Chancellor's order, rests on the assumption that the words "elder" and "younger" are to be taken in their natural and ordinary signification, and mean elder and younger in order of birth, and that, although they may receive another construction if the context of the instrument required it, there was nothing in the context of this will to warrant such other construction.

The words "elder" and "younger," applied to individuals, merely as living beings, without reference to property, office, title, or other like distinction, must, of course, be taken to refer to the order of their births; but the parties to whom they are applied may be placed in situations, and under conditions regardless of their ages, rendering the words capable of other distinctions; and then the question would be whether, from the context in which the [185] words are used, they are to be referred to the differences in the natural, or in the social or adventitious age of the parties to whom they are applied. There are many familiar instances in which the natural and ordinary meaning of the words is excluded when they are applied to persons with relation to their office or situation, as when it is said, one member of the bar is senior or junior to another, a junior bencher of one of the inns of Court, a junior peer of this House: So, also, in the construction of instruments providing portions for children, excluding the one to whom the family estate is limited, the words "elder" and "younger" have acquired a technical meaning, referable to the order of limitation of the principal estate, distinct from the order of birth.

There are several passages in this will which shew that the testator used the word "younger," in the Eccleston shifting clause, in the sense of "younger in the order of limitation." In the limitations of the Wrightington and Eccleston estates to the sons of the testator's sons in tail general, it is evident, from the context, that the words "eldest" and "younger" are to be construed in reference to the order of limitation, and not of birth. On examination of the will, it appears clear that, although it was a great object with the testator to found three distinct families, his desire in that respect was subordinate to a preference of males over females; and so his daughters do not take any of the estates until the sons and the whole of their issue are extinct; and the male issue of the son, last in order of succession to the estates, take before the female issue of the son first in order of succession. In the events which happened, of the Wrightington estate having devolved on Charles by the death of William, without issue, Thomas still living, the shifting of the Eccleston estate from Charles, and its devolution to Thomas would, as the appellant contends, depend, not on events in any way connected with Thomas or Charles, or [186] either

Lords, in the case of *Scarisbrick v. Eccleston* (5 Clark and Fin. 450-1-2). We agree with the observation, that what was there said as to the present case was extra-judicial, and not necessary with reference to the question then to be decided. At the same time it is satisfactory to us to know that, in reversing an order which has been so long acquiesced in, we have the high sanction of those who concurred in the opinion delivered by Mr. Justice Park.

of their families, but on the state of the family of any after born son of the testator. The decision of the Chancellor of the Duchy Court was, that there having been no subsequently born son of the testator, the Eccleston estate did not go over to Thomas, but remained in Charles, notwithstanding the Wrightington estate had devolved upon him; but the argument in support of that decision, admits that, if there had been a subsequently born son of the testator, who had died leaving only female issue, the Eccleston estate would have been divested from Charles and gone to Thomas, and it is plain that the same result must have followed, if there had been an after born son living at the time of the devolution to Charles of the Wrightington estate, and such after born son had afterwards died leaving female issue, which shews how capricious and inconsistent is the construction put on the word "younger" by the respondent, while by the appellant's construction of it the limitations of the Eccleston estate are in all cases consistent.

There was in the will an absolute gift to Thomas of the Eccleston estate, if, after satisfaction of certain charges, it proved to be of less value than £15,000, and there should be then living but two of the testator's sons, but if of the value of £15,000, it was to be the subject of a settlement. It is manifest on the face of the will that the testator intended to provide better for his eldest than for any other son. Yet the contrary would be the result of the respondent's construction; for the Eccleston estate, if not worth £15,000, would go to the eldest son, absolutely, with the Scarisbrick; but if of greater value, as happened, it would remain with the youngest son, in addition to the Wrightington estate, both which were of far greater value than the Scarisbrick estate, the only property that would, in that case, belong to the eldest son, diminished by the increased charges put on it by the second codicil made upon William's death.

[187] If Charles had died instead of William, it is quite clear that Thomas would have both the Eccleston and Scarisbrick estates, and William the Wrightington only; it is, therefore, imputing a very capricious intention to the testator to suppose that if his two surviving children should be the first and second, the first should have the two estates, and the second the one only, whilst if the two children who survived him should be the eldest and the third or a subsequently born son, the eldest should have but the one estate, and the youngest the two.

The provisions of the second codicil, made after the death of William, are inexplicable, unless on the construction contended for by the appellant, that the death of William gave the Eccleston estate to Thomas. By that codicil, the testator referred to the death of William, and in consequence of that event, charged the Scarisbrick estate with additional annuities to his wife and daughters. But why should he, on that occasion, select the Scarisbrick estate to bear those charges, unless it was that by that circumstance the owner of the Scarisbrick estate acquired a large portion of his property, as according to the appellant's construction he would do? But if, according to the respondent's construction, the death of William proved only an accession of fortune to Charles, surely the testator would have charged these additional annuities on one of the estates given to Charles.

It is to be observed that the testator in several parts of the will describes a younger son in order of birth, by the words "subsequently born son," and in other parts, as in the Wrightington shifting clause, he actually says his eldest son shall be a younger son in order of limitation, thereby putting his own meaning on the words, and leaving no doubt of his intention, which it is the duty of the House to carry into execution. The House, looking to the whole context, cannot fail to see the meaning of the testator.

[188] They cited *Oddie v. Woodford* (3 Myl. and C. 584); and *Hall v. Luckup* (4 Simons, 5).

The Lord Chancellor observed that the case had been very ably argued; yet, as the learned judges present entertained no doubt, nor did he himself, on the point in question, it was not necessary to hear the other side. His Lordship then put a question of law to the judges, which they obtained time to answer.

Lord Chief Justice Wilde delivered (June 24, 1847) the opinion of himself and the other judges:—

The answer to your Lordship's question depends upon the construction of the shifting clause relating to the Eccleston estate in Mr. Eccleston's will.

The language of the clause is not ambiguous, but is such as is in ordinary use, and bears a well known meaning. But it is contended, that upon reference to the other parts of the will an intention may be inferred on the part of the testator, which will not be fully carried into effect by reading the clause in question in the ordinary sense attached to the language. Such imputed intentions are in most respects speculative and uncertain, and where any are to be found which the construction of the clause in question, according to its ordinary meaning, will not carry into effect, or may defeat, it is more probable that such failure will arise from the testator not having contemplated or provided for the very many events which may be supposed as possible to arise in the family, than that he used such expressions in any other than the ordinary meaning. The clause being plain and simple in its language, we do not think the rules of construction, now considered as settled, will warrant the clause receiving a [189] construction other than according to its ordinary meaning, without its appearing satisfactorily from other parts of the will that the language was used by the testator in some other sense.

The judges having heard the arguments, and having perused the judgment given in the court below (*vide ante*, p. 175, *et seq.*, note), in which the judges entirely concur, are unanimously of opinion that none of the passages in the will referred to, nor any of the arguments which have been urged, warrants a construction of the clause in question, other than that which the language of it in the ordinary meaning should receive; and, therefore, we are of opinion that, on the death of the testator, his son Charles became entitled to the Eccleston estate.

Lord Brougham.—I entirely agree in the opinion that has been come to by the learned judges who acted as assessors to the Chancellor in the Court below, and with the learned judges who have pronounced their opinion to-day. I do not mean to deny that the words "younger son" might not, according to the context, be capable of a different meaning from what they ordinarily bear. I do not mean to deny that if any gross absurdity, any glaring inconsistency with the manifest intention of the party making the instrument, would arise from taking the words in their ordinary meaning, you might not by implication be entitled to take the unusual and extraordinary meaning of those words rather than the ordinary meaning. But those circumstances do not exist in the present case, neither in the context, nor as matter of inference, is there anything that entitles us to depart from the ordinary meaning of the words "younger son."

The Lord Chancellor.—I have merely to express that [190] my opinion is in accordance with the opinion of the learned judges. There is only one point to which I wish to allude, which was raised by Mr. Turner. Looking at the original decree of the Vice Chancellor of the Duchy, I find that there is no adjudication on the subject of the rents. There was merely an inquiry as to the receipt of the rents. That decree was the subject matter of appeal to the Chancellor of the Duchy, and is now before this House. There is nothing upon the subject of arrears of rent before us, which in the proceedings are under consideration; nothing is done with regard to rents that is not consistent with the judgment now pronounced by this House; that is, that the decree of the Court below be affirmed.

Mr. Tinney \*.—I trust, after this long litigation, your Lordships will give us the costs of the appeal.

The Lord Chancellor.—I think you are entitled to the costs: their Lordships' opinion is, that the decree of the Court below be affirmed, with costs.

The judgment was then affirmed, with costs.

[191] ROBERT ALLEN,—*Appellant*; RICHARD M'PHERSON and others,—

*Respondents* [March 17, 18, 1845; April 7, 14, 1847].

[*Mews'* Dig. xiv. 421; xv. 466, 1467. S.C. 11 Jur. 785. On point as to jurisdiction, see *Meluish v. Milton*, 1876, 3 Ch. D. 30. As to admission of part of document to probate (1 H.L.C. 209) adopted in *In the Goods of Thomas Duane*, 1862, 2

\* (Mr. Tinney and Mr. Charles Hall were counsel for the respondents.)

Sw. and Tr. 592; *Guardhouse v. Blackburn*, 1866, L.R. 1 P. and D. 117; *Harter v. Harter*, 1873, L.R. 3 P. and D. 20, 22. As to undue influence generally, see notes to *Huguenin v. Baseley*, 1 Wh. and T.L.C. 7th ed. 247; and cf. *Barron v. Willis* (1899), 2 Ch. 578; (1900) 2 Ch. 121.]

*Will—Fraud—Probate—Jurisdiction.*

A testator by his will and codicils gave R. A. large bequests, which he revoked by a final codicil, providing only a small weekly allowance for him during his life. The will and all the codicils having been admitted to probate, after litigation as to the last codicil in the Ecclesiastical Court, R. A. filed a bill in Chancery alleging that the testator had executed the last codicil under undue influence of the residuary legatee, and false representations made at her instance respecting R. A.'s character; and that he had not been permitted in the Ecclesiastical Court to take any objections to that codicil, except such as affected the validity of the whole instrument: the bill therefore prayed that the executors or residuary legatee might be declared trustees or trustee for R. A. to the amount of the revoked bequests.

Held, on demurrer, that the Court of Chancery had no jurisdiction in the matter (*dissentientibus*, Lord Cottenham (Chancellor) and Lord Langdale (M. R.), and that the proper course would have been an appeal to the Judicial Committee of the Privy Council against the sentence of the Ecclesiastical Court.

John Allen, a native of East Chinnock, in the county of Somerset, came at an early age to London, and there acquired a large fortune in trade, from which he retired in 1820. He made his will in 1834, and thereby, after appointing Richard M'Pherson and Samuel Tomkins his executors, and providing for his daughter, his only legitimate child, then wife of George Evans, he gave, among other bequests to his relations at East Chinnock, the sum of £4000 to the appellant and his sister and brother, children of his deceased nephew, in equal shares, to be [192] paid to them as by the will directed. He gave the residue of his estate to his executors, in trust for his daughter. He afterwards made nine codicils; by the fourth of which, dated November 1836, he gave additional bequests of £2000 each to the appellant and his brother, and £3000 to their sister, to take effect only in case Mrs. Evans died in her husband's lifetime. By the sixth codicil, dated March, 1837, he gave the fourth part of the clear residue of his estate to the appellant. By the seventh he appointed William Allen (who was his son born before marriage) an executor of his will, jointly with the two before named. By the ninth codicil he revoked the bequests given by the will and former codicils to the appellant and the other relatives at East Chinnock, and in lieu of them substituted smaller bequests. The substituted bequest to the appellant was a direction to the executors to purchase £800 in consols in the names of trustees, in trust to receive the dividends, and pay the same to the appellant by weekly instalments during his life; the capital, on his decease or attempt to sell or encumber it, to fall into the residuary estate.

The testator died in November, 1837, and probate of the will and nine codicils was granted by the Prerogative Court to the executors after an attempt made by the appellant to prevent the probate as to the ninth codicil.

The appellant filed his bill in Chancery in 1841 against the executors and Mrs. Evans and her husband, stating the will and codicils, and praying that it might be declared that the appellant was entitled to the bequests given or intended for him by the will and first eight codicils, notwithstanding the revocation of them by the ninth codicil; and that the executors of Mrs. Evans were trustees or trustee for him to the extent of such bequests.

The case stated in the bill to sustain that prayer was, in substance (the allegations in the bill are set forth in 1 Phil. 133), that the testator was, after the date of the [193] sixth codicil, feeble in mind and in body from age, and his previous habits of drinking wine and spirits; that Mrs. Evans, then residing with him, exercised great influence over him, and under that influence he executed the subsequent codicils; that she and William Allen, before mentioned, upon obtaining a knowledge of the bequests given to the appellant by the sixth codicil, became jealous of him, and formed a determination to obtain a revocation, or at least a great diminution, of



them, and with that view they contrived that William Allen should go to East Chinnock, with the testator's sanction, to inquire into the character and conduct of the appellant and his brother; that William Allen, upon a secret agreement with Mrs. Evans, concocted a report containing various false representations of the appellant's character and manner of life, in order to prejudice the testator against him; that such pretended report was read to the testator, who did not seem to understand the contents, and was then, without any express directions from him, taken by William Allen to Mrs. Evans's solicitor, who, from the suggestions therein contained, and from verbal instructions given him by W. Allen, prepared the ninth codicil, and the same was executed the same day by the testator—relying on the truth of the pretended report—without any draft being previously submitted for his perusal; the object of such haste being for fear the testator should on reflection think proper to inquire into the truth of the statements made in the said report, and so frustrate the scheme of William Allen and Mrs. Evans; that probate of the will, with the nine codicils, was granted by the Prerogative Court to the executors; that an attempt was made by the appellant to prevent such probate being granted as to the ninth codicil, on the grounds that the testator was of unsound mind at the time of executing it, and that undue influence was exercised over him by W. Allen and Mrs. Evans, but that he was confined by the said Court [194] to grounds of objection, which affected the said codicil as an entire instrument, and was not permitted to go into the case stated in the bill, or into any other case solely relating to the parts of the codicil which affected only himself.

The executors demurred to the bill for want of equity and of parties. The demurrer was overruled by the Master of the Rolls, but on appeal to the Lord Chancellor the demurrer was allowed for want of equity, by an order (1 Phillips, 142) dated the 11th November, 1842, against which the appellant brought this appeal.

Mr. Kindersley and Mr. Jolliffe for the appellant:

The bill shews a clear case of fraud on the appellant and imposition on the testator, committed by William Allen in conjunction with Mrs. Evans, who will take the benefit of the fraud either as residuary legatee under the will, or as sole next of kin of the testator, according to the Statute of Distributions. The question then is, whether a Court of Equity has not jurisdiction to relieve the appellant from the consequences of such fraud, notwithstanding the sentence of the Ecclesiastical Court establishing the whole will. Unless the court has and exercises such jurisdiction, the appellant was, before grant of probate, as well as after it, without remedy, inasmuch as the case of misrepresentation and fraud made by his bill could not be set up in the Ecclesiastical Court against the validity of the ninth codicil or any distinct part of it, because the codicil must be taken to be a part of the will, and made by the testator *animo testandi*. It must be admitted that he had the mind and intention to revoke the previous bequests, while he was not aware that the representations made to him respecting the appellant were false. But those representations being now admitted by demurrer to the bill to be false and fraudulent, and to have been made at the instance of the person who [195] would have all the benefit of their intended effect, it is contrary to equity and justice to allow the appellant to be deprived of bequests which he would receive if the codicil resulting from such representations had not been executed.

There is a great variety of cases on this subject, most of which were referred to in the arguments in the Courts below. *Marriot v. Marriot*, reported by Strange (1 Str. 666), and also by Chief Baron Gilbert (Gilb. Cas. in Chan. 203), whose judgment it was, goes to the full extent of the appellant's prayer. There the testator gave the residue of his personal estate to his wife, and made her his executrix; his sons filed their bill in the Exchequer, insisting that the gift of the residue was obtained by fraud and surprise; the wife's counsel contended that the probate of the will, which was granted to the wife, was conclusive, and that a Court of Equity had no jurisdiction touching the disposition of the residue, but that it was matter for determination in the Ecclesiastical Court; but the Chief Baron, in his elaborate judgment, says (1 Str. 673) "Courts of Equity can hold plea concerning a legacy, and likewise concerning the devise of the *residuum*; they may in notorious cases declare a legatee that has obtained a legacy by fraud to be a trustee for another." Then, after instancing some cases, he proceeds, "But in all such cases, Courts of Equity must consider what is the real will of the testator, and they cannot declare a trust according to their own fancy,

nor according to what the testator should have willed, for then they make the will, and not the testator. But they may, to answer the real intention of the testator, declare a trust upon such will, though it be not contained in the will itself, which is in three cases: first, in that of fraud upon a legatary (legatee) before mentioned." After stating the other two cases, he adds, "And nobody has thought, that declaring a trust in any of those cases is an [196] infringement of the ecclesiastical jurisdiction." The Lord Chancellor in his judgment in the present case expressed his concurrence in the three positions so laid down by Chief Baron Gilbert, adding, that in none of such instances would the Ecclesiastical Court be competent to afford relief; but he thought they were distinguishable from the case before him (1 Phillips, 144-5).

[The Lord Chancellor.—It was assumed in the argument before me, that the Ecclesiastical Court had jurisdiction in the case, and I took it to be so, but if it had not, then certainly my decision must be wrong.]

It must be admitted that, in executing the last codicil, as well as all the others, the testator had the *animus sic testandi*, and therefore the Ecclesiastical Court could not do otherwise than admit them all to probate; but it could not do what the appellant asks the Court of equity to do, declare the residuary legatee a trustee for him, upon the ground that the *animus testandi*, the disposing mind, which certainly existed, was produced by fraud. In all cases in which Courts of Equity refused to interfere, the question was whether it was the testator's will. That question does not exist here, for it is admitted that it is the will of the testator, made according to his then existing intention; but that intention was the result of fraudulent representations, into which the Ecclesiastical Court refused to enter, on the ground that it could not hear complaints of one legacy only, others given by the same codicil not being complained of; but a Court of Equity may even after probate inquire into the fairness of the case, whether of fraud or mistake; *Marriot v. Marriot* (1 Strange, 666), *Campbell v. French* (3 Ves. 321), *Kennell v. Abbott* (4 Ves. 802). The frauds of which the Ecclesiastical Court takes cognizance must be connected with the actual making of the will—with the mere manufacture of it; and sometimes it will reform a will where there is an ambiguity, and it sees [197] cause for it, as in *Harrison v. Stone* (2 Hagg. 549), *Shadbolt v. Waugh* (3 Hagg. 573); but will not strike out a clause in a will giving bequests to a class, for fraud upon one only of that class. That is the case here; there is no ambiguity, and the fraud complained of was not in the execution of the instrument, but in the residuary legatee's previously raising the testamentary disposition in favour of herself to the prejudice of another. What Lord Alvanley says in *Kennell v. Abbott* is quite in point. The testatrix there gave a legacy to a man whom she supposed to be her husband, but he was the husband of another. "I am called upon," says Lord Alvanley, "to determine whether the law of England will permit this legacy to be claimed by him. Under these circumstances, I am warranted to determine that whenever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed to be the motive of the bounty, the law will not permit him to avail himself of it." That is the principle, for the application of which the appellant contends: it is the same principle that was applied by Sir A. Hart in *Segrave v. Kirwan* (1 Beatty, 157), a case not of fraud but of accident and ignorance, and by Lord Eldon in *Bulkley v. Wilford* (2 Clark and Fin. 102), a case, if not of fraud, of culpable professional ignorance. There is no case or authority whatsoever warranting the argument that the jurisdiction over the fraud in this case belonged to the Ecclesiastical Court and not to the Court of Equity. The cases that were cited in the Court below, and which may be cited here in support of that position. *Archer v. Mosse* (2 Vern. 8), *Plume v. Beale* (1 P. Wms. 388), *Steventon v. Gardiner* (2 P. Wms. 286), *Kerrich v. Bransby* (7 Bro. P.C. 437), *Barnesly v. Powel* (1 Ves. sen. 284), *Ex parte Fearon* (5 Ves. 633), and *Gingell v. Horne* (9 Sim. 539), do not sustain it.

[198] Mr. Turner and Mr. Russell (with whom was Mr. G. M. Giffard) for the respondents:

The appellant's bill is of first impression. Such cases of fraud and undue influence as he complains of must have often occurred, and if relief had been ever given against them in equity, there would be some such case in the reports; in the absence of which it is not unfair to infer that the remedy for them was found in the Ecclesiastical courts; and so it is said in the text books, as Glanvill (Lib. 7, chap. 8), Bacon's

abridgment (Vol. 7, tit. Wills, p. 378), Wooddeson's Lectures (Vol. 3, p. 477), Dr. Arthur Brown's Lectures (Vol. 1, bk. ii., chap. 10). These writers refer to several cases in which it was held that a Court of equity has no jurisdiction to declare a testamentary instrument relating to personal estate invalid, especially after probate in the proper Ecclesiastical Court; *James v. Greaves* (2 P. Wms. 270), *Plume v. Beale* (1 P. Wms. 388), *Kerrich v. Bransby* (7 Bro. P. C. 437).

The case made by the bill is, that the Ecclesiastical Court admitted the ninth codicil to probate, although the appellant opposed it on the grounds that the testator was of unsound mind, and that undue influence and misrepresentation had been used. The proofs of mental incapacity having failed, the other grounds only are now relied on. It is admitted that the testator had a disposing mind at the execution of the codicil, and that he did dispose of his property according to his intention at the time; but it is alleged that that intention was produced by fraud and misrepresentation. The Ecclesiastical Court has the proper jurisdiction to investigate such a case, and, if proved, to refuse probate. Even if a court of equity had jurisdiction, still it would be contrary to law, and a most dangerous precedent, to inquire into the motives which might have induced a testator to make or revoke a disposition of his property, and to support or set aside such disposi-[199]-tion on the ground of his motives being well or ill founded:—

[The Lord Chancellor.—You must admit, what is stated in the record, that it was in consequence of the fraud alone the testator made this codicil. By demurring you admit the facts stated.]

Yes, facts that are well pleaded; they were pleaded in the Ecclesiastical Court, and the appellant was allowed to go into evidence of them; the inference therefore is, that the Court exercised its jurisdiction, as it does constantly in such cases; *Castell v. Fagg* (1 Curtis, 298); *In re Shuttleworth* (id. 911); *Grindall v. Grindall* (4 Hagg. 10). The interference of a Court of equity would give rise to a conflict of jurisdictions between two Courts acting on the same subject by different ways. There may be cases of fraud,—such as *Kennell v. Abbott*, where a person assumed a false character for the purpose of obtaining a legacy,—in which a Court of Equity would interfere to deprive a party of a legacy obtained by fraud.

The question raised by the bill was, whether upon the facts as stated, the Ecclesiastical Court had jurisdiction to admit or reject the testamentary papers propounded for probate. It is the *animus testandi* that that Court has to consider, and how far deceit or constraint will vitiate the testament. The principle is laid down in *Nicholls v. Nicholls* (2 Phillimore, 180, 185), *Swinburne* (Part 1, sec. 3, pla. 32), and *Godolphin* (Part 3, cap. 25, pla. 7). Circumvention by fraud, deceit, or flattery, have the effect of constraint by force to avoid a will. In this particular case the question is whether the *animus*, which is admitted to have existed, was circumvented by fraud; whether that question be considered on principle or on authorities, the Ecclesiastical Court must be admitted to have jurisdiction to determine the validity of the instrument, to admit or reject part of it, correct mistakes, or supply omissions; [200] *Fawcett v. Jones* (3 Phillimore, 434), *Micklin v. Franklin*, cited in *Fawcett v. Jones* (id. 461), *Billinghurst v. Vickers* (1 Phillimore, 187), *Wood v. Wood* (1 Phillimore, 357), *Grindall v. Grindall* (4 Hagg. 10). These cases all show that the Ecclesiastical Court will exercise jurisdiction over wills concocted in fraud. There is no case in which, after probate, a legatee was held, on the ground of fraud in obtaining the will, to be a trustee for a party rejected by the testator. Numerous cases of that sort, in which equity declined to interfere, have been referred to, but no one found in which the Court did interfere. *Kennell v. Abbott*, and *Campbell v. French*, were cases upon construction of the wills. In *Barnesly v. Povel* a distinction was taken between fraud in obtaining a will and fraud in obtaining the probate, which is a circumstance to show that the jurisdiction in equity does not attach to the former; and the principle of the distinction is illustrated by the late case of *Godrich v. Jones* (5 Moore's P. C. C.), and *Bullin v. Barry* (1 Curtis, 614).

Mr. Kindersley in reply.

The Ecclesiastical Court has jurisdiction to declare what a man's will is, but not its effect—that belongs to the civil courts. The jurisdiction of the Ecclesiastical Court ceases with the grant of probate—the temporal courts then take jurisdiction. The Ecclesiastical Court requires these three ingredients essential to a will: 1st. The

testamentary capacity; 2d. The fact of execution of the will; and 3d. The *animus ita* or *sic testandi* (2 Blacks. Com. 494), and where these are found, the probate must issue. But this does not prevent the Court of Chancery from holding a person who fraudulently takes a legacy under the will to be a trustee for another, who, but for the fraud, would have obtained the legacy. The probate would stand good notwithstanding the interposition of equity. If the *ani*-[201]-*mus testandi*, which the Ecclesiastical Court must find to exist, is produced by misrepresentation, that is a species of fraud over which that court has no jurisdiction; finding the *animus* or intention existing, however produced, it must grant probate.

[The Lord Chancellor.—Granted, that Courts of Equity have jurisdiction where the courts of law, or courts spiritual cannot do justice; is this a case in which the Ecclesiastical Court could not do justice? Again, suppose the Spiritual Court has jurisdiction, but the party omits to avail himself of it, has the Court of Equity jurisdiction there also?]

Yes; the *dicta* which have been cited from the text books to shew that the Ecclesiastical Court has the jurisdiction, are quotations from one another, and are founded on cases which do not apply here, as *Andrews v. Powys* (2 Bro. P.C. 504), *Ex parte Fearon* (5 Ves. 633), *Bodmin v. Roberts*; the same case as *James v. Greaves* (2 P. Wms. 270). The other cases that were cited to show that the Court of Chancery refused to interfere after probate, will be all found, on examination, to be cases in which the question was whether the will was the will of the testator, as *Archer v. Mosse* (2 Vern. 8), *Plume v. Beale* (1 P. Wms. 388), *Stevenson v. Gardiner* (2 P. Wms. 286), *Kerrich v. Bransby* (7 Bro. P.C. 437), *Bennett v. Vade* (2 Atk. 324), *Gingell v. Horne* (9 Sim. 539), *Barnesly v. Powel* (1 Ves., sen. 284), *Podmore v. Gunning* (7 Sim. 644).

There is no case among those cited from the Ecclesiastical Courts, which shows that they have jurisdiction to refuse probate in a case like this. In *Micklin v. Franklin*, and other cases cited in *Fawcett v. Jones* (3 Phill. 461), the codicil was written by mistake on the wrong will; there was no *animus sic testandi*; over mistakes like that, [202] and those that occurred in *Billinghurst v. Vickers* (1 Phill. 187), *Nicholls v. Nicholls* (2 Phill. 180), *Castell v. Tagg* (1 Curtis, 298), and *In re Shuttleworth* (*id.*, 911), it is not denied that the Court of Probate has and exercises jurisdiction. *Grindall v. Grindall* (4 Hagg. 10) was a peculiar case, but it bears on this case only as to the extent of the exception to the jurisdiction of the Ecclesiastical Court. The papers in a case of *Butterfield v. Scaven* in 1775 have been procured, but are too voluminous to extract any thing from them, except that it appears that the Court decided against the will propounded, and the case went to the Court of Delegates. Although Sir J. Nichol assumed jurisdiction in that case, that is no authority for holding that the jurisdiction in Equity, and of this House also, is ousted in cases of fraud. In the absence of authority either way, the Ecclesiastical Courts will bow to the decision of this House in favour of the jurisdiction in Equity, especially as the Courts Ecclesiastical are not well adapted to deal with questions of fraud.

(At the close of his reply he read, by direction of the House, some of the allegations and extracts from the judgment of Sir H. Jenner in this case,\* but he was [203]

\* The following are condensed extracts from his judgment, pronounced the 20th of July, 1840.

"The deceased was between seventy-seven and seventy-eight years of age; he left a widow, who was his second wife, and a daughter, Mrs. Evans, who resided with him, separate from her husband. It appears that he had, and retained up almost to the day of his death, a strong affection for the members of his family at East Chinnock, especially for Robert Allen (the appellant) and his brother. There was no provision in the will for William Allen, the deceased's reputed son; but it appears from the evidence that the £10,000 given to Mrs. Evans was a provision for him.

"There is no dispute as to the will and the other codicils; the sole question is, whether the codicil of the 2d of October, 1837, is, or is not entitled to probate. The party opposing the codicil is R. Allen; his brother and sister do not appear in the cause, though a decree has gone out against them, and they will be bound by the decision. R. Allen, who has thought it his interest to oppose the codicil, has appeared and sued in *forma pauperis*, and has had a proctor and a counsel assigned to him, under whose advice his cause has been ably conducted; and although I differ from

not able to point out any passage shewing that the appellant was confined, in the Ecclesiastical Court, to objections affecting the ninth codicil as an entire instrument, [204] as alleged in his bill. The counsel for the respondents were informed, by the Lord Chancellor, that the House [205] would hear any observations which they would

the prayer to pronounce against the validity of this codicil, I cannot come to the conclusion that the opposition to this testamentary paper was wholly unauthorized, that there were not circumstances which led the party to oppose this codicil, and in some degree to justify the proceeding adopted in the cause.

"I have already stated that the deceased had expressed a very great regard for his relations in the country; and had shown an intention to benefit them by several testamentary acts before October 1837, and it naturally must have been to R. Allen a matter of surprise and of strong feeling, after he had been led by deceased to believe, down to the spring of 1837, that he had been provided for by the will, to find that his interest under the will had been reduced to the receipt of the dividends of £800 consols; and I cannot but think that some inquiry into the manner in which this was brought about was perfectly open to the party.

"It seems that W. Allen, the reputed son of the deceased, was appointed an executor of the will in August 1837, and was not before then named in the testamentary papers. It did appear to the Court somewhat extraordinary that his name should not have appeared in the will, and that no provision should have been made for him; and it was not till on an examination of an answer to an interrogatory put to the solicitor of the testator, the Court found that a sum was set apart for W. Allen, the £10,000 which was given to the daughter, on an understanding between her and the deceased that it should be given to W. Allen, in order to save the legacy duty of ten per cent., or some other purpose. I mention this circumstance because it was argued that nothing could be more disinterested than the conduct of W. Allen, as he has no interest under the will to advance the cause of Mrs. Evans, so that he would derive no benefit from the confirmation of the codicil which diminished the interest given to R. Allen by the previous testamentary acts of the deceased. But it turns out that he is interested in this sum of £10,000, his receipt of which is to depend upon the fulfilment of the conditions and understanding between the father and daughter, for she is to have the disposal of this fund for the benefit of W. Allen: and when I find that both these parties, according to the evidence, are living together, and keeping up a joint establishment, it does not place W. Allen in the position in which he would have stood if he had been totally independent of any interest.

"There appears to have been always a jealousy between W. Allen and Mrs. Evans, and the Somersetshire relations; and this jealousy was naturally inflamed by information as to the contents of the will and codicils, by which so considerable an interest was given to R. Allen and to his brother and sister.

"I now come to the part of the case which led immediately to the execution of the codicil. I have stated that the deceased had had contradictory reports relating to his Somersetshire relations, and he was annoyed by the letters he received; and in consequence of this annoyance, and of the reports, W. Allen, who was at Tunbridge Wells, was summoned by the deceased's desire, for it is established by the evidence that it was by the desire and direction of the deceased that he was sent for to come up to London: and he then received instructions from the deceased to go into Somersetshire, as he represents, for the purpose of making inquiry into the conduct and character of the Somersetshire relations, and reporting thereon to the deceased. This must have been the purpose for which he was sent. When I look to the evidence and see that on his return he makes to the deceased a written report of information as the result of his inquiries, unless I suppose the deceased to have been in a state of incapacity, unable to understand the report, I must believe that this was the purpose for which he was sent down, and that in consequence of the information thus given to him, he proceeded to the execution of the codicil before the Court.

"A great deal has been said on the subject of this report. On the one hand, it is said that the report was not the result of inquiry; that there is no evidence to show that there was any inquiry made by W. Allen; on the contrary, it is said, that by the evidence it appears that before he came to the place he made certain charges against R. Allen, which are spoken to by one of the witnesses. But it is argued, on the other

wish to make on the matter just read ; they said that they heard nothing read requiring observation.)

[206] The case stood over for consideration ; and towards the end of the session 1846 it was set down for judgment, but the learned lords who heard the arguments, finding [207] that they differed in opinion, further postponed the consideration of it.

hand, that there could not be any doubt that the report made to the deceased was the result of inquiries, and amongst other things it is said that the Court would presume so from the *res gesta*; and although witnesses have not been called from whom W. Allen received such information, the Court would presume that the information was the result of inquiry, and *prima facie* that the representation was consistent with the information so obtained. I confess, in a case of this description, I think the Court is not entitled to assume anything. If the party has pleaded the fact that he went down to obtain information, and that on his return he stated to the deceased (as he pleads) the result of his inquiries, I think, in order to entitle him to the benefit of the report, he ought to examine the witnesses from whom he obtained the information, and that the Court is not to infer anything for the benefit of a party who has an opportunity of proving the facts, and does not examine witnesses to sustain them. I think it is no answer to say that the other party, knowing what the facts were, and the persons from whom the information was obtained, ought to have examined witnesses if he intended to dispute the veracity or correctness of the information. I apprehend that the party who pleads it, is the party who is to prove it, and it is too much to ask the Court to assume that the plea is true because the other party has not brought evidence to impeach it. But be the matter of the report true or false, a report was made to the deceased, and a letter was written on the return of W. Allen to London to his father, and the letter does particularly advert to the conduct of the party, and the deceased does adopt the information, and acts upon it. True it is, Mrs. Allen has said, that although the report was read to the deceased, she does not consider that he could understand it; though he smiled and appeared satisfied when he heard the report; and he wished her to read it, but she would not read it, and W. Allen read it aloud: and there can be no doubt the report was read to him, and he acted upon the report when the execution of the codicil took place.

"Then the question comes to this, what was the state of the deceased's capacity at the time when this report was made to him? The deceased deals with the matter; the report is read to him, and reference is made to it in an indorsement made by the deceased himself; and the Court, unless it were satisfied that the deceased was in a state of incapacity, must conclude that a report so made would naturally lead to the execution of a codicil founded upon it. I think the party is not altogether placed in the situation he ought to be, that of having the witnesses produced, instead of these charges being made behind his back: nevertheless, if the deceased thought proper to place such a power in the hands of W. Allen, and adopted the information which he laid before him, the Court cannot disturb a codicil which proceeded from the testator in consequence of a report so made to him.

"With regard to the state of the capacity of the deceased at the time the information was given to him, the counsel on behalf of R. Allen has relied upon the evidence given by Mrs. Allen, who says she believes he was not capable of understanding the report or the codicil; but her evidence is not sufficient to satisfy the Court that his mind did not go with the act, and to entitle it to say that he did not understand the contents of this codicil.

"The preparation of the codicil was from instructions received from W. Allen, it is said, without any direction from the deceased himself; but Mrs. Allen says that W. Allen read over the report to the deceased, and the deceased adopted it, and this codicil is in conformity with the report, though there is no proof of any positive direction from the deceased; but it is proved beyond doubt that the codicil was read over twice to him, and he objected to the legacy given to Thomas Allen of £200, but at the intercession of Mrs. Evans he suffered it to remain as part of the codicil; and Mrs. Allen was present, and did not interfere to prevent the execution of the codicil, or represent that the deceased was not in a proper state of mind to perform the act. The medical gentleman who attended the deceased a year and a half before he died, says that he was of perfectly sound mind, memory, and understanding, up to the

Lord Lyndhurst (July 20).—The case of the appellant is that the revocation by the ninth codicil of the bequests in his favour, was produced by the false and fraudulent representations made to the testator respecting his character and conduct; that these were made for the purpose of imposing upon the testator, whose faculties were impaired by age and disease, and who became the victim of this imposition.

The first question to be considered is the jurisdiction of the Ecclesiastical Court in a case of this nature. Would such a case, if established by evidence to the satisfaction of that tribunal, be a sufficient ground for refusing the probate? Upon this point no doubt can, I think, be entertained. "If a testator be circumvented by fraud, the testament loseth its force" (Swinb., part i., sec. 3, plac. 32). There cannot be a stronger instance of fraud than a false representation respecting the character of an individual to a weak old man, for the purpose of inducing him to revoke a bequest made in favour of the person so calumniated. The case of *Grindall v. Grindall* (4 Hagg. 10), before Sir J. Nicholl, was founded upon a charge of this description; and though the Court decided against the plaintiff, that decision proceeded upon the failure of the plaintiff's proof, and not upon any doubt of the authority and duty of the Court, if the charge had been established, to refuse the probate. In the course of his judg-[208]-ment, Sir J. Nicholl observed, that "the argument was that the testator's intention of excluding John Grindall, and giving the property to Captain Sturt, was produced in the mind of the deceased by fraud and contrivance practised upon him." "I cannot," he said, "for one moment, hesitate, after reading the evidence, in holding that the fraud is not proved (and where fraud is charged it must be proved); but on the contrary, I think the probability is most decidedly and infinitely more strong on the other side, viz., that the alteration in the deceased's intention was not produced by any fraudulent practice on the part of Captain Sturt; because it is quite clearly proved that the deceased did intend to exclude John Grindall as early as the 7th November."

We were furnished, by the kindness of Dr. Lushington, during the argument with a reference to a similar case, *Butterfield v. Scawen*, decided in 1775. The question there was whether a will had been revoked in consequence of fraud and imposition practised on the testator. The fraud consisted in a false representation made to the testator, that the woman, who was the principal legatee, had attempted to poison him, and that in consequence of this representation he had revoked the bequest in her favour. That learned judge entertained no doubt as to the jurisdiction of the Ecclesiastical Court to refuse probate, and upon sufficient proof of the facts charged, that it would be its duty to do so. Sir H. J. Fust, who was also consulted, expressed himself thus:—"If it should appear, as in the case stated by your Lordships, that an old and infirm testator who had bequeathed a legacy to A. B., had been induced by false and fraudulent representations with reference to the conduct of A. B., made to him for the purpose by C. D., to make a subsequent codicil revoking that bequest, and substituting for it a much smaller legacy, the effect of which would be to give a larger share of the re-[209]-sidue to C. D. than he otherwise would take, I conceive that the Ecclesiastical Court would not, under such circumstances, grant probate of such revoking codicil, provided it should be clearly established in point of evidence that such act and intention were produced by such false and fraudulent representations."

I think therefore your Lordships will be of opinion that this is a case coming distinctly within the jurisdiction of the Ecclesiastical Court, and in which, if the charge were established, it would be the duty of that Court to refuse the probate. It did, in fact, come before that tribunal; the parties were heard, and probate was granted.

10th of November, and fully capable of executing a codicil, or of doing any other act of business; and there are other witnesses who come to the same conclusion, and the Court has no reason to doubt the truth of their deposition. There is nothing to satisfy the Court that the deceased was not perfectly capable of understanding the report, and of giving instructions for this codicil, which was the necessary result of it.

"On the whole of this part of the case, therefore, I am of opinion that the validity of the codicil is fully established, and that the parties are entitled to probate of it, with the will and the other codicils."

It is stated in the bill, "that the appellant was confined in the Prerogative Court to grounds of objection which affected the codicil as an entire instrument, and was not permitted to go into the case stated in the bill, or into any other case solely relating to the parts of the codicil which affected only the appellant." The grounds of this alleged decision of the Court are not stated; it may have proceeded from the manner in which the plaintiff shaped his case, from the form of the allegations, or from the nature of the evidence.

It is perfectly clear that the Ecclesiastical Court may admit a part of an instrument to probate, and refuse it as to the rest. There are numerous cases to this effect, as *Billinghurst v. Vickers* (1 Phillimore, 187), *Barton v. Robins* (3 Phillimore, 455, note). It is, in fact, the constant practice of the Court; but if an error has been committed in this or any other respect, which I am very far from supposing, that would not be a ground for coming to a Court of Equity. The matter should have been set right upon appeal. But the present is an attempt to review the decision of the Court of probate, not by the Judicial Committee of the Privy Council, the proper tribunal for that purpose, but by the Court of Chancery. I [210] think this cannot be done. It was formerly, indeed, considered that fraud in obtaining a will might be investigated and redressed in a Court of Equity; but that doctrine has long since been overruled. In the case of *Bennet v. Vade* (2 Atk. 324), Lord Hardwicke states that "it has been settled ever since the case of *Powis v. Andrews* (2 Bro. P. C. 504), upon an appeal from Lord Macclesfield's decree, February 6th, 1723, to the House of Lords, that a will cannot be set aside for fraud and imposition here (in Chancery), because a will of personal estate may be set aside in the Ecclesiastical Court for fraud, and of real estate, at law." There are other cases to the same effect before the same learned judge (Lord Hardwicke), as *Webb v. Claverden* (2 Atk. 424), and in *Barnesly v. Powell* (1 Ves., sen. 287), where the probate had been obtained by fraud, he observed that, "however formerly doubted, it is now settled by the Lords, in *Kerrich v. Bransby* (7 Bro. P. C. 437), that this Court (of Chancery) cannot set aside a will of personal estate for fraud." "I will not," he adds, "infringe upon what is laid down there, and in *Powis v. Andrews*." "But there is a material difference," he continues, "between this Court taking upon itself to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the Ecclesiastical Court by his fraud, not upon the testator, but upon the person disinherited thereby and claiming after the testator's death against it. Fraud in obtaining a will infects the whole; but the case of a will, of which the probate was obtained by fraud on the next of kin, is of another consideration." The case of *Jones v. Frost* (3 Madd. 1), and of *Jones v. Jones* (3 Meriv. 161), are to the same effect. So in *Archer* [211] v. *Mosse* (2 Vern. 8n), which was a very gross case of imposition on a sick and weak man, the Lord Chancellor observed that while the probate stood, this matter was not examinable in Chancery; and though, as the reporter observes, the fraud was fully proved and opened to him, he would not have any proof read, but dismissed the bill. In *Plume v. Beale* (1 P. Wms. 388) it was alleged that a legacy in favour of the defendant had been interlined by her after the will was executed. A bill was brought to be relieved against this legacy. The will had been proved in the Ecclesiastical Court, with the legacy. The Lord Chancellor (Lord Cowper) said the will should have been proved with a reservation of this legacy; the remedy must be there, and the bill was dismissed.

It was contended that, although this Court cannot set aside the codicil for the fraud and imposition practised upon the testator, it can effect the same object indirectly by declaring the defendants trustees for the plaintiff; but if the fraud was cognizable by the Ecclesiastical Court, and would, if established, have been a ground for refusing the probate, to adopt the course suggested would be in effect, as I have already observed, to make the Court of Chancery a Court of appeal from the Ecclesiastical Court, a course the more objectionable in the present instance, the case having been decided after a full hearing by that Court. In the case of *Kerrich v. Bransby* [7 Bro. P.C. 437], referred to by Lord Hardwicke, which was a case of fraud and imposition in obtaining a will, it was argued on the part of the appellant, in this House, as in the present case, that the probate in the Ecclesiastical Court was not impeached by the decree, though the appellant was restricted, as in justice it was said he ought to be, from taking any beneficial interest under it, and such indeed was



the effect of the decree; this House, however, reversed the decision. Doubts [212] have been suggested as to the grounds of the reversal; but Lord Hardwicke, who held the Great Seal within a few years after the decision was pronounced, expressly states that it was reversed upon the point of jurisdiction. Such has always been the understanding of the Profession; and in *Ex parte Fearon* the Lord Chancellor observes (5 Ves. 647) that the determination in *Kerrich v. Bransby*, was "that this Court cannot take cognizance of wills of personal estate as to matter of fraud."

There are cases, undoubtedly, in which the Court has declared the legatee or executor to be a trustee for others, as in the case of *Thynn v. Thynn* (1 Vern. 296), where the defendant induced his mother, by false representations, to prevail on the testator to name him sole executor to his will, declaring that he would only be an executor in trust for her. This, the reporter observes, being a fraud, as also a trust, the Lord Keeper declared it for the plaintiff. *Marriot v. Marriot* (Gilb. Cas. in Cha. 203) has been much relied upon as containing the opinion of Chief Baron Gilbert upon the subject. The judgment was not delivered, but I lay no stress upon that circumstance. The Chief Baron mentions three cases in which a Court of Equity "may declare a trust upon a will according to the real intention of a testator, although it be not contained in the will itself: first, where the drawer of a will inserts his own name instead of the name of the legatee; no doubt," he adds, "he would be a trustee for the real legatee." But if probate were refused in such a case on account of the fraud, the real legatee would lose his legacy. The other two cases which he puts are not cases of fraud, but of trust, the one express, the other implied, and do not affect the present question.

In the case of *Kennell v. Abbott* (4 Ves. 802), the testatrix gave an estate to her brother, in trust to sell, and out of the [213] monies arising therefrom to pay her husband, Edward Lovell, the sum of £150. Edward Lovell was not her husband, but she believed him to be so up to the period of her death. He had been previously married to another woman, who was living at the time of his marriage with the testatrix. The legacy was given to him as her husband; that could alone, as Lord Alvanley observed, be supposed the motive of the bounty. The legacy, therefore, failed. This was a question of construction, and upon a trust, and came properly within the jurisdiction of a court of equity.

In the case of *Barnesly v. Powel* (1 Ves., sen. 284), the probate was obtained by fraud, and Lord Hardwicke drew the distinction to which I have already adverted, between a fraud on the testator and a fraud practised after his death in obtaining the probate. He thought, in the latter case, the Court might declare the party a trustee. This, he said, was a ground of jurisdiction in the Court distinct from the will itself. The distinction taken is decisive as to the opinion of Lord Hardwicke, that in a case like the present—a case of alleged fraud practised on the testator himself—the Court of Chancery could not take cognizance of the matter and apply a remedy by means of a trust. If this, indeed, could properly be done it would follow that in none of the numerous cases to which I have referred, ought the bill to have been dismissed. The attempt was made in *Kerrich v. Bransby* (7 Bro. P.C. 437). The bill prayed that the will might be cancelled, but this part of the prayer was not adopted in the decree, which merely directed that the legatee should account to the plaintiff, and that the plaintiff should be at liberty to use his name to get in the personal estate; in effect treating him as a trustee. This House resisted the encroachment and reversed the decree. [214] In the case of *Segrave v. Kirwan* (1 Beat. 157), the Ecclesiastical Court could not, upon the question of probate, have applied the proper remedy. The testator intended Kirwan to be his executor, but did not intend that he should take anything under the will. The question in *Podmore v. Gunning* (7 Sim. 644) had reference to an express trust. The case of *Bulkley v. Wilford* (2 Clark and Fin 102) has no application to the present case.

I will conclude by observing generally, that I think it will be found upon examining the cases in which this Court has declared a legatee or executor to be a trustee for other persons, that they have been either questions of construction, or cases in which the party had been named a trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate or proper remedy. If there be any decision that goes beyond this, I must, with all deference, be permitted to doubt its correctness. I will only add, that if the rule, which I have stated, be an inconvenient

one, still, if it has been sanctioned by this House, the Court below was bound by it, and your Lordships alone can apply a remedy.

The Lord Chancellor.—I very much regret the necessity which I am under of differing from the conclusion to which my noble and learned friend has come in this case. It is a case of extreme importance; for if your Lordships should affirm the judgment pronounced by the Court of Chancery, in my opinion, the jurisdiction of the Courts of Equity, as it has been administered from all time, will be most materially affected.

My Lords, this is upon a demurrer, and I am therefore under the necessity of calling to your Lordships' recollection, that what may be said to have passed as to matters [215] of fact, or as to the course to be pursued by other Courts, cannot be attended to beyond what appears upon the face of the bill. Now this bill states that the codicil not only affects the interest of the party, the appellant, but provides various other legacies and arrangements for other parties, and then it states, that the Ecclesiastical Court granted probate to the party named as executor after an attempt by the appellant to prevent such probate being granted on the ninth codicil, on the ground that the testator was of unsound mind at the time of the execution, and that undue influence had been exercised upon the mind of the testator in procuring such execution; and then it proceeds to state, that in the suit which arose in the Prerogative Court, touching the validity of the ninth codicil, the appellant was confined by the Court to the grounds of objection which affected the codicil as an entire instrument, and was not permitted to go into the case stated in the bill, or into any other case solely relating to the parts of such codicil which affected only him.

Now, my Lords, whether that statement be in fact correct or not, we are bound upon this demurrer to consider it as an accurate representation of what passed. There is therefore in this case a judgment of the Ecclesiastical Court, that it cannot enter into the question which affects the right of this appellant. It states the attempt to have been made, and the attempt to have been objected to by the Court, and the Court to have proceeded upon this ground only, that it could not listen to any objection as to any particular provision in the codicil, but that it was bound only to look at objections which went to the validity of the codicil itself. The case of fraud stated upon this bill I must assume to be capable of proof, and if proved it is sufficient to give the plaintiff right to relief somewhere. It states a prior provision largely made for his benefit, and a codicil obtained from the testator by contrivance, [216] conspiracy, and misrepresentation, which had the effect of procuring and producing this ninth codicil, which was a revocation of those benefits which were intended for the appellant. The facts therefore stated are that in the Ecclesiastical Court there is no remedy; that an attempt has been made to obtain a remedy, and that the attempt has failed upon a rule, which, according to the statement made upon the face of this bill, the Court acted upon—that it could not interfere in any question affecting any particular part of the codicil, but only in one affecting the whole of the codicil. That is so stated, and those who know the meaning of a demurrer, must know, that that is a statement from which none of the parties can depart.

Now, if that which is stated be taken as the fact, and if there be no remedy in the Ecclesiastical Court, and if (because we are not sitting here as reviewing any proceeding of the Ecclesiastical Court, and are not competent so to do) we are to say that the Court of Chancery has no jurisdiction to investigate this matter of imputed fraud, where is the plaintiff's remedy? It is obvious that he has none. If the Ecclesiastical Court has come to a wrong decision, and if that decision is capable of being reviewed, is that a reason why a Court of Equity should not interfere? The whole confusion appears to me to result from this, that the two proceedings are confounded, which are in their nature perfectly and entirely distinct. The Court of Chancery has nothing to do with a probate, or with the enquiry whether a certain paper be the will of the testator or not, it never interferes in such a matter. In those early cases to which my noble and learned friend referred, it did interfere, but it does not now interfere with questions which are questions solely for the consideration of the Ecclesiastical Court. But when the Ecclesiastical Court has vested in an individual the legal title to property, by granting him probate, then the Court of Chancery assumes that jurisdiction which belongs to it [217] over all titles, over all

interests, over all estates, where a proper case arises of attaching a trust upon that individual. It does so with land, it does so with money, it does so with every species of property.

If a testator were to devise land to trustees under circumstances which would create a resulting trust for an heir at law in equity, so as to entitle him to the benefit of it, would it be any answer to a bill filed by the heir claiming the resulting trust from the devisees to say, "you are quite wrong; to be sure the devisees have recovered in ejectment, they have got possession of the land, but it is all wrong; and if you try it over again, it will be found that there is no proper devise to the trustees, and therefore you must go to law to try whether the devise to the trustees be good or bad. If the devise be bad, the trial which has taken place was not a good trial, and the result is such a result as in law it ought not to be; there is no devise, do not therefore come here to a Court of Equity to ask for a decree declaring a resulting trust, because a Court of Law is the place where questions arising upon real estate are to be tried; go there, and see whether you cannot get rid of the devise." If the case stood thus, I apprehend that to any person, who knows any thing of the Court of Equity, it would appear perfectly ridiculous. But I would beg leave to ask, where is the difference? The only difference is this, that the Courts which decide upon real estate in questions of land are the Common Law Courts of the country. Here the Court which has decided upon the legal estate under the probate is the Ecclesiastical Court. In both the one case and the other, the decision is, as to the legal title, totally and entirely unconnected with that which is the province of the Court of Equity only, namely, a proper case of trust in a legal estate.

If this were a new case, if cases had not occurred, over and over again, from the earliest time, in the Court of [218] Chancery, there might be some difficulty perhaps in persuading your Lordships to agree to it as being the practice of the Court of Equity, but from the earliest time it has been the practice of the Court.

And now I will just observe upon one point which arises upon the face of the bill. Certain learned doctors of eminence, whose opinions upon the cases which they decide are entitled to the highest consideration, seem to have been consulted, not upon this demurrer, but upon some abstract propositions, and thence they appear to have inferred that the Ecclesiastical Courts are competent not only to grant or refuse, or recall probate of the whole codicil, but to recall probate so far as it may affect a particular part of the codicil. My Lords, I am not disposed to controvert that, though it is not at all necessary in the present case to give an opinion upon it; but this I know, that if it be the rule, it infinitely multiplies the number of cases against the decision now under appeal, because in every case where a trust has attached upon a probate, there must of course always have been a decision of the Ecclesiastical Court upon the legal title. In all those cases therefore, whether affecting the whole instrument or affecting a part of the instrument only, according to the opinions which we have heard from my noble and learned friend, there would be a probate and a power within the Ecclesiastical Court of deciding the particular point which a Court of Equity has been called upon to decide. So that if that be so, and I am not disposed to controvert it, all the cases in the books, in which a trust has attached upon a fraudulent bequest, are authorities where a Court of Equity has intervened, although the Ecclesiastical Court might have intervened; when I say that, I say that my noble and learned friend might have brought hundreds of cases against the conclusion to which he has come, because he has confused the difference which in some cases is taken between an objection to a part of a testamentary instrument [219] and an objection to the whole testamentary instrument.

My Lords in order to show that this distinction is not new, and that the rule of law which I have to submit to your Lordships' consideration is not of modern invention, I must refer to one or two authorities in which that distinction is taken, a distinction which is no longer available, because all the cases now would be authorities against the non-interference of a Court of Equity, because, in all cases the Court of Probate would have the power of interfering in the transaction. Lord Redesdale says (Treat. on Plead. 257, 4th edit.), "Where the fraud practised has not gone to the whole will, but only to some particular clause; or if fraud has been practised to obtain the consent of next of kin to the probate, the courts of equity have laid hold of these circumstances to declare the executor a trustee for the next of kin."

That is the deliberate opinion of Lord Redesdale, which has been received by the profession ever since it was published; and it is not a new opinion of Lord Redesdale's, because he refers to the argument, not the judgment (for it was not delivered), of Chief Baron Gilbert, an argument intended for a judgment, and which he printed with his reports (Gilb. Cas. in Cha. 203). He says, "Courts of Equity may, in notorious cases, declare a legatee, who has obtained a legacy by fraud, to be a trustee for another, as if the drawer of a will should insert his own name instead of the name of a legatee, no doubt he would be a trustee for the real legatee: and nobody has thought that the declaring a trust in those cases is an infringement upon the Ecclesiastical jurisdiction."

As the cases are all to be found in the printed report of this case (1 Phil. 133); I will not occupy your Lordships' time by referring to many cases, in which the principle is laid down which has been acted upon by the Court; but I beg to call attention to the distinction between this case and the objection which is made, that this would make a Court of Equity a Court of review, or a Court of appeal from the Ecclesiastical Court. If the Court of Chancery were to take upon itself to do now what it did formerly, to declare a will or codicil void upon the ground of fraud, no doubt it would be exercising the same jurisdiction as the Ecclesiastical Court exercises, and it would be open to that objection, but it never now attempts to do any such thing. The present bill is not founded upon any such principle, it asks no such relief. It gives credit, as it is bound to do, to the act of the Ecclesiastical Court, which has clothed the executors with the power of executors, and given them a legal title to the property, and all that the bill asks is that upon the proof (and we are now upon the assumption of the proof of the facts as stated) of the facts alleged upon the face of the bill, those persons who had so obtained that ninth codicil by fraud may not be permitted to enjoy the property themselves, but may be declared to hold it as trustees for those persons who would have been entitled to it if that fraud had not been practised.

Some of your Lordships are extremely well acquainted with the practice of the Court of Chancery, and I would ask whether we are now to repudiate the doctrine that Courts of Equity will attach trusts upon fraudulent wills; because, if this judgment be affirmed, it will be impossible, particularly now, after the distinction between whole testamentary papers in cases of fraud, and particular provisions in testamentary papers, to maintain that doctrine. Upon what principle can a Court of Equity hereafter say that a legatee is trustee for another? The answer will be at once, that "The House of Lords has decided in the case of a particular legacy, being one among other provisions: we will not look at the fraud, we exercise no jurisdiction over it, because you may go to the Ecclesiastical Court, although that Court has decided against you; we think the Ecclesiastical Court is wrong, if the facts you have stated are true, but you must go to some Superior Court of appeal from the Ecclesiastical Court and get yourself righted." First of all, we have nothing to do with the Ecclesiastical Court: we are not going to review their proceedings. What your Lordships are now asked to do is to administer justice as a Court of Equity to a party, who, upon the facts stated, is clearly entitled to it, and who states that the tribunal which has been applied to has refused, and the Court of Chancery is to refuse its assistance because another court ought to have done it, and has not. My Lords, the jurisdictions are totally distinct; the Ecclesiastical Court cannot do what the plaintiff is asking the Court of Chancery to do. The Ecclesiastical Court may, possibly, indirectly produce the same effect; it may refuse the probate, or, by a process of which I have yet to learn the details, it may strike out of the codicil a particular provision. But if that Court has that jurisdiction—if it has that power—that is not to deprive the Court of Equity of another jurisdiction, and another power founded upon totally different principles; and were that to be done the very foundation of the jurisdiction of the Court of Chancery would be gone, because the legal estate would be disposed of before the Court of Chancery intervened; but so long as the legal estate remains—so long as there is a title existing in a party under the decree of the Ecclesiastical Court which is adverse to the claim under the will, and which claim ought to prevail against him, if the case set up by the other parties is true,—so long as that circumstance exists, it is, and has been, from the earliest times, the province and jurisdiction of the Court of Chancery to attach a trust upon that estate so obtained by fraud; if that description of fraud be established, it is yet the duty of the Court of Equity to say,

"What you have [222] got you shall not keep, because you have obtained it by fraud; or even if you show it to be by a legal title which we cannot touch, we will take care that you shall not hold it for your own benefit, but as trustee for those who have been wrongfully deprived of it."

If I were to go through the whole of the cases which have been referred to, they would all and every one come to the same result; whether they apply to the whole or to parts of instruments, there is no distinction to be made. In every case where there has been a legal title derived from the Ecclesiastical Court; in every case where the plaintiff has succeeded, the Court has upon that legal estate, so established by the Ecclesiastical Court, fastened a trust and given the benefit to those who are entitled to it.

Upon these grounds I regret to say that I am obliged to differ from the motion of my noble and learned friend.

Lord Brougham.—I have, as it was my duty to do, very fully considered this case, upon which my two noble and learned friends have differed, and I have come to a conclusion against the decision at the Rolls, and in favour of the decision in the Court of Chancery. If I am wrong in the opinion at which I have arrived, I shall deeply lament it; for the question, I admit, is one of no common importance. But at least I have the satisfaction of feeling in my own mind assured that if I am in error, I have not fallen into it lightly, for I have most deliberately considered the case both in respect to the arguments, which were held at the bar, and to the authorities which were cited: and I have also taken to my assistance in this case, which is a case of some difficulty and of much importance, the lights given by the conclusions of the learned judges of the Ecclesiastical Court, to which reference has been made by my noble and learned friend who first addressed the House. I now, therefore, come prepared to give my opinion differing from my noble and learned friend [223] who spoke last, and agreeing with my noble and learned friend who preceded him, in favour of the judgment under review, the judgment of the Court of Chancery.

I entirely agree with my noble and learned friend who spoke last, and nobody can doubt it, that being here deciding upon demurrer to a bill, we are to take the bill as containing a true statement of the facts; we are bound to assume that all those facts are as they are set forth in the bill, because a demurrer, from its very nature and effect, admits the facts and says, "What then; you have no right to your remedy!" But my noble and learned friend seemed to me to carry the argument rather too far; he stated that the bill set forth not only that in the Court of Probate the party was not permitted to enter into the case stated in the bill, or into any other matter relating exclusively to those parts of the codicil which affected the plaintiff alone, but was confined by the Court to those grounds of objection which affected the codicil as a whole: and my noble and learned friend appeared to me, as I understood him, to go a little further than he was warranted in doing, and to have assumed the fact that the Court had not the power of doing that which the bill complains it refused to do, and the complaint of which refusal is the ground of appeal by way of a bill in equity.

Now it is one thing to say that the bill states a fact which we are bound by the demurrer to admit, viz., that the Court below did in point of fact confine the plaintiff to the objections to the codicil as one entire instrument: It is one thing to say that which I do not deny, and it is a very different thing to say that not only did the Court of Probate in fact refuse relief, and confined him within those particular limits, but that the Court was right in so doing, and had no means of doing otherwise. The Court of Probate is not alleged in the bill to have been right in so doing, or to have had no power of doing otherwise; the Court is only alleged in point of fact to have refused to [224] allow the plaintiff to go into his objections to particular parts of the codicil, that is all.

But I will go a step further, and I will suppose that the bill had alleged, which it does not, that the Court of Probate had no power to allow the plaintiff to go into that case, but was bound by the law of the court of Probate to confine itself to the objections to the codicil as one entire instrument. I do not think that the demurrer can be understood to admit that point of law. A demurrer admits facts, such as that the Court of Probate refused relief, but a demurrer never admits points of law, such as that the Court of Probate was right in that refusal. Take the demurrer, therefore, in either way, whether as admitting in point of fact (and you are bound to believe

the point of fact, and to assume that it is correct) or as admitting the allegation in point of law (which would be most incorrect), that the Court of Probate has no power to give any other decision than that which it gave; taking it in either way, it appears to me that the view taken by my noble and learned friend is not borne out. I do not consider it to be at all admitted that the Court of Probate had no such right. I am bound, out of respect to the Court of Probate, not to quarrel with its decision, but to believe that it decided correctly; but of this I am perfectly sure, that if the Court of Probate decided incorrectly, there was a remedy, and that remedy was by appeal to the Judicial Committee of the Privy Council. The remedy was not by going to the Court of Chancery.

My noble and learned friend says that the Court of Chancery is not to be considered as the Court that is to be applied to as the Court of appeal from the Court of Probate; but the course here taken amounts to nearly the same thing. In this case eight codicils gave A. B. certain benefits, and the ninth codicil, which is admitted to probate, took away those benefits; the party claiming under the first eight codicils, and whose claim is defeated by the [225] ninth (the revoking codicil) being admitted to probate, comes to the Court of Chancery and says, "Make C. D. a trustee for me." That is the way of stating it; but in substance and effect it amounts to one thing, namely, "Revoke the ninth codicil, that codicil which, revoking the first eight codicils, has been admitted to proof. I complain of the ninth codicil as having been obtained by fraud; declare that notwithstanding the ninth codicil, which revokes the first eight, I am entitled to the benefit under the first eight." That is the prayer of the bill in so many words.

Now it is admitted by all the cases, and it cannot be denied, that you cannot come to a Court of Equity to set aside a will of personalty as being obtained by fraud; if any doubt were entertained on the point, there are the cases of *Plume v. Beale* (1 P. Wms. 388), and *Kerrich v. Bransby* (7 Bro. P. C. 358),—which last is entitled to great consideration from the fact that Lord Macclesfield, who decided it, appears to have differed from the decision of Lord Cowper in *Plume v. Beale*, and to have allowed the parties to go into a discussion for setting aside the will as obtained by fraud; but when that case came before the House of Lords Lord Macclesfield's decision was reversed.

Much has been said of *Kennell v. Abbott* (4 Ves. 802), and of *Marriot v. Marriot* (1 Str. 666; Gilb. Cas. 203), which is reported by Strange and by Chief Baron Gilbert, and was a judgment of that most able judge; though I believe a judgment never delivered in Court; for the case was compromised. That therefore, *pro tanto*, lessens the effect of it, but still it would be a most important authority, and so would *Kennell v. Abbott* before Lord Alvanley, a very peculiar case according to my [226] recollection of it. The legacy in that case was bequeathed on the supposition that the party in whose favour it was given was the husband of the testatrix; it turned out that he was not, and the legacy fell into the residue. In the reports of the case,—as is observed in the judgment from which this appeal was brought,—we do not get any distinct account of what the fraud was, and I do not think therefore that it will weigh much in the present decision.

One thing may be said, no doubt, and it goes, I think, rather in favour of the decision of the Court below, and of the view taken by my noble and learned friend (Lord Lyndhurst). How, in the case of great fraud being practised by one party against another, the effect of which may be to swell the residue, is the Court of Chancery ever to get at that fraud, if probate of the instrument has been refused by the Ecclesiastical Court? That is very true, but in all such cases, if the judge of the Court of Probate sees reason to suspect that there ought to be relief in respect of fraud, a judicious mind would naturally lean towards granting probate, in order that the case might come before a Court of Equity, whereas it never could if the probate were refused. I should say that if the Court of Probate has not the power of giving relief, the judge there is bound to grant probate, in order that those who have the power may be able to exercise it, and grant redress. If the Court of Probate refuses to grant it, there is no harm done, or, at least, no harm ought to be supposed to be done, because then there is an appeal which the constitution provides, not to a Court of Equity, but to the Court of Probate in the last resort, formerly the Court of Delegates, now the Judicial Committee of the Privy Council.

Upon these grounds (and what I have stated to your Lordships is out of the great respect I feel for both my noble and learned friends who differ from each other, and [227] on account of the importance of this case, and I have therefore gone into it at greater length than otherwise I should have done); upon these grounds I agree with my noble and learned friend [Lord Lyndhurst] that the judgment of the Court below, allowing the demurrer and reversing the order of the Master of the Rolls, ought to be affirmed.

Lord Langdale.—My Lords, without attributing to the demurrer a greater effect than it ought to have, there is upon the record, as it now stands, an admitted case of fraud—of fraud committed upon the testator, and of fraud committed upon the legatee. It does not appear to me correct to say, that the fraud was practised upon the testator only; and considering the fraud to have been practised upon both the testator and the legatee, the question is, whether a Court of Equity, after probate granted, had any authority to give relief? Being myself of opinion that such relief might be given, I overruled the demurrer when the case was heard before me. My noble and learned friend, then Lord Chancellor, being of a different opinion upon the rehearing of the case, reversed my order, and allowed the demurrer. Had the case gone no further, it would have been my duty to conform to his Lordship's decision in all future cases of a like nature; and after the case was brought to your Lordships' House, I should, if left to act according to my own inclination, have awaited your Lordships' final determination, without taking any part in the discussion. My noble and learned friend, however, who allowed the demurrer in the Court of Chancery, desired my attendance here, and though I wished to be excused, I could not obtain his leave to be absent, and I attended at the hearing of the argument, as I attend to-day, at his particular request.

Under those circumstances I have considered this case, uninfluenced entirely, I hope, by any bias in favour of my [228] formerly expressed opinion, and so far as I have been able, uninfluenced by the authority of my noble and learned friend, to which I owe so much deference and respect. Having so considered this case, I find it my duty to declare that I still continue to be of the opinion which I at first entertained, that if the alleged facts be proved, the Court of Chancery has jurisdiction in this case; that the jurisdiction is supported by cases carrying with them sufficient authority, and that the jurisdiction is most important for the suppression of a considerable class of frauds.

It has been observed that there are early cases in which the Court of Chancery took upon itself to set aside wills both of lands and of personalty, not only for fraud, but for other causes, and even because wills had not been, as the judge thought, properly made, though there had been no fraud; those cases, however, had long since been overruled. It was established by the cases of *Archer v. Mosse* (2 Vern. 8), *Nelson v. Oldfield* (2 Vern. 76), *Plume v. Beale* (1 P. Wms. 388), and, above all, by *Kerrich v. Bransby* (7 Bro. P. C. 358), that the Court of Chancery had no authority to set aside a will of personalty, and no authority to set aside a will of land without a trial at law. For many years past this position has not been questioned; but it has been sometimes argued (as it appears to me, very erroneously), that the Court of Chancery, because it has no authority to set aside wills, has, therefore, no authority to give a remedy against frauds effectuated by the means of wills. The case is far otherwise. It appears to me that the Court of Chancery has always exercised the authority of attaching trusts to legal rights, which have been obtained by fraud, so as to relieve the sufferer against the effects of such fraud. However legal rights may have been acquired, the [229] Court of Chancery has interposed its authority to repress attempts made to use them for the purposes of fraud.

After the learned arguments addressed to the House on both sides, it is not necessary to go into a minute examination of the authorities; but I will take the liberty of stating that soon after the time when Lord Macclesfield decided the case of *Bransby v. Kerrich*, by treating a will relating both to real and personal estate, as if the Court of Chancery would set it aside (a decision which was clearly erroneous and was by this House declared to be so); very soon after that time Lord Chief Baron Gilbert prepared the judgment, which has been referred to in *Marriot v. Marriot* (1 Str. 666; Gilb. Cas. in Chan. 203). That judgment appears, by the report in Gilbert's Cases, not to have been delivered, but it is fully stated, and though it was not a judgment

actually delivered, yet it contains the opinion of that very eminent judge. That case gives the history of the jurisdiction in testamentary matters in a manner which I do not think any one can read without instruction; and after carefully considering several points bearing upon the case, his Lordship comes to a conclusion in conformity with the final decision in *Kerrich v. Bransby*. He then gives certain cases in which the Courts of Equity may grant relief, notwithstanding probate has been granted. He says, "Courts of Equity may declare the party who has obtained a legacy by fraud to be a trustee for the party who has been defrauded." But according to the argument used in support of the demurrer in this case, if the legacy was obtained by fraud, the Ecclesiastical Court has jurisdiction on that, and might grant probate of the will, with the exception of that particular legacy, and, therefore, the Court of Chancery has no jurisdiction. But this is not the doctrine or opinion of Chief Baron Gilbert; he says "the Court of Chancery may declare a legatee who has obtained a legacy by [230] fraud to be a trustee for another; as if the drawer of a will should insert his own name instead of the name of a legatee." Here it is supposed that probate has been granted by the Ecclesiastical Court, and yet the doctrine is that a court of Equity may grant relief by declaring the party a trustee. Further, he says, the Court, "to answer the real intention of the testator, may declare a trust upon such will, though it be not contained in the will itself, in these three cases: first, in that of fraud upon a legatory before mentioned; secondly, where the words imply a trust for relations, as in the case of a specific devise to executors, and no disposition of the *residuum*; thirdly, in the case of a legatee promising the testator to stand as a trustee for another." I conceive that the cases stated are by way of example and not in exclusion of other cases falling within the same principle, and I am not aware that the position of Lord Chief Baron Gilbert has ever been questioned till the question arose in the present case.

The case of *Barnesly v. Powel* (1 Ves., sen. 284), a case before Lord Hardwicke, appears to me to be a much stronger case even than *Marriot v. Marriot*, to show in what way a court of equity may deal with a case of fraud in these matters. It is only necessary to refer to what was done in that case; it was a case of forgery; the forgery was not quite apparent at first; the judge, therefore, sent it to trial, and, afterwards, when the forgery was established, it appeared also that there was another testamentary instrument, which might perhaps appear to be valid in the Ecclesiastical Court, so that his Lordship did not dispose of the whole matter himself, by at once declaring a trust, but, leaving it to the Ecclesiastical Court to decide whether the testamentary instrument, not appearing to be forged, was valid or not, he ordered the forged instru-[231]-ment to be brought in, and by his own jurisdiction and power over the person, and not assuming any jurisdiction to revoke or alter the probate, he ordered the party to appear in the Court of Delegates, and consent to the reversal of the sentence for granting the probate. The Court of Chancery was admitted to have no authority to set aside the sentence or the probate; yet Lord Hardwicke, upon the first hearing, before the fraud was established, with reference to the fraud, considered as then proveable, said he should not scruple decreeing that the defendant, who obtained that probate, should stand as a trustee in respect of the probate; and, afterwards, when the fraud was proved, he compelled the party to consent to the reversal of the sentence by which the probate was obtained; Lord Hardwicke desired not to interfere with the jurisdiction of the Ecclesiastical Court, and at the same time not to refuse to the suitors of the Court of Chancery the exercise of the jurisdiction by which it has in all times been so instrumental in the suppression of fraud.

The only other case to which I would call your Lordships' attention is the case of *Segrave v. Kirwan* (Beatty, 157), before Sir A. Hart. That was not a case of fraud, but a case of implied trust, founded on the non-performance of a duty. The same doctrine was there held, and though the question of jurisdiction, on the ground of fraud, did not arise, the opinion of Sir A. Hart on the subject is clear; and when the case was afterwards commented upon by Lord Eldon in the case of *Bulkley v. Wilford* (2 Clark and F. 177), it is very improbable that he should not have observed on the opinion of Sir A. Hart, in that respect, if he had thought it erroneous.

It is upon the opinion of Chief Baron Gilbert, in the case of *Marriot v. Marriot* [1 Str. 666, Gilb. Cas. in Ch. 203], the opinion and orders of [232] Lord Hardwicke in *Barnesly v. Powel*, and the opinion of Sir Anthony Hart in *Segrave v. Kirwan*,



that I principally rely for the support of the jurisdiction of the Court of Chancery in the present case; they are, I think, sufficient, without referring to other authorities of less general and distinct application. It appears to me that if your Lordships should allow the present demurrer, these cases, which have not (as far as I am aware of) been hitherto impugned, will be overruled.

Lord Campbell.—I am happy to think that it is not necessary for me to occupy much of your Lordships' time, after the ample discussion which this case has undergone by my noble and learned friends who have preceded me. But upon a question of such great importance, to which I have paid the most anxious attention, I feel it my duty to state the reasons which induce me to concur in the motion of my noble and learned friend, that the decree appealed from be affirmed. I do this without, in the slightest degree, wishing to encroach upon the jurisdiction of the Court of Chancery. I wish to guard against what I should consider to be an encroachment by the Court of Chancery upon the jurisdiction of another Court; for the question seems to me to be, whether an appeal from the Court of Probate shall be to the Court of Chancery or to the Judicial Committee of the Privy Council?

Now, be it well understood that I give implicit credit to every fact that is stated upon the face of the bill. I know that if there be a demurrer, it admits the facts that are alleged in the bill. It admits facts that are well pleaded, but not alleged inferences of law; and it is because I give implicit credit to every thing which is stated in point of fact in this bill, that I am of opinion that in this case the Court of Chancery has no jurisdiction.

According to the allegations of the bill, the probate of the part of the codicil which concerned the plaintiff, ought [233] not to have been granted. It is not denied that the Ecclesiastical Court had jurisdiction over the subject. It is not denied that the Ecclesiastical Court might have refused to grant probate; and the distinction attempted to be drawn between the powers of the Court of Probate over a will and a part of a will, or over a whole codicil and a part of a codicil, cannot be supported.

Upon the authorities cited by my noble and learned friend (Lord Lyndhurst), it is quite clear that the Ecclesiastical Court had jurisdiction to refuse probate of that part of the codicil which affects the appellant, because giving credit to the facts stated, that part of the codicil was not the will of the testator; he was imposed upon; and probate of that part of the codicil ought to have been refused. My Lords, it appears to be so when we examine the books, as well as upon reason and common sense; but we have the authority of the two judges who now preside in the Courts of Probate, Sir Herbert Jenner Fust and Dr. Lushington, who have both been consulted in this case, and who have both favoured us with their opinions, to which I give implicit credence. They assure us that upon such facts being proved before the Ecclesiastical Court, that Court would be bound to refuse probate. Then it clearly comes to the question which my noble and learned friend stated, had the Ecclesiastical Court jurisdiction over this matter to refuse probate, and was their decree a right or wrong one?

Now I must be permitted to say that my noble and learned friend, the Lord Chancellor, argued the whole case upon the supposition that the decree of the Ecclesiastical Court in granting the probate was right,—that there was a legal estate duly conferred by that probate upon the legatee, who was claiming under the ninth codicil. But giving credit to the facts alleged in this bill, that decree was clearly erroneous. I believe, as the bill states, that the Eccle[234]-siastical Court refused to allow the plaintiff to enter into any examination of a particular part of the codicil separate from any objections that might apply to the whole; but in my opinion that was wrong. My noble and learned friend who last addressed your Lordships very properly says, that this is a case in which there has been gross fraud, and that the party who availed himself of this fraud ought not to be allowed to enjoy the fruits of it. I entirely concur with him in saying so; but the question is, by what means shall justice be done? I say that the proper proceeding would have been an appeal from the decree of the Ecclesiastical Court to the Judicial Committee of the Privy Council, where the probate granted of the ninth codicil would have been reversed. If there has been probate erroneously granted by the Ecclesiastical Court, what is the remedy? If you say that in this case the party may apply to the Court of Chancery,

and may file a bill which shall make the legatee a trustee for the next of kin, or for any other party seeking to set aside that part of the codicil, just see the consequence : in every case, by this contrivance of making the party who would be beneficially interested a trustee for another, you do indirectly that which the law forbids you to do directly. The law says that the Court of Chancery has not jurisdiction over a will of personal property ; it cannot set aside a probate of personal property. Well, then, if you are not allowed to file a bill to set aside the probate, shall you be allowed, in every instance, to file a bill to declare the party in whose favour the probate is granted to be a trustee for the next of kin, or for some other party ? Wherever you wish to find fault with the probate which the Ecclesiastical Court has granted, you have only to file a bill and to pray that the party in whose favour the probate has been granted may be declared a trustee. Nay, my Lords, by this process you might review the sentence of the Ecclesiastical Court in *refusing probate* ; because, let [235] me suppose that the Court refuses probate, and grants administration to the next of kin, then, the Court having refused probate and granted administration to the next of kin, the party who claims under the will would file his bill, and would pray that the next of kin may be declared to be trustees for the legatee, and in that manner you might in every instance have an appeal from the Court of Probate to the Court of Chancery. That has never been the practice of our judicial constitution ; the appeal from the Ecclesiastical Court formerly was to the Court of Delegates ; it is now to the Judicial Committee of the Privy Council.

The reasoning on the other side proceeds upon the supposition that there is what we may call a legal estate in the legatee. I must take the liberty to say that I consider that an entire fallacy ; the legatee has no right. Probate ought to have been refused, and the refusal of probate would have done complete and final justice between the parties. This is totally different from the case of a legal estate being decided by a Court of law to be in a particular individual. In such a case there is no remedy whatever except by filing a bill in the Court of Chancery, and having the party in whom the legal estate is, declared to be a trustee for the party whom he has defrauded. We have a very well known example of that in *Bulkley v. Wilford* (2 Clark and Fin. 177), where an attorney caused a fine to be levied without informing the testator that the effect would be to revoke his will, he, the attorney, being the heir at law. It was very properly held there that the fine revoked the will, but still that it was a case in which the Court of Chancery might properly declare the heir at law a trustee for the devisee who had been defrauded.

For these reasons I am clearly of opinion that in this case the remedy ought to have been by appeal to the Ju-[236]-dicial Committee of the Privy Council, and not by a bill in the Court of Chancery. I do not go through the authorities, but there is one to which I must refer, because it is the decision of this House, and it is expressly in point. That is the case of *Kerrich v. Bransby* (7 Bro. Parl. Cas. 358). In that case there had been a probate granted of a will of personal property ; after that there was a bill filed to set aside the probate, but then that bill prayed such other relief as the Court of Chancery might see fit, and praying that the probate might be set aside, it prayed everything short of that. Lord Macclesfield did not set aside the will, but what did he do ? he made a decree that the legatee should be declared a trustee for the next of kin ; that is clearly the effect of his decision. My Lords, that, no doubt, was a right decision according to the doctrine which is now contended for as regulating the jurisdiction of the Court of Chancery, and it was acquiesced in for some time. But it was at last brought by appeal to this House, and the decree was reversed. An attempt was made to take off from the effect of that authority, by saying that it was not a bill to have the legatee declared a trustee for the next of kin, but that it was a bill to set aside the probate altogether. It sought every thing within the compass of that prayer, and it is to be regarded precisely in the same light as if the bill had been simply to have the legatee declared a trustee for the next of kin. Then it was said that that point was not discussed in this House, and that this House must have proceeded upon the merits of the case. I hold the report in my hand, and I will show your Lordships to demonstration that that point was argued in this House, and that that point was decided by this House. Unfortunately we have not got the judgment at length, but we have the arguments which were raised in support of the appeal. In support [237] of the appeal it was insisted that the Court

of Chancery ought not to have impeached the will of the 18th of March, 1715, so far as it concerned the personal estate, because it had been already established by the proper Ecclesiastical Court, which has the sole jurisdiction of determining wills so far as they may relate to personal estate, and if there had been any fraud or imposition in obtaining the will, it was properly examinable in that Court only. Therefore, at your Lordships' bar, in the year 1727, there was exactly the same argument which has been used by the party in this case. On the other side it was argued, "as to the probate of the will in the Ecclesiastical Court it was not impeached by the decree, though the appellant was restrained, as in justice he ought to be, from taking any beneficial interest under it." Now, my Lords, is not that the very argument used in support of the decree of my noble and learned friend, the Master of the Rolls? Because, it is said, you do not impeach the decree of the Ecclesiastical Court granting probate, you only declare that the party who took the benefit of that probate shall be considered a trustee for another. That argument was then urged in this case, but it was urged in vain, because the decree of Lord Macclesfield was reversed, and the probate granted by the Ecclesiastical Court stood with all the consequences belonging to it.

I would merely further observe to your Lordships, that I take this distinction; where the Ecclesiastical Court cannot do justice by the powers belonging to it, probate must be granted; it is not a Court of construction, and it must confine itself within its own limits; in certain cases it must grant probate, and refer the parties for justice to a Court of Equity; but if the Ecclesiastical Court in any particular case can do ample justice by granting or refusing a probate, then after the decree of the Ecclesiastical Court there is no remedy in the Court of Chancery; if the Ecclesiastical Court has come to an erroneous decision, [238] the appeal ought to have been, formerly, to the Court of Delegates, now to the Judicial Committee. To hold otherwise would lead to most inconvenient consequences; it would lead to a conflict of jurisdiction. Suppose that in this very case there had been an appeal to the Judicial Committee of the Privy Council, as there might have been, the Judicial Committee of the Privy Council might have been put in conflict with this House, they both being Courts of the last resort.

For these reasons I am of opinion that my noble and learned friend who first addressed the House was quite right in reversing the order of his Lordship, the Master of the Rolls, and that the order appealed from ought to be affirmed.

Appeal dismissed and order affirmed: no costs, the appellant suing as pauper.

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[239] The HONOURABLE HENRY TREVOR,—*Appellant*; The HONOURABLE GEORGE RICE RICE TREVOR and daughters,—*Respondents* [July 8, 14, 15, 1845; May 10, 11, July 20, 1847].

[*Mews* Dig. viii. 498; xiv. 391, 406, 1557; xv. 1375, 1439. S.C. 13 Sim., 108; 11 L.J. Ch. 417; 6 Jur. 863. See *Hadwen v. Hadwen*, 1857, 23 Beav. 551; *Coape v. Arnold*, 1854-55, 2 Sm. and G., 311; 4 De G. M. and G., 574; *Sealey v. Stawell*, 1875, 9 I.R. Eq. 499.]

*Will—Construction—Issue in tail male.*

A testator devised freehold estates to trustees in trust to settle and convey them to the use of G. R. for life, with remainder to his issue in tail male, in strict settlement, and in default of such issue the estates to go over. G. R. had no son but had several daughters, all born after the testator's death:—

Held that the words "in tail male" were descriptive, not of the issue, but of the interest they were to take, and that the daughters were entitled to take, under the limitation in remainder, as tenants in common.

This was an appeal from a decree of the Vice Chancellor on the construction of a will of Viscount Hampden (reported in 13 Simons, 108). His Lordship made

three distinct wills, by the first of which, dated the 6th of September, 1824, he gave his estates in the county of Sussex to the Honourable Henry Brand, the appellant, for life, or until he should succeed to the Barony of Dacre, then enjoyed by his brother; and after his decease or succeeding to that barony, the testator gave the said estates to the appellant's eldest son, Thomas Brand, for life, or until he should succeed to the said barony, with remainder to trustees to preserve, etc.; and after his, Thomas Brand's decease or succeeding to the said barony, the testator gave the said estates to his first and other sons successively in tail male, and, in default of such issue, to the appellant, his heirs, and assigns; "Provided that whenever any son of the said Thomas Brand, or his issue male, should succeed to the [240] said Barony of Dacre, then the estate of the person so succeeding thereto (provided that there should then also be in existence any other son or issue male of any other son of Thomas Brand) should determine in like manner as if the son of the said Thomas Brand, who or whose issue male should then so succeed to the said barony, were not only actually dead, but as if there were also an utter failure or extinction of male issue of such son of Thomas Brand, and thereupon the said estates should go over to the next or other son of Thomas Brand, or his issue male, to be entitled under the devises aforesaid: " With proviso also to take the name and arms of Trevor.

By the second will, dated the 7th of September, 1824, the said testator appointed executors, and by a codicil, dated the 8th of September, he gave them the residue of his personal estate upon certain trusts therein mentioned.

By the third will, dated the 8th of September, 1824, which is the subject of this appeal, the testator gave his estates in the county of Bedford to the Hon. Henry Brand, and another, and their heirs, upon trust that they "do and shall settle and convey the same to the use of or in trust for the Hon. George Rice, son of Lord Dynevor (the respondent) for life, without impeachment of waste, except permissive waste or spoliation, with remainder to his issue in tail male in strict settlement, upon condition that all person or persons from time to time to come into possession of the said settled estates do and shall, within one year afterwards, take the name and bear the arms of Trevor, and also upon the like condition to that I have made in my will of my Sussex estate, so far as the change of circumstances will permit, that the said estate shall go over to the party next entitled on the person for the time being possessed becoming entitled to the Barony of Dynevor, and in default of such issue of the said George Rice, I devise my said Bedfordshire estate unto the said Henry Brand, his heirs and assigns for ever."

[241] The testator directed that in the intended settlement should be contained the usual powers of leasing for George Rice, and the trustees to preserve, etc., during the minority of tenants in tail in possession, and also a power for the said George Rice to jointure any wife or wives, at one or several times, to the extent of one-fifth part of the then ordinary annual rental of the settled estates; and also a power to portion younger children to a limited extent; and the testator declared it to be his will and intention that, notwithstanding the absolute devise of his Sussex estates to Henry Brand and his son and issue male, a settlement under the direction of the same trustees should be made of these estates, so as to include such powers, provisions, and clauses, *mutatis mutandis*, as before mentioned, concerning his Bedfordshire estates.

The testator died on the 9th of September, 1824. Soon after his death, Henry Brand (the appellant), and George Rice (the respondent), took, respectively, the name and arms of Trevor, and the latter is now called George Rice Rice Trevor. He had no issue at the time of the testator's death, but he has since had five daughters, and no other child.

The Barony of Dacre, mentioned in the first will, is a Barony by writ, descendible to females as well as males. The Barony of Dynevor, mentioned in the will of the Bedfordshire estates, was created by letters patent, and is limited to heirs male of the body of the first Baron.

In a suit instituted in Chancery, between the respondent as plaintiff, and the appellant and others as defendants—to which suit the respondent's daughters were made parties—an order was made, referring it to the Master to approve of a settlement, in pursuance of the will of the Bedfordshire estates.

The Master made his report in 1841, setting forth the [242] draft of settlement,

of which he approved. The respondent, and his daughters, severally, took various exceptions to the settlement, all concurring in this, that the settlement contained no limitation in favour of daughters. (The settlement, exceptions, and arguments on them, and also the judgments, are set out in 13 Simons, 113, *et seq.*)

The Vice Chancellor, in his judgment on the principal exceptions held, that, under the limitation to the "issue in tail male," females might take, and he therefore allowed those exceptions, declaring by his order, dated the 27th July, 1842, "that in the draft of settlement approved by the Master there ought—immediately subsequent to the limitation therein contained of the hereditaments therein comprised to the first and other sons of Geo. R. R. Trevor successively in tail male, and for default of such issue—to have been inserted a limitation of the said estates to the use of all and every the daughter and daughters of the said Geo. R. R. Trevor, as tenants in common in tail male, with cross remainders between them in tail male. The subordinate exceptions also were allowed, some of them with variations; and the report was referred back to the Master to be reviewed.

The appeal was against that order.

Mr. Wigram and Mr. Hodgson (with whom were Mr. J. Parker, and Mr. C. Hall) for the appellant:—

The first and principal question in this appeal is, whether, in the settlement to be made of the Bedfordshire property, estates are, or are not, to be limited to the daughters of Geo. R. R. Trevor? Upon the decision of that question depend the first and third of his exceptions to the draft settlement approved by the Master; the first and third of the exceptions taken by the eldest daughter, and three exceptions taken by the other daughters. The eldest daughter's exceptions differed from those taken by [243] the younger daughters in this, that while the eldest claimed that in default of sons of Geo. R. R. Trevor the property should be limited to his first and other daughters *successively* in tail male, the younger daughters contended that all the daughters should take together as tenants in common; and to that conclusion the Vice Chancellor came.

There are two other, but subordinate questions: the first of them, raised by the second of Geo. R. R. Trevor's exceptions, relates to the extent of his power of jointuring, under the power given to him in the will, "to jointure any wife or wives, at one or several times, to the extent of one-fifth part of the then ordinary rental of the estates;" the second of these minor questions, raised by his fourth exception, relates to the clause shifting the estates upon the party in possession of them succeeding to the Barony of Dynevor.

The main question depends upon the meaning of the words "with remainder to his issue in tail male, in strict settlement." The respondents contend that the word "issue" describes the persons who are to take; that the words "in tail male" are merely descriptive of the estates which they are to take, and therefore that the settlement ought to contain limitations to daughters as well as sons. The appellant contends that the words "in tail male" go to form part of the description of the persons who are to take, limiting the estate to G. Rice, the first taker, and to the heirs male of his body, and therefore that the settlement ought not to contain limitations to daughters. That was the view taken by the Master, and the object of the appeal is to restore the settlement as approved by him. The grounds on which the appellant submits that the Master was right, and the Vice Chancellor's decree erroneous, are these:—*first*, according to the natural and proper technical [244] meaning of the words "issue in tail male," limitations to sons only ought to be inserted in the settlement; *secondly*, looking at the whole will, it appears that the testator plainly contemplated that there should be always a single successive ownership of the estates, and not a co-ownership among tenants in common, as the Vice Chancellor declared. But upon any reasonable construction of the will, it is impossible to agree with his Honour, that daughters are to be admitted to take estates under a limitation to "issue in tail male."

The phrase "issue in tail" is an expression properly and technically descriptive of "heirs of the body." It is a legal and correct phrase, marking that the word "issue" is used in its proper sense of including remote as well as immediate descendants, and not in any restricted sense, such as that of "children." In like manner the words "issue in tail male" are properly and technically descriptive of "heirs

male of the body." The expressions "issue in tail male," and "heirs male of the body," are synonymous; they are stated to have been so used by Lord Camden in *White v. Carter* (Amb. 670), and by Lord Chancellor Sugden, in noticing that case in *Rochfort v. Fitzmaurice* (2 Dru. and War. 25).

It is clear that if this had not been an executory, but an immediate, devise to G. R., and "his issue in tail male," or to G. R. for life, and after his decease to "his issue in tail male," G. R. would have been tenant in tail male; *Shelley's Case* (1 Co. Rep. 93). The words describing the issue to take are the same in the two instances, and they would have received the same construction. The words "in tail male" would, in each instance have formed part of the description of the issue to take. All the cases on the meaning of the word "issue," are collected in Mr. Prior's useful Treatise (see ss. 9, 189 and 209). The circumstance that the pre-[245]-sent is the case of an executory trust, and not of an immediate devise, can only make a difference in the mode of parcelling out the estate devised; that is, parties who would, under an immediate devise, have taken by descent, might, under an executory trust, be made to take by purchase; but the parties to take are in each case precisely the same. In *Blackburn v. Stables* (2 Ves. and B. 269-70), Sir W. Grant says, "there is no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention, which must be wanting in the latter." "If it is clearly to be ascertained, from any thing in the will, that the testator did not mean to use the expressions, which he has employed, in their strict proper technical sense, the Court in decreeing such settlement as he has directed, will depart from his words in order to execute his intention, but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense." In an immediate devise, the addition of the words "in strict settlement" would not have made any difference; and here they cannot be taken to mean any thing but to regulate the manner in which the persons designated by "issue in tail male" are to take, so as to preserve the estate to the different members of the family to whom it was destined, and to prevent the first taker from barring the remainder.

It is submitted that this view of the case is alone conclusive in favour of the appellant's construction. It shews that the settlement ought to be made on Geo. R. R. Trevor for life, with remainder to his issue, who would take under a limitation in tail male. This construction renders the testator's direction to settle, perfect in itself; at the same time that it clearly defines the issue who are to take, it also defines the manner and order in which they are to take; therefore, [246] no question can arise, upon this construction, as to the proper limitations to be contained in the settlement. But upon the respondents' construction the direction to settle is indefinite and imperfect. Numerous questions may arise as to the objects to take under the description of "issue," and the manner and order in which the issue are to take; events happening after the date of the will might vary the objects to take. Some of the difficulties arising upon the respondents' construction are so great and so obvious, that the omission of any provision in the will applicable to them, renders it impossible to suppose that the testator meant what the respondents contend for. If a solicitor were to send to counsel instructions for a settlement in the words used by this testator, no conveyancer of experience could doubt as to the meaning of an expression so familiar as "issue in tail male in strict settlement;" even a person less conversant with forms would at once conclude that they mean male issue, by considering that, otherwise, the instructions were too indefinite to be acted upon. The first rule of construction is, that if words be susceptible of their ordinary primary meaning—their proper and legal signification—they are to be taken in that proper legal signification, unless it be repugnant to the context. That rule was illustrated in a recent case in the Court of Exchequer, *Mallam v. May* (7 Jurist, p. 19).

According to the appellant's construction, the words "issue in tail male" are a description of all the issue who are to take under the limitations, whether by descent or purchase, and the proper sense of the word "issue," as extended to descendants of every degree, is adhered to. But upon the respondents' construction, the word "issue" requires to be confined to children, or to issue in some given degree; for manifestly a direction to settle [247] "on issue in tail male" including all descendants, whether male or female, however remote, would be absurd, and indeed con-

tradictory. The respondents' construction, therefore, would give a confined meaning to the word "issue," without anything in the context to warrant it. They contend that the words "in tail male" are words properly descriptive of an estate known in the law; and then, to avoid an absurdity, the word "issue" must be construed "children." But this argument assumes the point in dispute, that, is, it assumes that the words "in tail male" are descriptive only of the estate which the takers are to take. We, on the contrary, say the words are descriptive of the persons who are to take; that is the primary meaning of the words "issue in tail male," clearly signifying heirs male of the body; *Roe v. Grew* (2 Wils. 322), *Wharton v. Gresham* (W. Blacks. 1083), *Haydon v. Wilshire* (3 T. Rep. 373), *Whitelock v. Hedden* (1 Bos. and Pul. 243), *Leigh v. Norbury* (13 Ves. 340), *Dalzell v. Welch* (2 Sim. 319), *Gallini v. Gallini* (5 Barn. and Ad. 621), *Lees v. Mosley* (1 You. and C. (Exc.) 583).

The appellant's construction is aided by other parts of the testator's will and codicils:

First. The settlement is directed to be made upon a condition that the estate is to go over to the "party" next entitled, on the "person" for the time being possessed thereof becoming entitled to the Barony of Dynevor. The words giving the estate over, contemplate only the case of one party being next entitled. The terms of the condition, therefore, raise an inference against the construction that the estate was to go over to several daughters; and favour the appellant's construction, that there could be only a single owner,—only one person at a time entitled to the estate. [248] Upon the respondents' construction several daughters would take together as tenants in common; and so, according to the Vice Chancellor's decree, they would be all co-owners. It is also to be observed that the Barony of Dynevor is a Barony limited to heirs male only. Unless the appellant's construction be adopted, the condition can only be made applicable to some of the persons for the time being possessed of the estate, although, from the language used, it would appear to apply generally to every person for the time being in possession. The condition is not inserted at length in this will. The testator specifies the event in which the estate is to shift, and the person to whom it is to go over, and refers to the condition in the will of the Sussex estate as that with which the condition to be inserted in this settlement was to correspond, "so far as the change of circumstances will permit." There is no ground to argue that these words had reference to the difference in the nature of the limitations of the two estates. It is sufficient to say, that under the direction to settle the Bedfordshire estate in strict settlement, there might have been several estates for life, with several remainders to first and other sons in tail male of different persons, and the shifting clause in the will of the Sussex estate, which was framed so as to provide for a shifting from the issue male of one person only, might therefore require some re-modelling to make it apply to the different state of circumstances.

Secondly. The direction to take the name and arms of Trevor also shows that the estate was to be enjoyed by one person. That direction is inapplicable to females. It can hardly be supposed that the testator contemplated several persons in possession, all using the name and bearing the arms at the same time. The object of clauses of this nature, almost necessarily, is confined to the case of a family estate enjoyed by one person. Further, the testator does not provide for the husbands of daughters [249] taking the name and bearing the arms, a provision which is invariably inserted in similar clauses when females are included; and, further, there is nothing in the will to exempt a daughter who had taken the name, and subsequently married, from a forfeiture consequent upon the change of her name by marriage. The words "all person or persons from time to time to come in possession of the said settled estates," which are used in this condition, do not show that the case of more than one person at a time being in possession was contemplated. The plural, "persons," is rendered necessary by the use of the word "all." The words "from time to time" make the plural, "persons," applicable to a single and successive enjoyment. It is observable that the testator used the plural, "persons," in his codicil, in reference to his Sussex estate, which clearly was to be held by one person only at a time. The words of the codicil are, "to allow the persons for the time being entitled."

Thirdly. The testator directed that the settlement shall contain powers of leasing "during the minority of tenants in tail in possession," and a power of sale, exchange, partition and enfranchisement, "during the minority of each tenant in tail in

possession." The language here used, points to a single and successive enjoyment. The difficulty of applying these powers to undivided shares, is also in favour of the appellant's construction. There is no provision for the case of some of the persons in possession being infants, and others of age; and the want of such a provision would render it impossible to act under the powers in the case supposed. Leases or sales of undivided shares only, could not have been in contemplation.

Fourthly. In the codicil, the purchase of additional lands is (by reference to the corresponding direction as to the Sussex estate) to be made with the consent of the "person" who, for the time being, would be "tenant" for life, in [250] possession of the purchased estates; but it is a consequence of the respondents' construction, that there might have been several "persons" who, for the time being, would be tenants for life in possession. Upon that construction also, some of the persons in possession at the same time, as tenants in common, might be tenants for life, and other tenants in tail male, to which state of things the direction in question cannot possibly be applied.

Fifthly. The estate is given over "in default of *such* issue of the said Geo. Rice." Here the word "issue" is obviously used in the sense attributed by the appellant to the same word in construing the words directing a settlement.

Sixthly. The will of the Sussex estate and the will of the Bedfordshire estate were executed within two days of each other. The former will is not executory, and contains only limitations to first and other sons in tail male. The latter will directs a strict settlement to be made, and the testator therefore does not describe the issue to take as first and other sons in tail male, but generally as issue in tail male. At the end of the latter will the testator refers to the former will, and declares that though such former will was not executory, he now intends that it should be so, and that the settlement to be made of the Sussex estate should "include such powers, provisions, and clauses, *mutatis mutandis*, as herein before mentioned concerning my Bedfordshire estate." It is submitted that the provision here made, shows that the character of the limitations of the two estates were to be the same, that is, that both estates were to be settled on male issue only. It cannot be contended that those words have the effect of directing a settlement to be made of the Sussex estate on Thomas Brand and his "issue in tail male," in the manner in which the respondents construe those words, so as to let in female issue to take the Sussex estate.

[251] Upon the respondents' construction there would clearly be no ground for confining the word "issue" to "children." It must at least include all issue who might be living at the testator's death, and then very anomalous results might follow upon that construction; for instance, a daughter of Geo. R. R. Trevor might have had a daughter in the testator's lifetime, in which case the grand-daughter would, upon the respondents' construction, have been one of the stock to whom an estate by purchase was to be limited, and her male issue might have inherited; but if such grand-daughter had been born a day after the testator's death, neither she nor her male issue could have taken. Again, the daughter, born in the lifetime of the testator of a daughter, might take, while a daughter, not born at the testator's death, of a son, could not take; and the daughter of a daughter would thus be preferred to the daughter of a son, which would be most capricious. It is impossible for any thing to be more unusual and incongruous than for children, and the children of such children, to take together as tenants in common in tail male. The appellant's construction is free from incongruities and anomalies of that kind.

According to the respondents' construction, the will contains nothing to import any preference of sons to daughters or of daughters to sons, or sons *inter se*. The Court below expressed its opinion, that the words "in strict settlement" are to be referred only to the mode in which the tenant for life, Geo. R. R. Trevor, and his issue, should take. These words do not describe what issue are to take, but merely express that the issue shall take by purchase. The inevitable consequence would appear to be, that upon the respondents' construction, all the issue (sons, daughters, and remoter issue) must take together as one class, as tenants in common, in tail male. Yet it is certain, and is indeed agreed, that a preference as between sons, and as between sons and daughters, [252] must have been intended, and that the settlement must be framed accordingly. It is impossible, therefore, to adhere to the words used by the testator, if the respondents' construction be adopted.



The result of their construction would be to create limitations to the daughters as tenants in common in tail male. This was so decided by the Court below, and it is an inevitable result, for it is certain there is nothing in the will to give a preference to daughters *inter se*; such a mode of limitation is without precedent. In practice, limitations in settlements to daughters as tenants in common, are always in tail general. The result of the limitations is against the probable intention of the testator. In practice, where females are not excluded, the daughters of a son are always preferred to his sisters, and accordingly, where there is a limitation to daughters as tenants in common, it follows a limitation to sons in tail general, under which female descendants of the sons would take. It is admitted that the testator did not intend any female descendant of Geo. R. R. Trevor to take by descent, and it attributes a capricious intention to the testator to hold that he intended they might take by purchase.

This being the case of an executory trust, the proper mode of construing the words "issue in tail male," is to read them as referring to those limitations which a conveyancer of experience would insert in a settlement, if he was furnished with instructions in the words of the will in question. It is here again submitted, with great confidence, that any conveyancer of experience would, with such instructions, without hesitation frame the settlement in accordance with the appellant's construction.

[Upon the two subordinate questions, first, as to the power of jointuring, the learned counsel submitted that, according to the true construction of the will, Geo. R. R. Trevor should not be authorized to appoint by way of jointure, a *clear* yearly sum equal to one-fifth part of [253] the rental of the estates, without any deduction, but that the yearly sum appointed ought to be subject to the land tax; in other words, that the outgoings should be taken out of the gross rental, before the division took place, to ascertain the amount of the jointure; and, secondly, as to the shifting clause, they submitted that the estate of the person becoming entitled to the Barony of Dynevor, ought to be made to cease, whether there should or should not be in existence (applying the condition to Geo. R. R. Trevor himself) any child, or any issue male of any child, or (applying it to any of his children or their issue male) any other child, or any issue male of any other child, capable of taking under the limitations of the settlement. These questions were deemed to be of very little importance in comparison with the first, the decision of which must also govern the construction of the second of these two clauses of the will.]

Mr. Bethell and Mr. Romilly (with whom was Mr. Wickens) for the respondents:

It must not be forgotten that the question raised by the exceptions is, how the settlement of the estates is to be framed so as to effectuate the testator's intention. It is, in the first place, to be a strict settlement embracing Mr. Rice Trevor and his issue, and giving to the issue estates in tail male; and then comes the question, whether his daughters are to be excluded from participation in the estates.

The word "issue," used by the testator in describing the persons whom he meant to take the estates as purchasers, must be taken according to its ordinary acceptation, as including both males and females; *Hart v. Middlehurst* (3 Atk. 371; see other cases. *ante*, p. 247). Are you warranted by the language of the will, by decision, or by principle, in saying [254] that the daughters are to be excluded from the settlement on the "issue?" The words "in tail male" do not operate to exclude daughters. No legitimate inference can be drawn from the quantity of interest conferred, to show that the class of persons previously named to take is less extensive than the words import. The word "issue" contains the description of the persons who are to enjoy; the words "in tail male" are indicative of the quantity of interest they are to enjoy. The adjective "male" is not to be separated from the word "tail" and joined to "issue." The phrases "tenants in tail male" and "in tail special" are familiar to all, as laid down in Littleton's Tenures. The issue of Rice Trevor are to be the tenants of the estates to be comprised in the settlement. What interest are they to take? They are to take just the quantity of interest designated by the words "in tail male;" words apt and proper, and used in their plain and ordinary meaning. Let "children" be substituted for "issue," and there will be no difficulty in the construction of the limitation.

The question will be facilitated by attending to the rules of construction as stated in Jarman's Edition of Powell on Devises (Vol. II., p. 8; rules 14, 15, and 16):

"Words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and they are in all cases to receive a construction which will give them all effect, rather than one that will render some of them inoperative: and of two modes of construction, that is to be preferred which will prevent a total intestacy." "Where a testator uses technical words, he will be presumed to employ them in their legal sense, unless the context contain a clear indication to the contrary." "Words occurring more than once in a will shall be presumed to be used always in the same sense, unless a contrary intention [255] appear by the context, or unless the words be applied to a different subject. And upon the same principle, where a testator uses an additional word or phrase, he shall be presumed to have an additional meaning."

Let these principles be applied to the interpretation of these wills. It will be seen that in the will of the Sussex estates, an immediate devise to males only, the word "issue" occurs seven times, but never without the adjunct "male;" whereas in the will now under consideration, the testator uses the word "issue" only, thereby indicating that, in its proper technical sense, it comprehends females as well as males; but in the other will, where he meant to exclude females, he uses the proper adjunct. The context of the two testamentary instruments shews that the testator, if he had designed to exclude the daughters of Rice Trevor, knew how to use apt words for that purpose; and therefore, in the absence of such words, we cannot come to the conclusion that he had any such intention. The use of the words "person or persons," in the name and arms clause in the will now under consideration, shews that the testator there contemplated the possibility of his Bedfordshire estates being held by a plurality of persons, as females, tenants in common; but he carefully uses the singular number in the clause shifting the estates, on the person in possession of them succeeding to the Barony of Dynevor, which could be held only by one person, and a male. Again, "in default of such issue," he devised the estates over. There he does not use the words "male issue" or "issue male," which would exclude females, but the words "such issue," "such" relating to its antecedent "issue," capable of admitting females as well as males. In the last clause, declaring it to be his will that "notwithstanding the absolute devise of his Sussex estate in favour of Henry Brand, and his issue male," there should be a settlement of that estate, he uses the adjunct, "male," marking again the distinction he [256] made in the limitations of the two estates, the difference of expression manifesting the difference of purpose.

Much of the argument for the appellant has proceeded on the assumption, first, that "issue in tail male" are synonymous and identical with "heirs male of the body;" and, secondly, that the devise is to be considered as if it was an immediate devise to Mr. Rice Trevor, with remainder to his issue in tail male,—under which undoubtedly the first taker would have an estate in tail; Archer's Case (1 Co. Rep. 66), Wild's Case (6 Co. Rep. 17 b), *King v. Melling* (1 Ventris, 229). For the first part of that argument reference was made to *White v. Carter* (Eden, 366; Amb. 670), a case which, on examination, will be found to be no authority, and is besides incorrectly reported; and as to the second, the devise in this case is not to be confounded with a devise to a man and his issue in tail male which are words of limitation, and not of purchase—which all parties admit to have been here intended—and it is an established rule that where the word "issue" is used in an instrument as a word of purchase, it cannot, at the same time, be taken as a word of limitation; *Roe dem. Dodson v. Grew* (2 Wils. 322), *Cook v. Cook* (2 Vern. 545), *Doe dem. Cooper v. Collis* (4 Term Rep. 244). The word "issue," here taken as a word of purchase, without anything in the context to controul its meaning, comprehends equally male and female; *Hart v. Middlehurst* (3 Atk. 371), *Dod v. Dod* (Amb. 244), *Oddie v. Woodford* (3 Myl. and C. 600-10-13). (And see the cases, *supra*, p. 247.)

The clause in the will consists of three distinct parts, first, "issue," which is used as a word of purchase, and has the appropriate purpose of pointing out the descendants, male and female, who are to take; secondly, "in tail male," which words describe the nature and quality of the estates [257] to be taken; and, thirdly, "in strict settlement," which—inasmuch as "issue" is *nomen collectivum*—have the office of pointing out the series and form of arrangement in which the issue, males and females, are to take. How a settlement in that form is to be carried into effect,

is best shown by the practice of conveyancers, and by writers of authority on the subject. Mr. Fonblanque, in his *Treatise on Equity*, speaking of the general principles of the Court in respect to settlements, as in the case of marriage articles, says (Vol. i. p. 405, 5th edit.), "And if the parties come into a Court of Equity for a specific execution, the Court will provide, not only for the sons of the marriage by proper limitations, but likewise for the daughters; and even although a settlement were actually made in pursuance of such articles before marriage, equity will rectify it in favour of the issue female." Gilbert's *Lex Praetoria*, published about 1750, has this passage (page 253): "If articles be made between husband and wife, etc., in which the limitations are to the husband for life, remainder to the wife for life, remainder to the heirs of the body, etc., there if they come to a Court of Equity for specific execution, etc., the Court will provide, not only for the sons of the marriage by proper limitations, but also for the daughters." So that under the expression "heirs of the body," though not so comprehensive as "issue," daughters are comprehended. Passages to the same effect occur in Atherley's *Treatise on Marriage Settlements* (page 101), Butler's *Notes to Co. Litt.* (page 376 b), and Preston on *Estates* (page 131). The formula of strict settlement is given in the *Books of Precedents*, as in Horsman's *Precedents* (page 629, 2nd edit.), the limitations are to first and other sons of the marriage, in tail male, "remainder to daughters as tenants in common in tail." In Barton's *Conveyancing* (Vol. vii. p. 281, 1824) the form is given in full, and it is said in a note "the usual plan (of strict settlement) is to limit the estate" (after estates for life to husband, and then to the wife, with remainder to trustees to preserve, etc., interposed) "remainder to the first and other sons in tail, remainder to daughters as tenants in common, with cross remainders between them." Another note to the precedent states, that "in settlements of large estates, they are sometimes limited, on failure of male issue of sons, to daughters in strict settlement in tail male" (*id.*, page 312).

In Stewart's *Practice of Conveyancing* (Vol. ii. ed. 1832) the formula for strict settlement gives limitations to the sons successively in tail male or general, "to the daughters as tenants in common in tail male." In Shelley's settlement—one of the first precedents put by conveyancers into the hands of their pupils to copy—the limitations are to sons in tail male, to sons in tail general, to daughters as tenants in common in tail general, with cross remainders. The form in Shepherd's *Precedent of precedents* is to the same effect. Mr. Hayes' form (2 Vol. 54) gives the limitations in strict settlement to sons in tail male, then to daughters in tail male, then to sons in tail general, etc. And in Martin's *Conveyancing* (Vol. iv., p. 609, ed. 1844; by Davidson), under the head "Strict Settlements," the limitations are to the first and other sons successively, first in tail male, then in tail general; first and other daughters successively, first in tail male, then in tail general. Mr. Jarman's *Precedents* are precisely to the same effect. It is most important, if not imperative, on the Courts to attend to the meaning which practical men in any department of the law put on the language which they are constantly in the habit of using; the manner in which they use and act upon particular words in the instruments which they prepare, gives the best illustration of their meaning. [259] Lords Eldon and Redesdale, in numerous cases, expressed great respect for their practice, emphatically in *Smith v. Earl of Jersey* (3 Bligh, 444) and in *Cholmondely v. Clinton* (4 Bligh, 56).

[In refutation of the argument of the appellants, that "issue in tail male" was identical with heirs male of the body, they cited *Seale v. Seale* (1 P. Wms. 290), the observations of Sir W. Grant in *Blackburn v. Stables* (2 Ves. and B. 370-1), and Lord Eldon in *Jervoise v. Duke of Northumberland* (1 Jac. and W. 570-4).

As to the power of jointuring, they contended that the Vice Chancellor put the true construction on it; and the intention of the testator was that Mr. Rice Trevor should have power to appoint, by way of jointure, a clear annual sum to the amount of one fifth part of the gross annual rental of the estate at the time of making the settlement. The words in the will are "the ordinary annual rental of the estate."

And as to the clause for shifting the estates, on the succession of the person in possession, to the barony of Dynevor, they submitted that, according to the true construction of that part of the will which incorporates in it by reference the like clause in the will of the Sussex estate, the Bedfordshire estates ought not to be made

to shift from a child or the issue of a child of Rice Trevor, unless there should then also be in existence some other child, or issue male of some other child of Rice Trevor, capable of taking the settled estates under the limitations of the settlement.]

Mr. Wigram, in reply, claimed the benefit of the canons of construction read by Mr. Bethell from Mr. Jarman's Book (*ante*, p. 254), and desired that they might be applied to the in-[260]-terpretation of the disputed words, "issue in tail male." The question was narrowed in the cause to the meaning of these words; the appellants contending that they are all descriptive of persons, as distinguished from the estates they are to take, while the respondents contend that the word "issue" is descriptive of persons, the others "in tail male" designating the nature of the estates they are to take under the settlement. If the appellants are right in saying these words merely describe the line of persons who are to take, and are synonymous with the more technical words "heirs male of the body," the whole of the argument for the respondents fails. The appellants do not admit that issue, as used here, is a word of purchase; whether it is a word of purchase or of limitation was not a distinction in the contemplation of the testator. He directed a strict settlement to be made on a line of persons, and it is not till the settlement is to be made that it can be determined who takes by purchase and who by limitation. He referred to the cases that were cited in the argument for the respondents, and submitted that most of them supported his construction, and others of them had no application. He entirely concurred in the proposition, and in the inferences from those cases that were cited to show that in executory trusts for "issue," that term by itself included all descendants, female as well as male.

The order in which the counsel were heard was this: Mr. L. Wigram first, Mr. Hodgson, on the same side, was stopped by the Lord Chancellor, saying that their Lordships thought they had heard enough on that side, and that Mr. Hodgson would, if necessary, be heard in reply. Mr. Bethell was then heard for the respondents, and after him, instead of Mr. Romilly, who was with him, their Lordships called on Mr. Hodgson, and after him Mr. Romilly was heard, and then Mr. Wigram in reply.

[261] The case stood over for consideration until the end of the session of 1846, when the learned Lords, who heard the argument in 1845, viz., the Lord Chancellor, Lord Brougham, Lord Cottenham, and Lord Campbell, thought they ought to have the opinion of the common law judges, and the case was ordered to be argued before them, by one counsel on each side, in the then ensuing session.

The appeal came on now (May 10, 11, 1847) to be re-argued by Mr. L. Wigram for the appellant, and Mr. Bethell for the respondents, before the Lord Chancellor (Lord Cottenham), Lord Lyndhurst, Lord Brougham, Lord Langdale, and Lord Campbell; in the presence of Lord Chief Justice Wilde, Justices Patteson, Coleridge, Coltman, Maule, Wightman, Cresswell, Erle, and Williams, and Barons Parke, Alderson, Rolfe, and Platt.

The points of the arguments on this occasion, and some few new cases and authorities cited, are incorporated in the preceding summary of the more diffuse arguments at the former hearing.

The Lord Chancellor proposed the following question to the learned Judges, and, at their request, time was given to them to consider their answer:—

"George Rice Trevor died, leaving no son, but leaving one daughter, who had a son who attained twenty-one. The mother and son having agreed to sell the Bedfordshire estates to A. B., and to make a good title thereto, have brought an action against A. B. upon the agreement; the question is, whether they can, with the concurrence of the trustees, make a good title to these estates?"

Lord Chief Justice Wilde (June 28).—The question proposed by your Lordships has reference to a statement to the effect that "George Rice Trevor died leaving no son, but leaving one daughter who had a son who attained twenty-[262]-one; and that the mother and son have agreed to sell the Bedfordshire estates to A. B., and to make a good title thereto, and have brought an action against A. B. upon their agreement." And the question proposed by your Lordships is, "whether the only daughter of Geo. R. R. Trevor, and her son, can, with the concurrence of the trustees, make a good title to those estates?"

In answer to that question I have to state, that it is the unanimous opinion of the judges who heard the argument at your Lordships' bar, that a good title can be made, by the parties mentioned in the question, to the estates therein referred to.

The answer to the question depends upon the construction of the devise of the Bedfordshire estates, contained in the will of Lord Hampden, which devise is expressed in the following words: "I give and devise unto General the Honourable Henry Brand (meaning the appellant) and Joseph Rogers, gentleman, and their heirs, all and every my real estates in the county of Bedford, whether freehold or copyhold, upon trust, that they or the survivor of them, or his heirs, do and shall settle and convey the same to the use of or in trust for the Honourable George Rice, son of Lord Dynevor (now the respondent Geo. R. R. Trevor) for life, without impeachment of waste, except permissive waste or spoliation, with remainder to his issue in tail male, in strict settlement, upon condition that all person or persons from time to time to come into possession of the said settled estates do and shall, within one year afterwards, take the name and bear the arms of Trevor: And also, upon the like condition to that I have made in my will of my Sussex estate, so far as the change of circumstances will permit, that the said estate shall go over to the party next entitled, on the person for the time being possessed becoming entitled to the Barony of Dynevor; and in default of such issue of the said George [263] Rice, I devise my said Bedfordshire estate unto the said Henry Brand, his heirs and assigns for ever."

The question upon this devise is, whether, under either the word "issue" or the words "issue in tail male," sons only are comprised, or whether daughters as well as sons were intended to take?

The trusts in the will being executory, it is clear that Geo. R. R. Trevor was not entitled to more than a life estate, and that his issue, whether males only, or males and females, were to take by way of remainder as purchasers. It is not controverted that the word "issue," in its ordinary and proper sense, includes all descendants, however remote, and includes females as well as males. That such is the proper construction of that word is too well established to render it necessary to refer to authorities upon the subject. In this will, therefore, "issue," as a word of purchase, is synonymous with "children." But it is contended on the part of the appellant that the word "issue" in this will cannot be in any manner severed in construction from the words "in tail male" which follow it; and that the words "issue in tail male" must be considered as one entire and indivisible expression, describing the first takers and the estate to be taken; and, consequently, that the parties thereby designated as the first purchasers are the issue male, or sons of Geo. R. R. Trevor, to the exclusion of the daughters.

The respondents contend that the word "issue" is used in its natural and admitted ordinary sense, including females, and that such sense is not varied, or in any respect affected by the words "in tail male:" that the word "issue" expresses the parties to take, and the words "in tail male" the estate to be taken.

It seems to be agreed that the construction of the devise, as to the point submitted to the judges, is not [264] affected by the words "in strict settlement;" and we think that it is not.

The devise, if read in the manner contended for by the appellant, must be deemed to be framed in a very untechnical and inaccurate manner. The issue are to take as purchasers, and the word "issue" is a proper and apt word to describe those who are so to take; but "issue in tail male" is not an usual or apt form of expression to describe the first taker of an estate tail. "Issue in tail male" is an expression only correct when used in reference to an estate already settled; "issue in tail male" being the ordinary and correct form of expression to describe one taking by descent under an estate tail vested in the ancestor; and the words "issue in tail" are used in this sense, and as contrasted with the ancestor or first taker, by Lord Coke in the passages which have been referred to, and in the text books (Litt. ss. 638-642; Co. Litt. 326 b, 327 a, 327 b).

The question in this case seems to be narrowed to the point, whether in construing this devise the word "issue" is to be read in its ordinary sense, as including females as well as males; or whether, by the addition of the words "in tail male" in immediate connexion with the word "issue," or from other parts of the will, it is manifested that the word "issue" was not used in such ordinary and usual sense, but in a restricted and limited sense, as including males only.

It cannot be necessary to cite any of the numerous determinations in which the rule of construction has been recognized in the Courts of Law and Equity, and affirmed by your Lordships' house—that in a will, words, whether technical or otherwise, are to be understood as used in the sense ordinarily and properly applied to them, unless, from [265] the whole context of the will, it shall appear satisfactorily and clearly that the words to be construed have been used, and were intended to be understood, in some other sense.

We are of opinion that the word “issue” was used in the present will in its ordinary sense, and comprised females as well as males, and that such meaning is not controlled or affected by the words “in tail male” which immediately follow the word “issue,” or by any other part of the will.

The words “issue in tail male” were a convenient and not incorrect form of expression to denote the first purchasers, and the estate to be taken; the takers by the word “issue”; the estate to be taken by the words “in tail male.” There is no reason against an estate “in tail male” being limited to a female, or an estate in tail female to a male, and the limitation of an estate tail of one kind or the other has no necessary effect in denoting the sex of the first taker, the effect of the words of such limitation not being to describe the first taker, but simply to mark the course of descent from such first taker. If the word “issue” may be correctly construed as describing the first purchasers, and the words “in tail male” be a correct legal description of the estate to be taken by such purchasers, there should be found some very distinct and substantial reason for so construing the entire expression, as to render it an incorrect form of devise.

Therefore, as an estate in tail male may be limited to a daughter as well as to a son, and as daughters come within the description of issue, there seems no good reason, according to the ordinary rules of construction, for deeming this devise ambiguous.

The argument on the part of the appellant, to prove that the devise in question ought to be read as including males [266] only, has been mainly derived from other parts of the will, and especially from those parts which refer to the disposition and limitations relating to the Sussex estates contained in the first will, and in showing that the testator has limited those estates to males only, and from thence inferring that the testator intended to limit the Bedfordshire estates also to males only.

We think it would be dangerous, and lead to a great uncertainty in construing a devise relating to one estate, to infer an intention not expressed in it, from the intention apparent in regard to a totally independent estate, and devised in terms altogether different; but we see no ground for inferring an identity of intention on the part of the testator in regard to the two estates. Indeed as it appears that the first will is distinctly, aptly, and correctly framed to effectuate the intention of limiting the Sussex estates to descendants through males only, the reference to the terms of that will appears to the judges to afford arguments rather opposed to the appellant's construction of the devise in question than in support of it.

The numerous and important authorities regarding the true rules of construction of wills, determine that a departure from the ordinary meaning of the words contained in them should only be adopted from necessity and in cases where the context or other parts of the will satisfactorily manifest that the language of the will has been used in some other than such ordinary sense: Adopting the principles of those decisions, many of which have received the sanction of this House, the judges are unanimously of the opinion I have before expressed, namely, that the only daughter of George Rice Trevor, and her son, mentioned in the statement, can, with the concurrence of the trustees, make a good title to the Bedfordshire estates.

[267] Lord Brougham.—My Lords, we have had the benefit of two arguments upon this important case; first, in the session of 1845, by two counsel on a side, as usual. It then stood over in order that, in consequence of some doubts entertained in the course of that argument, we might have the benefit of the attendance of the learned judges. It was further argued this session, by one counsel on a side, before those learned judges, and we have now the inestimable advantage of their aid in the learned opinion which they have, with one voice, given upon the point submitted to them. (His Lordship read the question.) That was the only point, and it turned upon the construction which was to be put upon the words of the devise, “with remainder to his issue in tail male in strict settlement, upon condition,” etc., “and in default of such issue of the said George Rice,” etc.

The question is, what is the construction to be put upon those subsequent words, "such issue," connected with the preceding words "issue in tail male in strict settlement?"—"such issue" would, no doubt, be such issue "as your Lordships should be of opinion were meant by "issue in tail male in strict settlement."

There is no doubt of the principle of construction which the learned judges have adopted, and which requires no authority: for it rests upon sound sense as well as upon precedent, and it requires nothing else to support it. There is no doubt, that upon sound principle, you are to take words, especially in a will, in their ordinary sense, unless something in the whole context of the will shall be found to displace that ordinary sense, and to require you, for the purpose of effecting the general intention of the testator to give an extraordinary and special construction to the words, and take them out of their ordinary acceptation. As to the word "issue," the question is, whether the addition of the words "in tail male in strict settle-[268]-ment" makes it a limitation and restriction to issue male, the word "issue" having in it no one tittle of limitation or restriction to males, but being a general word applicable to all issue, female as well as male.

I can easily understand how, if the word "male" had been there, it would have been argued, and most forcibly argued, that "issue male" meant only issue male, to the exclusion of females. But "issue in tail male in strict settlement" is a totally different thing; even if "strict settlement" were not there, "issue in tail male" is something perfectly different. The words "tail male" do not apply to issue, they are not words restricting the issue; they are words describing the estate taken by that issue. Consequently "issue in tail male" is, as the learned judges observed, a convenient and not incorrect form of expression to denote the first purchasers and the estate to be taken, the word "issue" designating the first purchasers, and the phrase "tail male," to which is added "in strict settlement," being a description of the estate taken by those purchasers.

Therefore, I hold the opinion at which the learned judges have arrived, that as an estate in tail male may be limited to a daughter as well as a son, and as daughters come within the description of "issue," there is no reason for deviating from the ordinary rule of construction. The consequence will be, that the question being answered by the learned judges in the affirmative, "that the only daughter of George Rice Trevor, and her son can, with the concurrence of the trustees, make a good title to these estates," it will follow that the judgment proceeding upon that construction—and which is involved in the question so put and so answered by the learned judges—ought to stand, and that your Lordships ought to affirm the judgment of the Court below, to which I humbly move your Lordships.

[269] It is, of course, not a case in which we ought to give costs.

Lord Lyndhurst.—It is scarcely necessary to add anything to what my noble and learned friend has stated. The only question is, after George Rice Trevor's estate for life, what is meant by "remainder to his issue in tail male?" The word "issue," in ordinary acceptation, as my noble and learned friend has very properly said, comprises females as well as males, daughters as well as sons: is there anything in this will to limit it to issue male?—I find nothing whatever. That which was relied upon—the phrase to which my noble and learned friend referred—"in tail male" does not at all affect the question, because females may take in tail male as well as males. I agree with my noble and learned friend, that "issue" points to the purchasers who are to take in the first instance, and that "in tail male" is the description of the estate. That is exactly the judgment that was pronounced by the Vice Chancellor, and it corresponds with the opinion which was expressed by the learned judges. Upon these grounds I think that that part of the judgment of the Court below must be affirmed.

There are two or three other exceptions which have been raised in this case; but the only doubt that could possibly arise related to the point to which my noble and learned friend has addressed his attention. Therefore, being of opinion with my noble and learned friend that the judgment on that point was right, I advise your Lordships generally to affirm the judgment of the Vice Chancellor, and I have authority to state that that is the opinion of the Lord Chancellor, who is prevented from being here by circumstances which oblige him to attend the Court of Chancery.

[270] Lord Campbell.—I concur in the opinion of the learned judges. It seems to me to be a clear case. A number of authorities were cited in the argument, but I do

not think that, on either side, they much assist us. The words of the will ought to have the natural and legal meaning and effect, unless there be something in subsequent parts of it which renders it inconsistent that that effect should be given to them.

We have the words "remainder to his issue." I pause there. If I were punctuating this will, I should there put a semi-colon. Then there being "remainder to his issue," which of course would enable us to ascertain who are to take—next comes the quality of the estate which they are to take; they are to take "in tail male." Females may take in tail male as well as males. Then as to the words "in strict settlement," it appears to me that the effect of those words is rather to confirm the opinion which I form on the previous words, that females might be included, because generally speaking where you settle an estate in strict settlement, after the estates given to the sons, the daughters would generally take, therefore, I hold that the words in the will do not go in the slightest degree to restrain, or limit, or affect, the natural interpretation which is always given to the words "issue in tail male."

Lord Lyndhurst.—I wish to add that during the argument considerable stress was laid upon the devise of the Sussex estate. I agree entirely in the opinion of the learned judges, that it would be of very dangerous consequence if we were to introduce any circumstances out of the disposition of that estate, for the purpose of governing the construction of this particular and distinct devise. I also concur in the opinion which they have expressed, that if you refer to the devise of the Sussex estate, it does [271] not in the slightest degree tend to vary the opinion which I should have formed merely from the disposition of the estate which is now in question.

Mr. Wigram.—There is a large fund standing to the credit of the Bedfordshire estate, and I do not understand that the respondents ask to have the judgment affirmed with costs.

Lord Lyndhurst.—In a question of this sort it should be without costs.

Lord Brougham.—I have said so.

The decree was then affirmed, without costs.

[272] The MAYOR, ALDERMEN, and BURGESSES of GLOUCESTER,—*Appellants*; JACOB OSBORN and JOHN S. SURMAN,—*Respondents* [Feb. 9, 10, 16, 17, 23, 24, 1846; March 10, June 28, July 21, 1847].

[Mews' Dig. iii. 299; xv. 1450; S.C. *sub nom. Gloucester Corporation v. Wood*, 3 Hare, 131, 7 Jur. 1125. Cited in *Aston v. Wood*, 1868, L.R. 6 Eq. 421; and see *Willoughby v. Storer*, 1870, 22 L.T. 897.]

*Will—Missing codicil—Uncertainty.*

A testator gave to his executors beneficially, in equal proportions, all his property, which he might not dispose of, subject to his debts and any bequests which he might afterwards make. He afterwards made a codicil in these words, "In a codicil to my will I gave to the corporation of Gloucester £140,000. In this I wish my executors would give £60,000 more to them, for the same purpose as I have before named. I would also give my friends" (several were named, with large legacies), "and I confirm all other bequests, and give the rest of my property to the executors for their own interest." No other codicil was produced.

Held (affirming a decree of the Court of Chancery on a bill filed by the Corporation of Gloucester claiming the two legacies), that the purpose of both the legacies must be held to be the same, and that both failed for uncertainty of the purpose.

James Wood, of the City of Gloucester, banker, died in April, 1836, seised of considerable freehold estates, and possessed of a very large personal estate, estimated at about £800,000.

In December 1841, the Prerogative Court of Canterbury, after much litigation there (2 Curtis, 82), and before the Judicial Committee of the Privy Council upon appeal (2 Moore's Priv. C. Cas. 355), granted probate of the three following testamentary papers to Sir Matthew Wood, Jacob Osborn, and John S. Surman, the surviving executors named in the first:

(A) "Instructions for the will of me, James Wood, esq., of Gloucester. I request my friends Alderman, Wood, of [273] London, M.P., John Chadborn, of Gloucester,



Jacob Osborn, of Gloucester, and John S. Surman, of Gloucester, to be my executors, and I appoint them executors accordingly; and I desire that they will take possession of and retain to themselves all my ready monies, securities, and personal estate, subject to the payment of my just debts, and such legacies as I may hereafter direct; and with respect to my real estate, I shall dispose of the same to such persons and in such parts as I shall by any writing endorsed herein direct. Witness my hand this 2d December, 1834.—JAMES WOOD.”

(B) “I, James Wood, esq., do declare this to be my will for disposing my estates as directed by my instructions:—I declare my wish that my executors shall have all my property which I may not dispose of, and that all my estates, real and personal, shall go amongst them and their heirs in equal proportions, subject to my debts and to any legacies or bequests of any part thereof, if any, which I may hereafter make. In witness whereof I have to this my last will set my hand, this 3d December, 1834.

“(Signed, in presence of three witnesses) JAMES WOOD.”

(C) “In a codicil to my will I gave to the Corporation of Gloucester £140,000. In this I wish my executors would give £60,000 more to them for the same purpose as I have before named. I would also give to my friends Mr. Phillpotts £50,000 and Mr. George Council £10,000.” [Four others were then named with large legacies, amounting together to £54,000.] “And I confirm all other bequests, and give the rest of my property to the executors for their own interest.—JAMES WOOD.

“Gloucester City, Old Bank, July 1835.”

The papers (A) and (B) were propounded by the executors, and paper (C) by some of the legatees therein named.

Upon probate of these papers being granted, the appel-[274]-lants filed a bill in the Court of Chancery against the executors, for payment of the two sums of £140,000 and £60,000. The bill was afterwards amended, and the Attorney General was made a party defendant.

Sir Matthew Wood, by his answer, said that several testamentary papers alleged to have been signed by the testator before December 1834, were referred to in the suit in the Prerogative Court, but no testamentary paper of his was found in his house after his death, save the said papers (A) and (B), and another paper writing made in 1834, expressive of his wish that John Chadborn should have the custody of his deeds and management of his affairs. And defendant stated that to the best of his knowledge and belief the testator did not in 1835, or at any time, make or sign the codicil (C), or any such codicil as was there referred to; and if he ever gave such legacies as there mentioned to the Corporation of Gloucester, the purpose for which they were given could not be ascertained, and they were therefore void.

The answers of the respondents, Osborn and Surman, were to the same purport and effect, with this addition in Surman's, that even if paper (C) should be held to be valid—which he submitted to the judgment of the Court—yet the legacy of £140,000 must be deemed to be revoked by revocation of the alleged codicil referred to in paper (C) by the testator, which revocation, defendant submitted, must be presumed from the circumstance of such alleged codicil not being discovered since the testator's death. And this defendant insisted further, that assuming that no such revocation had taken place, or could be presumed, then the two alleged legacies were void for uncertainty.

The Attorney General answered that he was a stranger to the matters stated in the bill, and he claimed, on behalf of charities generally, all such rights as he might be found entitled to.

[275] Vice Chancellor Sir J. Wigram heard the cause in July 1843, and in the November following gave his judgment, ordering the bill to be dismissed, without costs; and refusing to declare that such dismissal should be without prejudice to the appellants filing another bill for the said legacies (see the judgment, 3 Hare, 136).

The appeal was against that order.

Sir Thomas Wilde and Mr. Swanston (Mr. James Wilde was with them) for the appellants:

The question for decision arises on the codicil (paper C). The original bill alleged a prior codicil, but the defendants having, in their answers, denied the existence of it, that allegation was struck out by amendment, and the claim to the two legacies now rests on this codicil alone. But although the missing codicil was so withdrawn from the consideration of the Court, the Vice Chancellor founded his judgment on its

absence, declaring that without it he could not ascertain what the purpose was for which the legacies were given. And his Honour, without directing any enquiry as to the existence of that codicil, dismissed the bill, and refused to declare that the dismissal was without prejudice to the appellants' right to file a new bill, by which the circumstances in evidence before the Court of Probate, in reference to the missing codicil, might be brought before the Court. Under these circumstances it was now submitted to their Lordships, that they would find enough in the papers before them to justify them in holding the appellants entitled to the legacies, or, if not, that they would direct an enquiry as to the missing codicil by declaring the appellants entitled to file another bill for that purpose.

The Vice Chancellor's judgment proceeded on an erroneous principle; he ought to have confined his view to the papers proved in the cause, and construed them without [276] out any reference to another paper, which was not proved or propounded.—

[The Lord Chancellor.—That proposition is too broad. Suppose a testator, by his will, gave £1000 for a purpose mentioned in his marriage settlement. That settlement, of course, is not admitted to probate, but the judge, in construing the will, is bound to refer to it to ascertain the purpose for which the legacy is given.]

Then, if reference to the missing codicil was necessary, it was the duty of the judge to direct an issue or inquiry, as asked by the appellants, relative to the testator's testamentary papers, and the executors' dealings with them, in order that the facts might be ascertained, and the proper legal conclusions drawn from them in respect of the existence or non-existence of the missing codicil, and its custody and non-production. The Vice Chancellor, instead of directing such inquiry, drew fancied conclusions from an imaginary document.

The appellants submit, with confidence, that the codicil of July 1835 alone amounts to a substantive gift of the legacy of £140,000. The reference in that codicil to a former codicil does not prove that the former one ever existed; even though it may be considered as having once existed, yet the gift of £140,000 referred to as made thereby, is not revoked, and the non-production of such former codicil does not affect the validity of the gift of either the £140,000 or the £60,000. The codicil in the cause shews a still existing intention to give the £140,000, as well as the “£60,000 more.” The words of reference to the supposed codicil, whether it was ever made or not, or, being made, was revoked, shew a subsequently revived intention to give the sum of £140,000. The gift of that sum is unconnected with any purpose whatsoever.

It appears clear from all the testamentary papers that the testator was an illiterate man, so that it would be unsafe to rely on his use of words in their ordinary sense. [277] The word “purpose” in the codicil—if the testator annexed any meaning to it—is capable of three distinct interpretations: to two of them, the purpose of benefiting his native town, or the corporation individually, the objection of uncertainty would not attach. To the third interpretation alone, that the gift was made to the appellants, for the benefit of some private individual, the objection would be fatal. But it is hardly credible, “highly improbable,” as the Vice Chancellor himself said—that the purpose of the gift was for a private person. Would not the testator rather give the individual the legacy directly, as he gave several other legacies by the same codicil? Or would he not make his friends and well paid executors, rather than a changeable body, such as a corporation, trustees for the individual? But if the “purpose” of the bequest was for the public benefit of the testator's native town, or for beneficial enjoyment by the Corporation, then it was reasonable to transfer the trouble of administering it from the executors of the Corporation.

This construction of the bequest is not affected by the objection of uncertainty. A Court of construction never requires positive certainty of purpose to establish a testamentary gift. Lord Ellenborough says, in *Driver v. Frank* (3 Maule and Selw., p. 50), “When I speak of certainty, I must be understood to speak of moral certainty, the only certainty which relates to this subject; and hardly any certainty upon any moral subject can be predicated, which does not admit some degree of mere possibility to the contrary.” It is the intention that the Court tries to find; and if of two constructions of ambiguous words in a will, one is improbable and inconsistent, and the other is consistent and probable, the Court will adopt the latter, and will ever prefer the construction which preserves the gift to that which destroys it. In *Wright v. Atkins* (G. Coop. Ch. Cas. p. 122), Lord Eldon says, “The cases at law amount to this,

that if a man de-[278]-vises to A. B., with remainder to his family, inasmuch as the Court never will hold a devise to be too uncertain, unless no fair construction can be put upon it, the heir at law, as the worthiest of the family, is the person taken to be described by the word 'family.' Lord Brougham makes similar observations in *Winter v. Perratt* (9 Clark and Fin. 687).

The word "purpose" applies to the gift of £60,000 only. But a legacy given for a purpose not ascertainable, is not therefore void, inasmuch as the indication of purpose is not inconsistent with the intention of beneficial enjoyment of the legacy by the legatee; and an intention that he should take the legacy upon trust, is not to be presumed without express words or necessary implication; *Cook v. Fountain* (3 Swans. 591). If the testator gave these legacies upon "trust," using that word instead of "purpose," and then stopped, the trust would fail for uncertainty of the object; *Per* Lord Eldon, in *Morice v. The Bishop of Durham* (10 Ves. 527-35). And so also if precatory words—words of request, desire, or recommendation, which create a trust—are annexed to a gift, unless both the subject and object are certain, the legatee takes the gift absolutely, unless the circumstances are such as amount to an intestacy (*id.*, p. 536, *et seq.*); *King v. Denison* (1 Ves. and B. 260), *Walton v. Walton* (14 Ves. 322), *Gibbs v. Rumsey* (2 Ves. and B. 294), *Cruwys v. Colman* (9 Ves. 319-23), *Paul v. Compton* (8 Ves. 375-80), *Pierson v. Garnet* (2 Bro. C. C. 41), *Pushman v. Filliter* (3 Ves. 7), *Ommaney v. Butcher* (Turn. and R. 270), *Hill v. The Bishop of London* (1 Atk. 618), *Dashwood v. Peyton* (18 Ves. 41), *Benson v. Whittam* (5 Sim. 19), *Thorp v. Owen* (2 Hare, 607). The same principle governs the Courts in sustaining defective ex-[279]-cutions of powers of appointment; *Wilson v. Piggott* (2 Ves., jun., 351), *Poulson v. Wellington* (2 P. Wms. 533), *Fortescue v. Gregor* (5 Ves. 553), *Alloway v. Alloway* (4 Dru. and War. 380).

The Courts struggle to prevent intestacy by supplying deficiencies of expression, and presuming testators' intentions, rather than leave their bequests liable to the objection of uncertainty; *Castledon v. Turner* (3 Atk. 258), *Fox v. Collins* (2 Eden. 107), *Humphreys v. Humphreys* (2 Cox, 185), *Phillips v. Chamberlaine* (4 Ves. 51), *Price v. Page* (*id.* 680), *Garvey v. Hibbert* (19 Ves. 125), *Tomkins v. Tomkins* (19 Ves. 126, note (b)), *Mildred v. Robinson* (*id.* 588), *Sheratt v. Bentley* (2 Myl. and K. 149).

These are only a few of the authorities which support the principle that the Courts will put a forced construction on the words, in order to give effect to the testator's intention where it can be ascertained. It is not the fault of the appellants, if, without the missing codicil, the Court cannot clearly ascertain the purpose of this gift; for that the respondents are responsible, as not producing all the testamentary papers. But there are many cases in which a bequest by recital of it, or by reference, as in this case, to a missing paper, containing the purpose of it, was sustained; *Martin v. Douch and Overton* (1 Chan. Cas. 198), *Baylis and Church v. The Attorney General* (2 Atk. 239), *Dormer v. Bishop Burnett*, cited in *Downing v. Townsend* (Amb. 280), *Bibin v. Walker* (Amb. 661), *Smith v. Fitzgerald* (3 Ves. and B., p. 7), *Knewell v. Gardiner* (Gilb. Cas. 184). In *Druce v. Denison* (6 Ves., p. 397), Lord Eldon says, that "if a testator, by a subsequent paper, says he has bequeathed by [280] a former instrument that, which he has not bequeathed, the Ecclesiastical Courts will hold that subsequent paper a disposition, as being a declaration of his will at the time he made it to dispose by the will, not in terms expressing that it is then his will, but that he has disposed of it before." In *Vaughan v. Foakes* (1 Keen, 61), Lord Langdale says, "A recital of what a testator had done, or supposed he had done, may amount to a gift."

If these be not gifts to the Corporation of Gloucester for their beneficial enjoyment, it is submitted that they take them in their corporate capacity for public or charitable purposes; *Attorney General v. Syderfen* (1 Vern. 224), *Mills v. Farmer* (1 Meriv. 55), *Commissioners of Charitable Donations v. Sullivan* (1 Dru. and War. 501), *Incorporated Society v. Richards* (*id.* 294), Stat. 5 and 6 W. 4, c. 76, s. 71, *et seq.*, *Sonley v. Clockmakers' Company* (1 Bro. C.C. 81), *Widmore v. Woodrooffe* (Amb. 636).

Mr. Turner for the respondent Osborn, and Sir F. Kelly for Surman,\* argued

\* Mr. Walker, Mr. Hodgson, Mr. J. Parker, Mr. Rolt, and Mr. Jolliffe, were with them. The Attorney General was not a party to the appeal.

that the gifts of both sums of £140,000 and £60,000 were connected with the same purpose, and the purpose being unknown, the Court could not presume it; both gifts therefore were void for the uncertainty. [The arguments on these points are comprised in the Vice Chancellor's judgment, 3 Hare, pp. 141, 145.]

[The Lord Chancellor.—Suppose these were gifts to the trustees of the British Museum, "for a purpose before mentioned," but which was not mentioned, would it not be presumed that they were gifts to the trustees for the general purposes within the scope of their duty?]

There is no case in which the Court has ever gone so far as to presume the contents of a paper not produced, [281] and founded its decision upon them. That would be to presume the intention of the testator; *Mills v. Farmer* (1 Meriv. 55), *Wheeler v. Sheer*, as explained by Lord Eldon in the case of *Moggridge v. Thackwell* (7 Ves. 36: see p. 79).

There could be no doubt that by the word "purpose" it was the intention to create a trust; *Stubbs v. Sargon* (3 Myl. and C. 507). The case of *Martin v. Douch and Overton* (1 Cas. in Chan. 198) is not to be relied on as authority for the point for which it was cited. *Dormer v. Bishop Burnett* (cited in Amb. 280), and other cases of that sort, referred to by the appellants, are of doubtful authority, and are neutralised by recent decisions; *Jerningham v. Herbert* (4 Russ. 388).

They submitted that there was no gift at all of the £140,000, even if it was to be held unconnected with, and independent of, the word "purpose." There was no case cited in which the recital of a gift was construed to be a gift. The reference to this gift was only a mere supposition of the testator that he had given that sum; he did not recite it as a present gift, and therefore the principle of *Bibin v. Walker* (Amb. 661), *Smith v. Fitzgerald* (3 Ves. and B. 7), *Vaughan v. Foakes* (1 Keen, 61), *Wilson v. Piggott* (2 Ves., jun. 351), *Dashwood v. Peyton* (18 Ves. 41), *Shelley v. Bryer* (Jac. 207), and other cases, in which the Court assumed the intention and supplied words of gift, were not applicable to this case:—

[The Lord Chancellor.—What is the meaning of "£60,000 more?" Does not the addition show some prior gift?]

The recital that the testator had given the £140,000 does not operate to give effect to it as a gift. Suppose the "purpose"—with which both sums are clearly connected—was unlawful or impossible, or subject to conditions which the [282] Court would not enforce; such supposition shows at once the danger of holding the recital to operate as a gift.

[The Lord Chancellor.—If the gift was for a charitable purpose, the Court would give it effect, though the particular charitable purpose could not be ascertained.]

Certainly; but the Court would not presume it was for a charity, where charity was not mentioned. There may be a thousand other purposes besides charity, legal or illegal. There would be the greatest danger in presuming a testator's intention in one paper by reference to it in another paper. The gift may have been intended for accumulation beyond the legal period, or for corrupting parliamentary electors, or for other illegal purposes.

If the testator had intended these gifts for the beneficial enjoyment of the Corporation, would he not give the legacies to them unqualifiedly, as he did to his several friends mentioned in the same codicil?

In support of the arguments that the gifts failed for uncertainty of the purpose, with which both were evidently connected, and that even if they were presumed to be given in trust for a charitable purpose, such trust could not take effect, as being too indefinite, they cited, among other cases before referred to, *West v. Palmer* (1 Chan. Cas. 224), *Collins v. Wakeman* (2 Ves., jun. 383), *Sonley v. The Clockmakers' Company* (1 Bro. C. C. 81), *Morice v. The Bishop of Durham* (9 Ves. 399; 10 Ves. 522), *Doe v. Aldridge* (4 T. Rep. 264), *Sandford v. Raikes* (1 Meriv. 646), *Nash v. Morley* (5 Beav. 177), *Kendal v. Granger* (5 Beav. 300), *Ellis v. Selby* (7 Sim. 352; 1 Myl. and C. 286), *Williams v. Kershaw* (5 Clark and Fin. 111 n.), and the *Incorporated Society v. Richards* (1 Dru. and War. 258). They insisted that the cases of *Martin v. Overton* (1 Ch. Cas. 198; Salk. 150), *Dormer v. Bishop Burnett* (cited in Amb. 280), and *Baylis* [283] v. *The Attorney General* (2 Atk. 239), relied on by the appellants, were too brief in the reports, differed in their circumstances from the present

case, and the reasons given for the judgments were clearly wrong, or at all events inconsistent with subsequent decisions.

As to the objection to the decree of the Court below for dismissing the bill without reserving to the appellants the right without prejudice to file a new bill, they insisted that that was a matter in which the Court exercised its best discretion on a full view of the pleadings.

Sir T. Wilde, in reply, urged the arguments before addressed to the House for the appellants, and in conclusion implored their Lordships, in case they should not reverse the judgment, not to part with the case without giving directions for further inquiry respecting the missing codicil.

The case stood over for consideration.

Lord Lyndhurst (July 21, 1817).—The testator made a codicil to his will, dated July 1835, in the following terms: "In a codicil to his will I gave to the Corporation of Gloucester £140,000. In this I wish that my executors would give £60,000 more to them for the same purpose as I have before named." He then, after bequeathing several large sums as legacies to different individuals, "confirms all other bequests, and gives the rest of his property to his executors, for their own interest." The appellants claim under this codicil the £140,000 and the £60,000.

The codicil refers to a former codicil. No such codicil has been produced. All we know of it is from the reference contained in the codicil of July 1835. The question upon this state of facts, therefore, is, what construction ought to be put by a court of justice upon the produced [284] codicil? I confess that neither during the arguments at your Lordships' bar, nor at any time since, have I been able to bring my mind to entertain any doubt upon this question, and nothing but the very large amount of the sums in controversy, and the irrevocable effect of your Lordships' decision could have led me to pause upon the subject.

First, then as to the construction of the gift of £60,000:

The Vice Chancellor, in the judgment appealed from, first considered what would have been the proper construction of the codicil, if that legacy had been to an individual; and, secondly, whether any difference would result from the corporate character of the legatees. This was a convenient course, as much stress was laid at the bar (and properly laid) on the circumstance that the gift was to a municipal corporation. Looking then at the instrument, the testator, after stating what he had already given to the Corporation of Gloucester, in a former codicil, proceeds to say, "In this I wish my executors would give £60,000 more to them for the same purpose as I have before named." When the testator speaks of the purpose he before named, to what is he referring? Where, and upon what occasion, was the purpose named? Obviously, I think, in the former codicil. He does not indeed tell us in terms where he had named the purpose, but the natural, and, I think, the only reasonable construction of the passage is, that he had before named the purpose in the former codicil, to which he was then referring, and in which that legacy was given.

But the former codicil is not produced, no account is given of it, and we have therefore no means of ascertaining the purpose for which the gift was made, or to what it is to be applied. In the same sentence in which the legacy is given, and immediately after the words of gift, the gift is stated to be for a purpose which the testator [285] had defined, but which is wholly unknown and cannot be discovered. How then could the legatee be allowed to take the legacy for his own use? The purpose is a qualification of the legacy; it is an essential part of it, and till this is ascertained, it is wholly uncertain what the legatee is to take, whether for his own benefit, or for the benefit of others; and for whom, whether for private purposes or for public or charitable objects. It is, therefore, I think clear, that if the legacy had been to an individual, it must have altogether failed. What the testator intended—whom he meant to benefit—does not appear, and cannot be ascertained.

But a distinction had been taken on the ground that the legacy is to a municipal corporation. It is said that a court would presume that a gift to a municipal corporation was for a public object; that, in fact, the property of the Corporation, which the appellants represent, is, by the act 5 and 6 Will. 4, chap. 76, entirely applicable to such purposes—purposes which come within the legal interpretation of charitable

objects; and that even if the objects were not fully ascertained, if the purposes of the bequest were charitable, the Court could supply the omission. This is undoubtedly true; and I agree with the Vice Chancellor that the probability is that the legacy was given for some purpose that would be considered to be a charitable purpose. But it cannot, at the same time, be denied that a municipal corporation may take property in trust for the benefit of individuals, and for purposes altogether private, and it is impossible to say, with that degree of legal certainty which would justify your Lordships in giving effect to this bequest, that such was not the case in the present instance.

For these reasons, which in substance are the same, though less elaborately stated than those upon which the Vice Chancellor rested his decision, I have come to the [286] conclusion that the legacy of £60,000 must fail. The same reasoning and the same objections will apply to the legacy of £140,000. I submit to your Lordships, therefore, that the judgment of the Court below should be affirmed.

I beg leave to state, that the Lord Chancellor, who is unable to give his attendance here to-day, entirely concurs in this opinion. He was present during the whole of the argument.

Lord Brougham.—This case, though of very large amount, £140,000 and £60,000, making £200,000 altogether, appears to me to rest upon exceedingly plain and simple grounds. I entirely agree with my noble and learned friend in the view which he has taken of the bequest, both as regards the first argument on the construction of the bequest, and the second argument with respect to its possible application. I am clearly of opinion that the right construction has been put upon it by the Court below, that it fails altogether, and that the property in question goes according to the destination pointed out by the decree; and, therefore I agree with my noble and learned friend's proposition to your Lordships, that this judgment should be affirmed.

Under the peculiar circumstances of the case (I do not enter into details), I submit to your Lordships that it is not a case in which costs should be given.

Lord Campbell.—In the course of my experience, I never read a judgment more cautiously expressed, and better reasoned than that of his Honour the Vice Chancellor Wigram in this case. I have only to state to your Lordships, that after having carefully considered the arguments on both sides, I entirely concur in the judgment which has been proposed.

The appeal was accordingly dismissed, and the decree appealed from was affirmed, without costs.

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[287] JOHN IRVING,—*Plaintiff in Error*; CHARLES JOHN MANNING and JOHN L. ANDERSON,—*Defendants in Error* [June 29; July 1, 8, 23, 1847].

[Mews' Dig. xii. 708; xiii. 1139, 1224. S.C. 1 C.B. 168; 2 C.B. 784; 6 C.B. 391. Followed in *Barker v. Janson*, 1868, L.R. 3 C.P. 307; and cf. *Rankin v. Potter*, 1873, L.R. 6 H.L. 144; *Burnand v. Rodocanachi*, 1880, 5 C.P.D. 426; *Aitchison v. Lohre*, 1879, 4 A.C. 761.]

#### *Policy of Insurance—Total loss.*

A vessel is totally lost, within the meaning of a policy, when it becomes, as a ship, of no use or value to the owner, and is as much lost as if it had gone to the bottom of the sea, or had been broken to pieces, and the whole or great part of the fragments had reached the shore as wreck.

A loss is also to be considered as total where a prudent owner, if uninsured, would not have repaired.

In a valued policy the agreed total value is conclusive.

A policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree before hand in estimating the value of the subject assured by way of liquidated damages.

A ship was insured in a policy, in which the value was stated at £17,500. The

ship was injured by storms, was surveyed, and the repairs were estimated at £10,500. When repaired, the vessel would have been of the marketable value of £9000. The assured abandoned and claimed as for a total loss. The jury found that, under the circumstances existing in the case, a prudent owner, uninsured, would not have repaired the vessel:

Held, by the Lords, affirming the judgment of the Court below, that the assured could recover as for a total loss.

This was a writ of error on a judgment of the Court of Exchequer Chamber, which had affirmed a judgment of the Court of Common Pleas, in an action of *assumpsit* brought against John Irving, the defendant in the Court [288] below, as the representative of the Alliance Marine Insurance Company. The plaintiffs below were the managing owners of a vessel called the *General Kyd*, upon which a policy of insurance had been effected with this Company for the sum of £3000. The ship was valued in the policy at £17,500, and was insured for a voyage "at and from China to Madras, while there, and back to China, not east of Hong Kong, with leave to call at the Straits." The first count of the declaration was on this policy, and the loss claimed was a total loss, which was averred to have happened through the perils of the sea. There were the usual money counts. The defendant pleaded to the first count that the vessel was not wholly lost in manner and form, etc.; and to the remaining counts *non assumpsit*.

The cause was tried before Mr. Justice Cresswell, at Guildhall, at the sittings after Trinity Term, 1844, when a verdict was found for the plaintiffs. The facts were stated in the form of a case for the opinion of the Court, and were afterwards turned into a special verdict, which stated that on the 6th June, 1843, the plaintiffs effected with the defendants the policy on their ship, the *General Kyd*, for the purpose of *bona fide* covering and protecting themselves from the loss of the said ship, together with its stores, seamen's wages, and other matters not constituting part of the permanent value of the ship; that no insurance was effected by them on the freight; that the ship was of the burthen of one thousand three hundred and eighteen tons; was built originally, and at great expense, for and employed in the trade of the East India Company, and was, on the said East India Company ceasing to trade, sold to the plaintiffs for £11,000; that at the time of effecting the policy the ship was, together with stores, seamen's wages, and other matters not constituting part of the permanent value of the ship, of the value to the plaintiffs of £17,500, and was insured for that sum; that the plaintiffs were interested, as the declaration set forth, [289] and that the ship set sail on the voyage mentioned; that during the risk, and while prosecuting the voyage, the ship was damaged by perils of the sea, so as to become incompetent to proceed on the said voyage, unless repaired as after mentioned; that the necessary expenditure to repair such damage, so as to render the ship sea worthy, and competent to proceed on the voyage, would have amounted to a sum of not less than £10,500, and that if such repairs had been done, and such expenditure had been incurred, the ship being so repaired would have been worth a sum not exceeding £9000, and which was its marketable value, as well at the period of effecting the said policy, as also immediately before the said damage; that a prudent owner, being uninsured, would not have repaired the vessel, and that the vessel was duly abandoned to the underwriters.

The question was, whether, under the circumstances set forth in the special verdict, the defendant was liable as for a total loss. The Court of Common Pleas gave judgment for the plaintiffs (1 Com. Bench Rep. 168). The defendant brought a writ of error in the Exchequer Chamber where that judgment was affirmed (by Lord Chief Baron Pollock, Justices Patteson, Coleridge, and Wightman, and Barons Parke, Alderson, and Rolfe; see 2 Com. B. 784). The writ of error was then brought in this House. The judges were summoned, and Barons Parke and Alderson, Justices Patteson, Coleridge, Coltman, and Maule, Baron Rolfe, Justices Wightman and Cresswell, Baron Platt, and Justices Erle and Vaughan Williams, attended their Lordships.

Sir F. Kelly, and Mr. Serjt. Channell (Mr. Lathom J. Browne was with them) for the plaintiff in error.—The judgment of the Court below rests upon the authority of two cases; *Allen v. Sugrue* (8 Barn. and Cres. 561; 3 Man. and Ryl. 9), and *Young v. Turing* (2 Man. and Gr. 593; 2 Scott, N. R. 752). It is submitted that the

principle declared in both those cases, that there is, in respect of a question of partial or total loss, no distinction between an open and a valued policy, is erroneous, and that, at all events, such a principle cannot govern the decision in this case.

There are three classes of cases in which total loss may occur. The first is where the ship absolutely sinks and is in fact lost; the second, where the ship itself may not be in fact totally lost, but may be unable to continue the voyage, being injured past repair; and the third, where the ship can be repaired, but the expense of repair will be so considerable, that after the repairs have been effected, the vessel will fetch less in the market than the sum expended in repairing it. This third class is now known as the class of a constructive, total loss. The present case is of that class; and the owners insist that they may refuse to expend a sum of £10,500 in repairs; may therefore convert a loss which is only partial, and capable of reparation, into a total loss; may thereby cast on the insurers a loss of £17,500, and thus gain a large profit on the loss of their vessel. It is submitted that they are not entitled to this advantage.

Nothing is clearer than that a policy of insurance is a contract of indemnity, and in no case will the law give the party insured more than an indemnity. If the assured can here recover as for a total loss he will obtain more than an indemnity; he will do so even upon his own statement of the value of the thing insured. The policy is on the ship alone; stores and other matters are not insured. The ship is not said to be worth £17,500, but to be so together with stores, provisions, and seamen's wages. To allow the assured to recover the whole of that sum will be to allow him to recover more than an indemnity for the thing he has insured, by taking into calculation things which he has not insured.

[291] But he will also obtain more than an indemnity, even with regard to the ship itself, if he should be allowed to recover as for a total loss. Under the circumstances which exist in this case, the vessel might have been repaired, and might have continued the voyage. The voyage was not, therefore, totally lost, it might have been continued had the vessel been repaired, and a profitable freight might have been earned. The assured was not entitled to make this question one of a comparison of advantages and disadvantages, and on the balance of that comparison to decide, to put an end to the thing insured, and claim as for a total loss. The practice of claiming a total loss where the ship is not past repairing, is one of very modern origin. It is one of a dangerous kind, and may introduce fraud into insurance cases.

Although the law considers the ship, upon being abandoned, to be totally lost, still, when that abandonment takes place upon a valued policy, and the value on the policy so far exceeds that which is proved to be the real value of the ship, the law will not allow the assured to recover the value stated in the policy, for that would be to break through a great legal principle, and to give the assured more than an indemnity. There are several cases in which the party has not been permitted to recover more than the actual value of the ship. *Hamilton v. Mendez* (1 Sir W. Bl. 276; 2 Burr. 1198) is one of that kind. There the ship had been captured, and recaptured, and abandoned, but the recapture of the vessel having been effected, and the vessel brought safe into port before action brought, the Court held (2 Burr. 1214) that "the plaintiff, upon a policy, can only recover an indemnity according to the nature of his case, at the time of the action brought, or, at most, at the time of his offer to abandon." The case of *Lewis v. Rucker* (2 Burr. 1167) [292] is to the same effect, when the principle adopted in that case comes to be attentively considered; for there it was distinctly said (2 Burr. 1171) that "the only effect of the valuation is fixing the amount of the prime cost," and the assured only recovered the real amount of the loss.

It is true that, in the case of a valued policy, where there has been an actual total loss, no question can arise as to the sum to be paid to the assured, for that sum has been fixed by the policy itself, which, according to Lord Mansfield in the cases just cited, definitively settles what shall be taken as the prime cost of the things insured; but where, as in this case, the loss has not been an actual total loss, but the owner has the option to repair or abandon, it is not consistent with justice, nor can it be reconciled to the policy of the law, that the assured shall receive the whole value agreed upon in the policy, when that has only been agreed upon as that which is to be paid in the event of an actual total loss. That agreement can only be carried



into effect where the loss is actually total. Here the ship would be, when repaired, of the value of £9000, and it cannot be said that, that being so, the underwriters must pay the sum of £17,500.

It cannot be contended that, because the policy is a valued policy, the sum stated in it is conclusive as against the insurer, and against him alone. The case of *Hamilton v. Mendez* (1 Sir W. Bl. 276; 2 Burr. 1197), already cited, shews that the real amount of the loss may be considered upon a valued policy. And the case of *Forbes v. Aspinall* (13 East, 323) is even more directly an authority for that proposition. There, upon a valued policy upon freight, the plaintiff was only allowed to recover for the freight on the fifty-five bales of cotton actually on board at the time of the loss. And in accordance with that doctrine is the opinion of Mr. [293] Justice Story, as quoted in an American work on Insurance (Phillips on Insurance, vol. 2, p. 273), where it is said, "In giving an opinion on this question, Mr. Justice Story says,—'In what respect does the case of the ship differ from the case of the goods, as to the ascertainment of the damage? Can the valuation in the policy be a more correct guide in the one case than in the other? The question in each case is necessarily the same—what is the present value of the property compared with its value before the injury? and for the same purpose; to fix the extent of the damage sustained by the accident. One should suppose that this was the true measure of the damage in all cases in which it is attainable. The valuation on the policy cannot, in the case of the ship, any more than of the goods, measure the proportion of the damage, because the value may, in the mean time, have essentially changed. And yet it is that proportion which is the object of the inquiry. The law deems the ship worth repair, unless injured more than half its value. At what time?—Surely at the time of the injury.'—*Peele v. The Merchants Insurance Company* (3 Mason, 27). The doctrine of Mr. Justice Story has been distinctly adopted by the Supreme Court of the United States; *Patapasco Insurance Company v. Southgate*" (5 Pet. S. C. R. 604).

In the next page of that work it is said, "On the other hand the Supreme Court of Massachusetts has laid down the doctrine, that the rule of abandonment for damage over half of the value, refers to the value in the policy. . . . In the first of the decisions referred to, this Court says the value in the policy is *prima facie*, and, in the absence of other testimony, the true value. *Winn v. The Colonial Insurance Company*" (11 Pick., 279). But this doctrine, in laying down which Mr. Justice Story himself took part, [294] does not in reality contradict the former, for it admits that "other testimony" may be given to shew the true value, and if so, the value stated in the policy ceases to be conclusive between the parties. It is, therefore, submitted that the policy must, in the case of a merely constructive total loss, be treated as an open policy, and the real amount of the loss must be ascertained. If, as the assured contend, the policy is to be treated as an open policy, when the question of the propriety of repairing the ship is under consideration, it must equally be so treated when the amount payable in respect of the loss is to be determined. It is open for all or closed for all purposes. If it is closed for all, then it is clear that the owners had no right to abandon on account of the expence of repairing, and then to claim for a total loss; for the ship existed in specie and might have been repaired, and, being repaired, would then have been a good sea risk. The principle adopted in *Hamilton v. Mendez* (which case was not cited either in *Allen v. Sugrue*, or in *Young v. Turing*) is that which must govern the present case. The judgment of the Court below is in contradiction to the first principles of marine insurance law, and must be reversed.

The Attorney General and Sir F. Thesiger (Mr. Greenwood was with them) for the defendants in error.

The question here is not, what is the amount to be paid? but has there, or has there not been a total loss? For the purposes of this case there is no distinction between an open and a valued policy. If so, the assured was entitled to recover, for there can be no doubt that the loss here was a total loss. The facts shew it to be so, and it is so found in the special verdict, which declares that, under the circumstances existing in this case, a prudent owner being uninsured would not have repaired the vessel. It is contended that the fact of the policy being a valued policy cannot affect the question of the right to recover [295] as for a total loss, when the loss is shewn to be in the nature of a total loss.

It is said that a policy of insurance is a mere contract for indemnity, and the main objection to the right of the assured rests upon that argument. It is in some respects a contract of indemnity, but not so as to prevent the right of the assured to recover as for a total loss upon the assessment of that total loss made in the policy itself. That this is a valued policy cannot affect the question, whether this is a case of total loss or not. It would have been a total loss upon an open policy, and the special verdict finds that the circumstances of the loss were such that a prudent uninsured owner would not have repaired the vessel. Upon an open policy it is therefore clear that the plaintiff would have been entitled to recover for a total loss; why should he not do so upon this which is a valued policy? This is an attempt to overturn the decision in *Allen v. Sugrue* (8 Barn. and Cr. 561; 3 Man. and Ry. 9), which has been recognized as an authority ever since it occurred. It is true that neither in that case, nor in *Young v. Turing* (2 Man. and Gr. 593; 2 Scott, N. C. 752), which confirmed and adopted the former, was the case of *Hamilton v. Mendez* referred to. But it is impossible to doubt that that case was known to the counsel who argued, and the judges who decided both the latter cases, and that it was not cited simply because it was not deemed applicable; and it is not, for the only question there was to what extent the goods insured had been injured. It is not denied that a policy of insurance is in some respects a contract of indemnity, but that indemnity is not to be measured by the mere amount for which the vessel would sell at the moment of the abandonment being made. If that measure of value was alone applied to it, the assured would not be indemnified. The indemnity is to be measured by what [296] was agreed to be the value of the ship when the insurance was made. That was the rule which the Court applied in the case of *Shaw v. Felton* (2 East, 109), though there the value of the thing insured was daily becoming less during the voyage. There an insurance was effected on ship and goods, valued at a certain sum, on a voyage to Africa and the West Indies. The assured was held entitled to recover on a total loss which happened at the latest period of the voyage, although a considerable part of the estimated value consisted of stores and provisions for the purchase and sustenance of slaves during the voyage. The judgments of Mr. Justice Lawrence and Mr. Justice Le Blanc are important on this point. The former said (2 East, 115), "As the practice of binding parties as to the amount of their interest by valued policies has obtained ever since the statute of Geo. II., it would require very strong reasons to show that it is wrong. The effect of a valued policy is not to conclude the underwriter, and prevent him from showing that the assured had no interest, and that in fact it was a mere wagering policy within the statute; but in order to avoid disputes as to the *quantum* of the assured's interest, the parties agree that it shall be estimated at a certain value. Here it is not pretended that the subject matter of the insurance was not of the value estimated in the policy. Then how does this differ from the case of an open policy in this respect. Would it not be sufficient for the assured in an open policy to prove that at the time the ship sailed the subject matter of the insurance was of such a value? Is not that the period to look to, and not the state of the thing at the time of the total loss happening?" And Mr. Justice Le Blanc said (2 East, 116), "The value of the property must be continually diminishing, and if the loss should happen at the latter end of a long voyage, no doubt the [297] property must be considerably deteriorated by the usual wear and tear, and yet it is never objected that the underwriter is not liable for the original value." There is no authority whatever which supports the doctrine that the assured is not entitled to recover beyond the actual loss, as measured by the value of the ship at the moment that loss occurs, while both these judgments lay down an exactly opposite rule. The case of *Allen v. Sugrue* is opposed to such a doctrine as that which is contended for on the other side; and there are two cases which occurred between the period of the decision of *Allen v. Sugrue* and *Young v. Turing*, both of which proceed on the principles recognized and adopted in those decisions. One of these is the case of *Edington v. Jackson* (tried at York in the year 1832) before Mr. Baron Alderson. The notes taken in that case, by Mr. Justice Cresswell then at the bar, on an application for a new trial, give this account of the case. The action was on a valued policy, and there Lord Tenterden said it may be prudent not to have a valued policy, but we must decide the question of total loss or not just as we should in a case of an open policy; and the Court, composed of Justices

Littledale, Parke, and Patteson, expressly concurred with that opinion. The other case was that of *Herne v. Ray*, before Mr. Justice Maule (tried at Liverpool, in the year 1842), in which that learned judge expressly adopted the rule as laid down in the case of *Allen v. Sugrue*, and his ruling there was never afterwards questioned. Then came the case of *Young v. Turing* (2 Man. and Gr. 593; 2 Scott, N. C. 752), and considering the circumstances in that case, it is impossible to imagine a stronger authority for the doctrine now contended for on the part of the defendants in error. In delivering the judgment of the Court, Lord Chief Justice Tindal said (2 Man. and Gr., 601; 2 Sc., N. C. 761), "I am not aware of any [298] case or principle in the law of insurance which makes the estimated value in the policy a circumstance on which the question of total or partial loss ought to turn. The agreed value in the policy of the subject insured is intended to save the expence and doubt that may attend the investigation of value, as affecting the *quantum* of compensation only. It may operate, according to events, to the advantage or detriment of either party; and where no fraud exists, both are bound by it." No cases can be cited to impeach the doctrine thus distinctly laid down, and the attempt now made is therefore a mere attempt to avoid its application to the present case. It is, in substance, contended on the other side, that the fact of a policy being valued, ought to be taken into consideration in deciding the question of total or partial loss. Such a proposition cannot be maintained, yet if not maintainable, the arguments on the other side are absolutely inapplicable and valueless.

There are two classes of losses, total and partial, but the expression "constructive total loss" is not a happy one; it introduces confusion into the subject. Whether the loss is total by the absolute sinking of the ship to the bottom of the sea, or by the circumstance that it has sustained such an injury, and is in such circumstances that no prudent uninsured owner would attempt its repair, there is equally a loss of the vessel and the voyage, and an end of the risk. Both cases must proceed on the same principle. It is not pretended to be denied that if the vessel here had been actually sunk, the owner would have been entitled to recover the full amount stated in the policy. Suppose it had been known that at the moment when the ship foundered in the open sea it was only worth £5000, it cannot be pretended that the underwriter would have been entitled to say, "I will only pay you £5000." Yet he might say so if it is true that, to all intents and in every respect, a policy of insurance is a mere contract of indemnity, and nothing more. In some respects it is a contract [299] of indemnity, but it is a contract which, in the case of a valued policy, while it promises an indemnity, settles and declares what shall be the amount of that indemnity. The case of *Lewis v. Rucker*, so much relied on by the other side, is an authority for that proposition. In that case, Lord Mansfield says (2 Burrow's Reports, 1171), "a valued policy is not to be considered as a wager policy, or like interest or no interest; if it was, it would be void by the act 19 Geo. 2. The only effect of the value is fixing the amount of the prime cost, just as if the parties admitted it at the trial. . . . It is settled that upon valued policies the merchant need only prove some interest to take it out of the 19 Geo. 2, because the adverse party has admitted the value; and if more was required, the agreed valuation would signify nothing. But if it should come out in proof that A. had insured £2000, and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination that by such an evasion the Act of Parliament may be defeated." This last expression clearly shows what was Lord Mansfield's meaning when he spoke of a policy of insurance being a contract of indemnity.

A similar observation may be made with regard to what Lord Mansfield says in *Hamilton v. Mendes* (2 Burr. 1198; 1 Sir W. Bl. 277):—It is clear that a policy being a contract of indemnity is an expression which must be understood with respect to the subject matter. There a capture and recapture had taken place—there was nothing but a delay of the voyage; and the question was whether the assured, by the mere act of his own will, had a right to turn a partial into a total loss. The point of that judgment may be found in this expression of Lord Mansfield (2 Burr. 1212), "If the thing in truth was safe, no artificial reasoning shall be allowed to set up a [300] total loss." But in that very judgment he assumes that total loss may depend on something besides the actual destruction of the vessel, and he says (*Id.* 1209), "It

does not necessarily follow that because there is a recapture, therefore the loss ceases to be total."

The case of *Aspinall v. Forbes* (13 East, 323) has nothing to do with the present. There the insurance was on freight, and the ship was lost when only some of the goods on which freight was to be earned were on board. Of course, though that was a valued policy, the value was fixed upon the freight of a full cargo, and when only a small part of the cargo was on board, that which had to give rise to the freight was not in existence. Lord Ellenborough distinctly put the judgment upon that ground. Provided the thing on which the insurance was to take effect, and on which the value was calculated, was in existence, the policy would attach, and, when once it had attached, the value in the policy must be taken as conclusive. Thus: suppose there was a valued policy on a ship, and after the policy was effected, but before the loss, a decree of the Government should issue, which produced the result of lessening the value of all shipping by one-half, that would not affect the right of the insured to recover the value according to which he had insured.

The argument here amounted to this, that if the expences of repairs do not exceed the value of the policy, then the loss is to be deemed only a partial loss. But it is impossible to produce any decision, or any declared principle of law, to support such a proposition. The grounds on which the assured may recover for what is called a constructive total loss, are those on which a prudent uninsured man would not go to the expence of repairs, but would put an end to the voyage. Such have always, hitherto, been deemed sufficient. But it is now, [301] for the first time, contended that that is not the test, but that a new element must be introduced into the discussion of the question—that the value fixed in the policy must be taken into consideration, and that if that value exceeds the amount required for repairs, though that amount may itself be greater than the value of the vessel after the repairs have been executed, the owner must nevertheless repair the ship and submit to the loss. This would be to put him, when insured, into a worse position than if he had not been insured, and would convert what the plaintiff in error asserts to be a contract of indemnity into a contract to incur loss without the hope of indemnity.

According to all the principles of marine insurance law there has been a total loss, and if so, then the assured are entitled to recover the value fixed in the policy. The fact that a value has been so fixed cannot affect the question, which is simply, whether the loss is a total or a partial loss?

As there can be no doubt that it is a total loss, the title of the assured is complete, and the judgment of the Court below must be affirmed.

Sir F. Kelly in reply.—There is in this case a conflict of principles. The first principle controverted here is that a policy of insurance is a contract of indemnity, and nothing more; the next is that which governs the Courts with respect to a valued policy. The parties here have admitted the value of the ship. That fact must be taken as settled, and then it is said that where the ship is insured on a valued policy, and is totally lost, there can be no inquiry into the value at the time of the loss, for the parties, as between themselves, have admitted it. But taking that argument to be true in part, and true as applicable to cases of actual total loss, it is not true when the case is merely one of constructive total loss. From all [302] the authorities, the paramount principle on which a distinction is founded may be deduced. In the case of a ship positively lost—sunk to the bottom of the sea—there can be no conflict of principle, the contract is one to indemnify the assured for the loss actually sustained. But if the loss is not actual, but only constructive, all the circumstances attending it must be taken into consideration, and in that sense of the word the policy is an open policy. A different doctrine cannot be reconciled with the principle that a contract to indemnify is of the very essence of a policy of insurance.

The ship here is valued at £17,500. As between the parties it is therefore said, that it must be taken as conclusive that the ship is of that value. But if so, it must be so taken for all purposes, against the owner as well as against the underwriter. Then how stands this case? The owner comes into Court and claims for a total loss. When he has proved that the ship has been totally lost he may recover the value stated in the policy; but to prove that it will cost him £10,500 to repair the ship, does not prove that the ship is totally lost, and till he gives that proof he cannot

be entitled to recover. As the proof stands in the present case, the owner has merely proved that he has sustained a loss of £9000, and yet he claims to recover £17,500. That is not indemnity, it is profit. A party cannot be permitted thus to prove a loss of a certain amount, and on that proof to recover something which far exceeds that amount.

To pass from the principle of law to the decided cases. There can be no doubt that all those cases are unfavourable to the claim of the owners. In *Hamilton v. Mendez* the Court held, that though value was not generally an open question on a valued policy, yet, that cases might arise in which it would be absolutely necessary, in order to maintain other and more important principles of law, to shew what was the real value.

[303] And in *Lewis v. Rucker*, Lord Mansfield said, that he desired it to be understood that in a valued policy the plaintiff could not recover more than the actual value when the loss occurred. And that principle is the more strongly to be enforced in this case, because, though the ship alone was insured, the valuation was made on the ship, the stores, provisions, and seamen's wages. The case of *Forbes v. Aspinall* fully supports this argument. There the insurance was on freight, and the damage claimed was for more cargo than was on board the ship when it was lost, and there it was held, that where the valuation is for a greater sum than is actually lost, the indemnity cannot go beyond that loss.

It is clear that where there is a valued policy, the sum mentioned in it must be taken to be the value of the ship as respects both parties, and for all purposes whatever, or for none, and cannot be treated as a fixed sum for one purpose, and an unfixed and unsettled sum for another. It cannot, therefore, be treated as a settled amount for the purpose of the demand on the underwriter, but as an unsettled and unascertained amount, when the conduct of the assured in putting an end to the voyage and converting a partial into a constructive total loss comes to be considered. Yet, unless this inconsistent mode of dealing with the policy can be supported, it is clear that the assured cannot here make out a title to claim as for a total loss.

The Lord Chancellor moved that the following question be put to the Judges:—“Whether, in the judgment upon the special verdict in this case, the damages ought to be taken on property assessed at £3000, or at £1500?”

The Judges requested time to consider the question.

[304] Mr. Justice Patteson, in the absence of Barons Parke and Alderson, stated the answer of the judges in the following terms:—I am desired by the judges, who heard the whole of the argument at your Lordships' bar, to give their answer to this question, and to state their opinion that the plaintiff below was entitled to recover, upon the facts found by the special verdict, the sum of £3000.

Upon the record it appears that the action was on a policy for £3000 on a ship valued at £17,500. The other facts found by the special verdict show, that it was fairly valued at that sum (and, indeed, it would be assumed that it was so, unless fraud had been pleaded and proved), and then it is found that the vessel during the voyage was so damaged as to be incompetent to proceed without repairs; that the necessary expenditure, in order to repair and make it seaworthy, would have amounted to £10,500, and that the ship would have been then worth £9000 only, which was its marketable value then and at the time of the policy; that a prudent owner, uninsured, would not have repaired the vessel; and that it was duly abandoned to the underwriters.

If this had not been the case of a valued policy it is clear that on the facts found there was a total loss; for a vessel is totally lost, within the meaning of a policy, when it becomes of no use or value as a ship to the owner, and is as much so as if the vessel had gone to the bottom of the sea, or had been broken to pieces, and the whole or great part of the fragments had reached the shore as wreck; and the course has been in all cases in modern times to consider the loss as total where a prudent owner, uninsured, would not have repaired.

In an open policy, therefore, the assured would have been entitled to recover for a total loss, the amount to be ascertained by evidence.

What difference then arises from the circumstance that the policy is a valued policy?

[305] By the terms of it, the ship, etc., for so much *as concerns the assured, by agreement* between the assured and assurers, are and shall be rated and valued at £17,500, and the question turns upon the meaning of these words.

Do they, as contended for by the plaintiff in error, amount to an agreement that for all purposes connected with the voyage, at least for the purpose of ascertaining whether there is a total loss or not, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired?

Or do they mean only, that for the purpose of ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to avoid disputes as to the *quantum* of the assured's interest?

We are all of opinion that the latter is the true meaning; and this is consistent with the language of the policy, and with every case that has been decided upon valued policies.

In the case of *Lewis v. Rucker* (2 Burr. 1167), on a valued policy on goods, the amount to which the underwriter was held liable for a partial loss was ascertained by computing such a proportion of the value in the policy as the difference between the price for which sound goods would have sold at the port of delivery, and that for which the damaged goods, actually sold, bore to the price for which sound goods would have sold. So that in estimating the extent of the loss, that is, in determining whether it was a loss to the extent of one half, one third, or to any other extent, the value in the policy was wholly disregarded, and nothing was considered but the state of the goods as ascertained by their selling prices. If sound goods would have brought double [306] the price of the damaged, the loss was one half, or fifty per cent., whatever the value in the policy might be. But the extent and nature of the loss being ascertained by this comparison, the underwriter was held liable to pay the proportion so ascertained of the value in the policy; and this mode of treating partial losses on goods is always adhered to. Now the question whether a loss is total or partial, is a question of the same nature as the question, what is the extent of a partial loss? and there is the same reason in both cases for excluding the consideration of the value in the policy from the inquiry as to the extent of the loss, and for treating that value as binding on the question of, how much the subject so totally or partially lost was worth; so that the mode of determining the question, whether the loss was total or not, which has been adopted in this case, agrees, in so far as it excludes the consideration of the value in the policy, with that in which the inquiry into the extent of a partial loss on goods is always conducted. Such has been the construction put upon valued policies in the cases which are questioned in this writ of error; *Allen v. Sugrue* (8 Barn. and Cres. 561); *Young v. Turing* (2 Man. and Gr. 593); and *Egginton v. Lawson*, 1832; and *Herne and Hay*, 1842, cited by Sir F. Thesiger. Those cases have now been considered, for many years, as having settled the law, and have been the basis on which contracts without number have been formed, and they ought not on slight grounds to be departed from. The principle laid down in these latter cases is this: that the question of loss, whether total or not, is to be determined just as if there was no policy at all; and the established mode of putting the question, when it is alleged that there has been, what is perhaps improperly called, a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner [307] would have done in the state in which the vessel was placed by the perils insured against.

If he would not have repaired the vessel, it is deemed to be lost.

When this test has been applied, and the nature of the loss has been thus determined, the *quantum* of compensation is then to be fixed.

In an open policy, the compensation must be then ascertained by evidence.

In a valued one, the agreed total value is conclusive; each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to receive in case of a total loss.

It is argued that this course of proceeding infringes on the generally received rule, that an insurance is a mere contract of indemnity, for thus the assured may obtain more than a compensation for his loss; and it is so.

A policy of assurance is not a perfect contract of indemnity. It must be taken

with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify.

The Lord Chancellor (July 23).—My Lords, in this case of *Irving v. Manning*, which was before your Lordships a short time since, your Lordships called in the assistance of the learned judges. All the learned judges who were present at the hearing, were clearly of opinion that the judgment of the Court below was correct, and in that opinion all the noble and learned Lords who attended that hearing also concur. I have therefore only to move your Lordships to affirm the judgment of the Court below in favour of the defendant in error.

Lord Campbell.—My Lords, I am extremely glad that a question which has agitated Westminster Hall for the [308] last thirty years is at last solemnly decided by a judgment of your Lordships. It is a question of great importance to the commerce of this country. I entirely concur in the opinion expressed by my noble and learned friend upon this subject.

My Lords, it appears to me that upon the just construction of this contract, the plaintiff was entitled to recover the sum which the jury has awarded him. If you look at the contract, it seems to me that it was definitively determined that, for all purposes, the value of the ship would be taken at the sum of £17,500. There was nothing illegal in this contract; we have only to put a construction upon it, and if it be a just construction, and there is neither any rule of common law nor any statute to prevent that construction being carried into effect, we are bound to give effect to it, and to pronounce in favour of the plaintiff below.

I repeat that I rejoice that this question, which has so long agitated Westminster Hall, is now for ever set at rest, and is satisfactorily decided.

Judgment affirmed, with costs.

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[309] HENRY PINKUS,—*Appellant*; THE RATCLIFF GAS-LIGHT and COKE COMPANY, GEORGE OFFOR, and others,—*Respondents* [May 11, 12, 18, 25, June 8, 15, 1846; July 21, 1847].

*Agreements—Specific performance—Companies—Lien.*

The appellant having claimed to be a partner with one Paynter in gas works, which the latter had erected and was about to sell to a Company then about to be formed, it was agreed between them, for the purpose of ending their disputes respecting the ownership of the gas works, that Paynter should be at liberty to sell the works at such price as he pleased, upon accounting to the appellant for the value of the works at a certain rate, and that Paynter should hold shares for the appellant in the company to the value of £2000 for two years. The Company having been formed, and having purchased the gas works from Paynter, the appellant filed a bill against him, and obtained a decree for specific performance of their agreement. Before that decree was made, the Company was dissolved, and the gas works were sold to the Ratcliff Gas-light and Coke Company. The appellant then filed a new bill against Paynter, the Ratcliff Company, the directors of the dissolved company, and the assignees of Paynter, who had become bankrupt, to establish a lien upon the gas works for what should be found due to him under the former decree, as well as to carry out the former decree against all these parties:—

Held, by the House of Lords, affirming a decree of the Vice Chancellor, that the sale of the gas works by Paynter to the London Company was authorised by the appellant's agreements; that he had no just claim against the Company, or lien on the property, and that the supplemental bill was properly dismissed, with costs, as against all the defendants, except Paynter and his assignees.

This was an appeal against a decree of the Vice Chancellor of England, in a suit

instituted by the appellant for the purpose of enforcing certain agreements entered into between him and one Paynter, relating to a gas manufactory at Prossom's Island and New Crane, Shadwell, as [310] against all the respondents (except one who was a mortgagee of the appellant's interest under the agreements). Offor, and five other respondents, were directors of a company called the "East London Gas-light Company," and claimed an interest in the property in question under a purchase from Paynter. The respondents, the Ratcliff Gas-light and Coke Company, claimed a similar interest as purchasers from the East London Gas-light Company. The remaining respondents were the assignees of Paynter, who became a bankrupt after the institution of the suit.

The appellant had, in the year 1827, invented improved methods for generating and purifying gas, for lights and other purposes, and being desirous of obtaining patents to secure the exclusive use of the inventions, he and Paynter entered into agreements, dated respectively the 17th of April and 20th of August, 1827, by which —after reciting the said inventions, and that in consideration of Paynter having agreed to advance money for making working models of them, and for obtaining patents, and paying the appellant £200 and £400, and other sums, in the events therein mentioned, the appellant had agreed to sell to Paynter a moiety of his inventions, and of the gains and profits to arise therefrom, and that the same should be established and carried on for their joint and equal benefit, subject to the terms and in manner therein mentioned—covenants were entered into by the parties for performance of these agreements. Patents were taken out for both inventions in the same year, for terms of fourteen years each, and leases were obtained of premises in Prossom's Island and New Crane, Shadwell, which were demised to Paynter alone for long terms of years from the year 1830. Upon these premises the appellant and Paynter erected extensive gas works, and carried on the manufacture of gas, according to the appellant's inventions, Paynter finding all the necessary capital. The premises were held, and the manu-[311]-factory carried on, upon the terms of the agreements, for the equal benefit of the appellant and Paynter, who was the acting and ostensible partner, and in whose name the contracts were usually entered into. An agreement on account of the partnership was entered into in July, 1830, between Paynter and George Barlow, which recited the granting of the leases of the premises, and the erection of the works; and that contracts had been entered into for the supply of gas, producing a gross rental of £3000 per annum; and then it was agreed that the possession of all the property, and the benefit of the contracts were to be made over to Barlow for twenty-one years; and he agreed, during that term, to manufacture and supply gas, pay all expenses, enter into further contracts for supplying gas, collect the rents, retain certain allowances, including a salary, and to pay over the residue to Paynter.

In August 1830, Paynter being desirous to form a company which should purchase the gas works, caused copies of a prospectus to be circulated, headed, "Proposals for the establishment of an Association, to be called the East London Gas Company." The prospectus stated that the proprietors of the said gas works were invited to extend their mains, etc., for the supply of gas to a wider district, at moderate prices, and proposed a scheme for forming a company, with a nominal capital of £30,000, in 2000 shares of £15 each, of which sum £8 per share would be required forthwith, and which, it was alleged, would be sufficient for the purchase of the works and mains.

On the 10th of August, 1831, an agreement was entered into by Paynter and the appellant, which recited their intention that the said works and establishment should be sold, and the proceeds paid to Paynter, in order to the just division thereof between them both; the accounts of Paynter for his disbursements to be submitted to arbitrators named by him and the appellant, and that whatever balance [312] should be ascertained by the award to be due to Paynter for his disbursements, should be first paid out of the proceeds of the intended sale; the residue to be equally divided between him and the appellant. The agreement then provided for the reference and for distribution of the proceeds of the sale, according to the recitals.

Shortly after that agreement Paynter renewed a negotiation with Offor, and others of the respondents, for the formation of a joint-stock company; but this negotiation was concealed from the appellant, who, on becoming acquainted with it, wrote to one



of the respondents, reminded him that he was joint proprietor of the gas works, that he would not sanction the negotiation unless terms were made with him, and that he dissented from those proposed by Paynter.

An agreement was, notwithstanding, concluded on the 25th of October, 1831, between Paynter of the first part, Offor and others of the second part, and Barlow of the third part, for the sale of the gas works, plant, and property, with the lease of the premises, etc., for £17,500, to a Company to be formed by these parties. The material parts of the agreement were, that the before-mentioned covenant with Barlow should be cancelled, and a new one entered into between him and the directors of the proposed Company; that Paynter should take shares in the Company to the extent of one-sixth of the whole, and should not sell or transfer them for two years, without the consent of the directors; that the capital of the Company should be £30,000, to be raised by 6000 shares of £5 each; that all instalments should be paid to the bankers of the Company, and £75 per cent. thereon should be paid to Paynter, in part of the purchase-money (the instalments due on his own shares to be given credit for as part of such payment), until £13,500 should be paid to him, during which time he was to receive the rental (which was stated at £3300) and allow interest at £5 per cent. on such payments as he [313] should receive; and after payment of the £13,500 the Company were to receive the rental and pay interest after the like rate on the balance of £4000 till the same should be paid, and then the leases and all the property should be assigned to the directors; that if the Company should not be formed, all the expenses incurred should be borne by Paynter, but if it should be formed, then by the Company.

The parties to the agreement issued a prospectus of the "East London Gas-light Company," and the provisional directors therein named passed resolutions to the effect that no person should hold or transfer shares in the Company without the approbation of the directors, which resolutions were, as the appellant alleged, intended to exclude him from all knowledge of what was taking place between Paynter and the Company.

This agreement was not discovered by appellant, as he alleged, until more than a year afterwards. In the mean time he and Paynter entered into an agreement, dated 29th of October, 1831, for sale of the works to a Company to be formed, Paynter thereby agreeing to take and pay for shares in such Company of the value of £2000 for the appellant, and hold them for his interest for two years after the formation of the Company, the appellant to receive all the profits on the shares during such years, Paynter after the expiration of the two years to transfer them to the appellant, and he in consideration thereof agreeing that Paynter might sell said works for such price as to him might seem proper. Then followed other stipulations, one of which was that Paynter should, after the sale, account to the appellant as to the proceeds under the agreement of August, for the value of the works at a price which at £7 per cent. per annum would produce an income equal in amount to the net rentals then payable to the proprietors, which price should be divided between them according to the said agreement. Among the other stipulations was one which provided for the mutual [314] release of the parties, in certain events named, as partners in the gas works.

The appellant being apprised of the formation of a company, by the circulation of the prospectus before mentioned, sent a letter in January 1832, to the directors therein named, informing them that he was partner with Paynter in the said gas works.

The provisional directors of the proposed company met, and after considering the said notice, and the several agreements between the appellant and Paynter, resolved that it was their opinion that the property and title to the gas works were vested in Paynter, and that he had full power to carry the agreement with them into effect. They accepted an offer made by Paynter to deposit one thousand shares in the new company with bankers, as an indemnity against the appellant's claims.

The proposed company was formed in February 1832, by the name of the "East London Gas-light Company," and a deed of settlement was executed, and a sum of £6000 was paid to Paynter as a first instalment, under the agreement of the 25th of October, 1831. He at the same time repudiated the agreements with the appellant of the 10th August and 25th October, 1831, and in July 1832 he assigned the whole property in the gas works to the directors of the said Company, he himself having taken two thousand shares in the concern, five hundred of which he held in trust for the appellant, under the agreement of the 29th of October. 1831.

In May, 1833, the appellant filed a bill against Paynter, and two others, incumbents on the appellant's interest in the said works, stating most of the matters hereinbefore stated, and praying that the said agreements between the appellant and Paynter of the 10th of August and 29th October, 1831, might be carried into execution, and that Paynter might be decreed to concur in all acts [315] requisite for that purpose, particularly in effecting a transfer to the appellant of the shares taken on his account, pursuant to the agreement of the 29th of October, 1831, and that all proper accounts might be taken of Paynter's disbursements on account of the said works and premises, and that the same might be valued by competent persons, and Paynter decreed to account to the appellant for the value of the said works and premises, at a price which, at £7 per cent. per annum, would produce an income equal in amount to the net rental which at the time the agreement of the 29th October, 1831, was executed, was payable to the proprietors of the said works; and that such net rental might be ascertained with reference to the additional customers obtained for the gas: And that Paynter might be declared liable to pay to the appellant a moiety of the value so to be ascertained, after deducting the balance which should be found justly due to him on account of his disbursements, and subject also to the deduction of the £200 in the agreement of the 29th October 1831 mentioned; and that out of the shares in the newly established company which had been taken by Paynter, he might be decreed to be a trustee for the appellant of shares, which at the time of taking the same, were of the value of £2000, and for which the sum of £2000 was paid by him; and to account for and to pay over to the appellant, all the dividends and profits accrued due thereon, which had been received by him or for his use.

Paynter, in his answer, stated the agreement with, and conveyance to, the directors of the "East London Gas-light Company" of the said works and premises, and that the purchase money was £17,100, of which he received £7200 in cash, and the balance in shares; and he took and paid for shares of the value of £6000, viz., one thousand five hundred shares at £4 each, and he insisted that the appellant had no interest in such shares, and that [316] their agreements of the 10th of August and 29th of October, 1831, were void.

Subsequently to the answer, and before the hearing of the cause, alterations were made in the nature and amount of the indemnity, before stated to have been provided by Paynter for the said Company against the appellant's claims; and a negotiation, commenced in June 1833 between the East London Gas-light Company and the respondents, the Ratcliff Gas-light and Coke Company, was carried into effect by an agreement dated the 15th of April, 1835, made between the respondents Offor and others, the then directors of the former Company, of the one part, and certain persons therein described as the committee of management of the latter Company, of the other part, by which, for the consideration of £22,500, partly in cash and partly in shares, as therein mentioned, the parties of the first part agreed to sell the whole leasehold premises and property of their Company to the respondents, the Ratcliff Gas-light and Coke Company, and to procure the regular dissolution and winding up of the affairs of the former Company.

The appellant, on being informed of this agreement, gave notice to the directors of both Companies of his claims in the gas works and premises, and of his suit against Paynter to enforce such claims. Notwithstanding that notice, a deed was executed, the 15th of April, 1835, by the parties to the last mentioned agreement, conveying and assigning the whole property upon the terms thereof. And the directors of the then dissolved company executed to the Ratcliff company a bond in the penal sum of £20,000 against all costs or damages to which they might be put in defending themselves against the claims of the appellant in the property; and by way of counter security to the obligors, Paynter executed to them an indenture, dated the 1st of October, 1836, whereby—after reciting among other [317] things the bill in the suit of *Pinkus v. Paynter*, and the said bond, and that Paynter, at the time of the dissolution of the "East London Gas-light Company," held one thousand two hundred and thirty-five shares therein, in his own name; and in case they were his own absolute property, discharged from any claim of the appellant, then the proportion of the purchase money of £22,500, paid by the Ratcliff Gas-light and Coke Company for the premises, which Paynter would be entitled to receive in respect of his said shares,\* would be £6175, of which sum £2500, with £240 for dividends, would be

payable to the appellant, if he should establish his claim in his said suit—it was, therefore, agreed that out of the said purchase money the sums of £2500 and £240 should be invested in the purchase of £3032 8s. 11d., consols. And such sums were accordingly so invested in the names of Paynter and others of the respondents, upon trust to indemnify the proprietors of shares in the dissolved Company, at the time it was dissolved, against the claims of the appellant.

The cause of *Pinkus v. Paynter* was heard on the 6th December, 1836, before the Vice Chancellor of England, when his Honour declared that the appellant was entitled to specific performance of the agreements of the 10th of August and 29th of October, 1831, and decreed that the same should be performed, and carried into execution; that the appellant was entitled to an immediate transfer and assignment to him of the five hundred shares in the East London Gas-light Company—of which the certificates had already been deposited by Paynter in the hands of his clerk in Court, under orders made in the cause, the 28th of March, and the 3rd of May, 1833—and to all profit or emolument which had arisen from such shares; and that Paynter should accordingly execute to the appellant a proper transfer and assignment of such shares, and pay to him all profits and dividends that were re-[318]ceived on these shares by him, Paynter, or by others by his order. And it was ordered that the Master should ascertain the value of the said works and premises, computed at a price which, at £7 per cent. per annum, would produce an income equal in amount to the net rental payable to the appellant and Paynter, as proprietors of the said works, on the 29th of October, 1831; and should take an account of all their dealings and transactions, receipts and payments, in respect of the patents, works, and premises, and of any other works and premises in which the appellant and Paynter, were or had been jointly interested, having regard to the before stated agreements of April and August 1827, and the said agreements of the 10th of August and the 29th of October, 1831; and should ascertain the balance due on such account.

Notice of this decree was served by the appellant on the directors of the two companies.

The sums of £131 17s. 4d. Bank Annuities, and £7 18s. 4d. cash, were, in pursuance of the decree, transferred and paid to the appellant, and also certificates of five hundred shares were delivered to him, one hundred and fifty of which were delivered by him, pursuant to the said decree, to persons who were incumbrancers on his interest in the gas works.

The Master, in March 1837, made a separate report with reference to the dividends and profits which had been received by Paynter, in respect of the said five hundred shares in the East London Gas-light Company, over and above the said sum of £131 17s., and which he found to amount to £256 13s. 4d. That sum was paid by Paynter to the appellant, as the decree directed.

The appellant was unable, as he alleged, to prosecute his said decree with effect, owing to the delivery of the books of the East London Gas-light Company to the Ratcliff Gas-[319]-light and Coke Company; and inasmuch as both that Company and the directors of the former Company had, throughout the whole of their transactions, acted with full notice of his rights, against Paynter, the appellant, in June 1839, filed a bill against all the parties, which, after stating and charging most of the matters hereinbefore stated, prayed that the appellant might have the benefit thereof, as a supplemental bill against Paynter, and as an original bill against the several other defendants thereto; and that he might have the benefit of the said several matters in prosecuting the said decree, as against Paynter, and might also have the benefit of the aforesaid agreements, and of the said suit, and of the evidence therein, and of the said decree and other proceedings, as against all the other defendants; and that it might be declared that not only Paynter, but also the other defendants were liable and bound to make good to the appellant, the five hundred shares in the East London Gas Light Company, to which, by the said decree, he was declared entitled, and the profit, interest, and emoluments which had arisen from such shares, so far as the same had not then already been made good to him; and that in order thereto he might be declared entitled to fifty shares in the Ratcliff Gas-light Company, as from the dissolution of the East London Gas-light Company and the transfer of the said works and premises to the Ratcliff Company, or the union of the two companies, in lieu of such five hundred shares, or to the value of such fifty shares, computed as therein mentioned, or to a proportionate part, or so much of the said sum of £22,500 purchase money, as

was properly attributable to such five hundred shares, together with interest thereon at £5 per cent. per annum, at the appellant's option; and that all the defendants might be declared to be bound by the accounts, which by the said decree were directed to be taken of the several other matters and things therein men-[320]-tioned; and that not only Paynter, but also the respondents, Offor and others, the directors of the late East London Gas-light Company, and also the said works and premises so sold to the Ratcliff Gas-light and Coke Company, or the last mentioned Company in respect thereof, might be declared to be chargeable, and might accordingly be charged with the balance which should be found due to the appellant on the taking of such accounts, with lawful interest thereon; and that such balance, and the interest thereof, might be raised and paid by the defendants, or some of them, out of the said works and premises, and the rental, rates and monies of the Ratcliff Gas-light and Coke Company; or otherwise that the rights and interests of the appellant, as against the said defendants in respect of the said matters, might be ascertained and declared. The bill also prayed for a manager or receiver, and for an injunction.

The respondents, Offor and others, directors of the East London Company, put in a joint answer, and the respondents, the Ratcliff Gas Company, also put in their answer, and they all by their several answers admitted the notices hereinbefore mentioned to have been received by them or their officers respectively; but they insisted that the purchase made by the East London Gas Company from Paynter of the leasehold messuages, gas works, and other premises, and the subsequent sale of the same to the Ratcliff Gas Company, were respectively valid and effectual as against the appellant, and that he was not entitled to any relief as against them, the answering parties.

Paynter, by his answer to the last-mentioned bill, insisted upon his right to sell the said messuages, gas works, and premises, under the aforesaid agreements entered into between him and the appellant.

[321] Paynter was declared a bankrupt soon afterwards, and his assignees were then made defendants to the bill.

The supplemental cause was heard by the Vice Chancellor of England, in July 1843, and in January 1844 his Honour made a decree ordering the bill to be dismissed, with costs, as against all the defendants, except the assignees of Paynter, out of whose estate they were to retain their costs; and it was ordered that the accounts directed to be taken by the decree of December 1836, made in the said cause of *Pinkus v. Paynter*, should be prosecuted as against them as such assignees. And it was declared that the estate of Paynter was liable for the value of the five hundred shares in the East London Gas-light Company, together with interest thereon, from the 25th of March 1835, after setting off what (if any thing) might be found due from the appellant to the estate of Paynter upon taking the said accounts (see 13 Law Journ. (Eq.), 244).

The appeal was brought against so much of this decree as ordered the dismissal of the bill as against the said several defendants thereto, and as directed their costs to be paid by the appellant, and the accounts directed by the former decree to be prosecuted only against Paynter's assignees, and as declared that his estate only was liable for the value of the said shares in the London Gas-light Company.

Mr. Kindersley and Mr. W. P. Wood, for the appellant:

The facts stated and proved, on behalf of the appellant, in the Court below, entitle him to the relief prayed by his supplemental bill, or similar relief, or at least part of such relief. Under the agreements entered into between himself and Paynter on the 10th of August and 29th of October, 1831, and the previous agreements between them, the appellant had, in the first place, a lien on the partner-[322]-ship property, and also on the purchase monies for which the same might be sold, for the full amount of his interest in that property, estimated on the basis of the agreement of the 29th of October, 1831, according to the rental on that day, or at least to the extent of the purchase monies. In the next place, the appellant had, by the said agreement, dated the 29th of October 1831, an independent right to shares of the value of £2000 in the company about to be formed, as therein mentioned; and to all such benefit as the possession of the said shares might entitle him to.

The respondents, the directors of the East London Gas-light Company, were affected with direct notice of all the appellant's rights and interests in the partnership property, and of his rights as against Paynter, when they entered into the agreement

of the 25th of October, 1831. They had also direct notice of the instruments executed on the 29th of October, 1831, before any payment whatever was made by them to Paynter by virtue of their agreement. By their conduct, and also by virtue of the notice, they placed themselves, personally, and the company of which they were directors, in precisely the same position, as regarded the rights of the appellant, as that in which Paynter himself stood, as to the partnership property, the purchase monies, and the shares of the value of £2000. And the respondents, the Ratcliff Gas-light and Coke Company, being also affected with direct notice, as well as by the pendency of the suit of *Pinkus v. Paynter*, were bound to deal with the property and the purchase monies agreed to be paid by them for it, including the part payable in shares, in the same manner as Paynter and the directors of the East London Gas-light Company would have been bound to do. After the purchase was effected between the two companies, and the purchase money paid in money or by shares in the Ratcliff Company, the directors of the dissolved company gave a bond of indemnity to the [323] Ratcliff Company against any claims of the appellant, and took a counter-indemnity from Paynter, who, for their security, invested £2740 in consols, in the name of trustees. The sum of £3023 8s. 11d., £3 consols so purchased, was set apart by the respondents, or some of them, as representing the five hundred shares assigned to the appellant: he is entitled to that sum of £3023 8s. 11d., £3 consols, and the dividends which have accrued thereon, either as representing the said five hundred shares, or as part of the unpaid purchase monies for the partnership estate and effects.

Mr. Stuart (with whom was Mr. Chandless) for the respondents, the Ratcliff Gas-light and Coke Company, pointed out discrepancies between the decree in the suit of *Pinkus v. Paynter*, and the prayer of the supplemental bill, and contended that the relief sought by the latter bill was inconsistent with the decree made in the original cause, and also inconsistent with the relief sought in that suit: that by the agreements of the 10th of August and 29th of October, 1831, between the appellant and Paynter, Paynter had a full and absolute right to sell the manufactory, works, and premises, at his sole discretion, and to receive and give a good discharge for the proceeds of such sale; and that right was exercised, *bona fide*, and for a valuable consideration, duly paid to him by the East London Gas-light Company, in which the appellant never was a shareholder: that if he was by law a shareholder in that Company, he could only have shares therein according to its constitution, and must take such Company just as it was formed, and upon the ground on which it was formed; and that it must be taken, as against him, that the East London Company was formed, was carried on, and was ultimately dissolved, and the manufactory, works, and premises sold to the Ratcliff Company, according to the terms of the deed of the 21st of February, 1832, by which the East London Company was created: that the appellant was well [324] aware, before the decree was made in the cause of *Pinkus v. Paynter*, of all the circumstances touching the sale of the manufactory, works, and premises, to the East London Company, the dissolution of that company, and the ultimate sale of the manufactory, works, and premises to the Ratcliff Company, upon which he founded his title to relief in the supplemental cause. By the prayer of his bill he recognised the dissolution of the East London Company, and at the same time prayed that these respondents might make good to him the five hundred shares in the Company, which he so admitted to be dissolved, the dissolution having been effected strictly and completely in compliance with the provisions of the deed of settlement of that Company. Under these circumstances the Vice Chancellor could not justly do otherwise than dismiss the bill as against these respondents.

Mr. Bethell (with whom was Mr. Smythe), for the respondents, Ofor, and the other directors of the dissolved East London Gas-light Company, also argued that the case made and the relief prayed by the appellant in his bill against the Ratcliff Company and these respondents, was inconsistent with the case made and the decree taken by him in his original suit against Paynter: that according to the true construction of the agreements of the 10th of August and the 29th of October, 1831, Paynter had full power to sell the gas works and premises to the East London Company, and the appellant was not entitled in equity to any lien upon the said works, or to any relief against the East London Company as the purchasers thereof,—in which company he never was a proprietor—or against the indemnity fund; *Colyear v. The Countess of Mulgrave* (2 Keen, 81; see p. 98). In that case the Master of the Rolls says, “I appre-

hend that when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has no [325] right to enforce the covenant against the two, although each one might as against the other." The indemnity fund here was the subject of a private agreement to which the appellant was not a party, and to the benefit of which he was not entitled; but if he claimed to be interested in that fund, he could not maintain the claim without consenting to adopt and confirm the sale by the East London Company to the Ratcliff Company; which he refused to do.

If the appellant had any case to make against the East London Company, such case could not be maintained against these respondents after the dissolution of the company; he ought to have instituted his proceeding when he first became acquainted with the circumstances upon which he relied, and of which he was aware before the date of the decree against Paynter. The Vice Chancellor's judgment comprised, in a few words, a complete answer to all the appellant's demands. (13 L. Jour. 246.)

Mr. Walker (with whom was Mr. Rolt) for the respondents, the assignees of Paynter:

The agreement for indemnity, in pursuance of which the indemnity fund was set apart in the names of trustees, was entered into exclusively between Paynter of the one part, and the directors and proprietors of the East London Company of the other; and such agreement was entered into, and the fund was set apart solely as a counter-indemnity to the directors of that company, against the bond of indemnity given by them to the Ratcliff Company. The appellant was not in any way a party to the agreement, nor in any way interested in it, or in the indemnity fund, either under the indenture or declaration of trust of the 1st of October, 1836; and, instead of acquiescing in and confirming the agreement, he claims relief inconsistent with it.

The appellant has not made a case for any relief against Paynter or his assignees, or against any other person or [326] Company, except under and by virtue of the agreements between Paynter and himself, in August and October 1831. Under those agreements the appellant had not any lien upon the gas works and premises sold by Paynter to the East London Company, or any claim against that Company, or any person or Company claiming the gas works and premises under or through them, either in respect of the shares of the value of £2000, which, by the agreement of the 29th of October, 1831, Paynter agreed to purchase and pay the price of for the appellant, or in respect of the balance, if any, which, upon taking the accounts mentioned in the agreements, might be found due to him from Paynter.

The appellant had, long previous to the decree of December 1836, in the first suit against Paynter, full knowledge of every circumstance relied on by him in the cause, in which the decree now appealed from has been made; and so far as he had not previously obtained the full benefit which could be obtained by him from the decree of 1836, the decree now appealed from gives him the full benefit of that decree, and all the relief to which he is entitled as supplemental thereto; any other relief would be inconsistent with the case made by the appellant in the first suit, and with the decree made in that suit. That was rather a harsh decree on Paynter, although the respondents, his assignees, did not complain of it.

Mr. Kindersley replied.

Lord Lyndhurst (July 21, 1847).—This case which, at first view, seems to be long and complicated, will be found, when stripped of superfluous matter, to resolve itself into one or two not very difficult questions. And first as to the purchase of the Gas Works by the East London Company: That pur-[327]-chase was expressly authorised by the agreements of the 10th of August and the 29th of October, 1831. Pinkus was aware that Paynter was in treaty for the sale of the property to a company; he was apprehensive that it might be sold for an inadequate price, and to obviate all difficulties on this head, the second agreement of the 29th October was entered into, by which it was stipulated that Paynter should be at liberty to sell the works for whatever sum he might think proper, but that in his accounts with Pinkus he should be charged upon the purchase according to the rate stated in that agreement.

It was upon the faith of these agreements, and the authority which they conferred upon Paynter, that the East London Gas Company was afterwards formed, and the works were sold to that company according to the terms stipulated in the previous

conditional agreement of the 25th of October, 1831. The appellant's notice, dated the 30th December, 1831, and served on the 27th of January, 1832, would not affect the transaction. It merely stated that the plaintiff was a partner in the property with Paynter, which was perfectly consistent with the agreements authorizing the sale, and appeared on the face of those agreements.

The plaintiff, far from repudiating these agreements, insisted upon them, filed a bill against Paynter for a specific performance, and obtained a decree accordingly. He says that at the time of signing the agreement of the 29th of October, he was not aware of the conditional agreement made by Paynter for the sale to the intended company, and that it was carefully concealed from him by Paynter. But, assuming this to have been the case, and the concealment to have been material, he has since, with full knowledge of the fact, ratified these agreements, by his subsequent suit against Paynter, and the decree [328] which he has obtained in that suit, and upon which he is now proceeding.

The next question is: What rights has the plaintiff acquired by this sale against the East London Gas Company? And first as to the purchase money: it was expressly stipulated between the plaintiff and Paynter, by the agreement of the 10th August, 1831, that the purchase money should, in the first instance, be paid into the hands of Paynter, in conformity, as it was said, with the existing agreements. It is equally clear, from the agreement of the 29th October, 1831, that the plaintiff was not to look for any part of the purchase money to the company, since Paynter was to account with the plaintiff, not for the sum received upon the sale, but according to an estimated value to be applied by Paynter, agreeably to the stipulations contained in the previous agreement of August. The purchase was afterwards paid for by the company to Paynter, partly in money, and the residue by an appropriation of shares in the company. The plaintiff can therefore have no claim, either against the company or their property, in respect to the purchase money upon this sale.

But the appellant was, by the agreement of the 29th of October, not only entitled to the benefit in account as against Paynter, for his share of the estimated value of the property, but he was also, as a consideration for his agreeing to the sale, to have an interest in certain shares in the concern, to the value of £2000. They were to be taken in the name of Paynter in trust for the appellant, and to be transferred by him into the plaintiff's name at the expiration of two years. By the company's deed of settlement, it was declared, as is usual in such instruments, that as between the company and any person claiming to be a proprietor, the share register book should be conclusive evidence of his right as proprietor; that the registered proprietors should alone have a voice, and be entitled to act in the proceedings of the company, that payment to the registered proprietor and his receipt should be a sufficient discharge in all cases of trust or any other interest, and that no person's name should be substituted as a proprietor, without the consent of a certain number of the directors, nor should any person be entitled to the rights and privileges of a proprietor until he should have signed a deed of covenant to abide by the rules and regulations of the company. When the appellant agreed with Paynter to take an interest in the shares of the company, he could only take such interest as far as the company was concerned, subject to the regulations by which the company was governed. The company was not bound to consider him as a proprietor, for his name had not been entered as such in the share register book; he never was entitled to act as a proprietor, and accordingly in his first bill, he confined his complaint exclusively to Paynter, praying against him personally for a specific performance of the agreements between them, for a transfer of the shares, and for an account.

This leads, then, to the consideration of the subsequent part of these transactions. While this suit was depending, and in the month of May 1835, measures were taken for dissolving the East London Company, in conformity with a power reserved for that purpose in the deed of settlement. The requisites of the deed in this respect were strictly complied with. The directors were in consequence authorised and required to sell the property: they accordingly disposed of it to the Ratcliff Gas Company, a rival establishment. The competition between these two companies had been injurious to both, and the sale, which seems to have been a prudent and beneficial transaction, was clearly within the competence of the respective parties. [330] The

price was fixed at £22,500, a part of which was to be paid in shares estimated at £50 each, and which were to be allotted to such of the East London proprietors as should be willing to take them.

The plaintiff, being informed of these proceedings, caused a notice to be served upon the East London Company, and the Ratcliff Company, of his claims, of the pendency of the suit in Chancery, and other matters, and declaring that he should hold them liable for any loss he might sustain in respect of his interest in the shares to which he claimed to be entitled.

In consequence of this notice, the Ratcliff Company refused to complete their purchase without being indemnified against this claim. The directors of the East London Gas Company executed a bond for that purpose, and they required, on their part, a counter security for the protection of themselves and the shareholders. For this purpose a proportion of the purchase money, payable in respect of Paynter's shares, sufficient to cover the claim of the plaintiff, was, with Paynter's assent, vested in the funds in the names of trustees. Soon afterwards a decree was obtained in the case of *Pinkus v. Paynter*, directing, among other things, that Paynter should assign to the plaintiff the shares which he so held in trust for him.

In this state of things the present bill has been filed against the two companies, and against Paynter and his assignees.

First, then, as to the Ratcliff Company: The purchase which they made from the directors of the East London Company appears to have been a perfectly fair transaction. The resolution passed at the meeting of proprietors of the East London Company to dissolve the company was in accordance with the provisions of the deed of settlement. The power of the directors to sell was given by the same instrument, and was a consequence of the resolution [331] to dissolve. The price is not shewn to have been inadequate; that price has been paid by the Ratcliff Company to the directors of the East London Company, who, according to the deed of settlement, were the persons to receive it. There appears, therefore, no ground for maintaining this suit as against the Ratcliff Company, and the bill was properly dismissed as against them.

Then as to the directors of the East London Company: they had authority to dispose of the property, and it was their duty to do so. If, by reason of the appellant's notice, the sale could not be completed without the bond, it was proper to give it, and they had a right to insist upon the counter indemnity. The transaction was, I think, within their powers, under the deed of settlement, as a consequence of the dissolution. Independently of any assent on the part of Paynter, they had, I think, a right to retain a sufficient portion of the purchase money to protect themselves and the shareholders against the effect of their bond, and the plaintiff's proceedings against the Ratcliff Company.

It is further to be observed, that, according to the deed of settlement, by the provisions of which in respect of these shares the plaintiff is bound, the produce of a sale of the property upon a dissolution was to be paid to the proprietors, that is, to those registered as such. The directors were, therefore, authorised to pay Paynter the proportion due in respect of the shares standing in his name, and consequently, as I conceive, to retain or apply it by his authority for their indemnity. They cannot, I think, be deprived of this security till they are discharged from their liability to the Ratcliff Company, and secured from all other loss or damage in respect of which the indemnity was given. These are questions which cannot be settled in this suit, and I think, therefore, the bill was [332] properly dismissed by the Vice Chancellor as against the East London Company and their trustees.

The appeal must, therefore, be dismissed, and, I think, with costs.

Lord Campbell concurred.

The appeal was ordered to be dismissed, and the decree complained of to be affirmed, with costs, to be paid by the appellant to the three sets of respondents, namely, the Ratcliff Gas-light and Coke Company, the directors of the (dissolved) East London Gas-light Company, and the assignees of Paynter. (See Lords' Jour. for 21st July, 1847.)

Paynter himself did not put in an answer to the petition of appeal, and did not appear by counsel at the hearing of it.



[333] FREDERICK SQUIRE, RICHARD KING, and JOHN SQUIRE,—*Appellants*;  
MARY PHILIPPA WHITTON,—*Respondent* [Feb. 11, 14, 1848].

[*Mews'* Dig. v. 349. S.C. 12 Jur. 125. On point as to suretyship, see *Archer v. Hudson*, 1844, 7 Beav. 551; *Lake v. Brutton*, 1853, 18 Beav. 34; 8 De G. M. and G. 440; *Small v. Currie*, 1853, 2 Drew. 102.]

*Void Bond—Inoperative Agreement—Surety—Concealment.*

A bond, void in law, may be enforced as an agreement in equity, subject to the effect of the equitable circumstances under which it was made.

An instrument, purporting to be a bond, executed by the obligor, with blanks for the name of the obligee, and therefore void in law, is inoperative in equity as an agreement, there being no second contracting party.

A party joining as surety in a bond, ought to be informed of the nature of the obligation, name of the obligee, and the relation in which he stands to the principal obligor.

M. induced W. to join his as surety in a bond for repayment of a loan, saying he only wanted time to realize securities, and he would hold her harmless. M. and S. being trustees of a fund, sold it, with consent of B., the *cestui que* trust, and thereby raised the loan for M., who informed W. that B. was the lender, but did not inform her how the loan was raised:

Held that, B. not being in fact the lender, his personal representatives had no privity of contract with, nor equities against, W., and that, in consequence of the concealment from her of the real nature of the transaction, she was, in equity, altogether released from the bond.

In the year 1833, Mr. William Morgan, a stock-broker in London, being suddenly required to provide a large sum of money, applied to his friends for pecuniary assistance, and, amongst others, to Mrs. Whitton, with whom he had been for many years on terms of intimate friendship, and was then co-executor with her of the will of her late husband. Mr. Morgan wrote to her the following letter:—

[334] London, 7th August, 1833.

"My dear friend,—On Friday Mrs. Morgan and myself went to Ramsgate, etc. But if any one regretted the loss of a friend, it is poor me, at this moment, at the loss of dear Mr. Whitton; for, to make short of my story, William (the writer's eldest son) in my absence, entered into a speculation most unaccountable, which I have to make good in seven days from the present; and in order to give time to realize other securities, may I ask the favour of you to join me in a bond for £10,000, which will give me time to make arrangements. You may depend upon it I will hold you harmless; but your answer must be by return of post, or it would be too late for my purpose. I shall take the first opportunity of seeing you, to state particulars; in the meantime believe me, my dear friend, yours, etc., William Morgan."

What answer, or whether any, was made to this letter did not appear; Mrs. Whitton being about seventy-six years of age, when she put in her answer to the bill, was not able to recollect (*vide infra*, p. 340); and Mr. Morgan in his answer said that by her particular desire he from time to time destroyed all the letters which he received from her.

On the 9th August, 1833, a letter was written by the appellant John Squire, to Mr. Robert Farthing Beauchamp, who was then residing in Somersetshire, and was also an intimate friend of Mr. Morgan. That letter was not produced in the cause, but the purport of it appears, from Mr. Beauchamp's letter of the 11th of August, to have been to obtain the advance of £10,000 (*vide infra*, p. 337).

Mr. Morgan, aware that the security of Mrs. Whitton was necessary to enable him to obtain the money, instructed Mr. Charles Morgan, one of his sons, then a [335] clerk in the office of Mr. Gregson, the solicitor of Mrs. Whitton, to prepare a bond in the names of William Morgan and Mrs. Whitton, as the obligors for securing the said sum, and to leave blanks for the name of the obligee, and the rate of interest to be

reserved. Mr. C. Morgan, pursuant to these instructions, prepared and engrossed a bond as follows:—

“Know all men by these presents, that we, William Morgan, of Colneyhatch, in the county of Middlesex, esquire, and Mary Philippa Whitton, of Stonewall, in the parish of Chiddingstone, in the county of Kent, widow, are held and firmly bound to

in the penal sum of £20,000 of good and lawful money of Great Britain, to be paid to the said

, his certain attorney, executors, etc., for which payment, etc., we bind ourselves jointly, and each of us separately, etc., by these presents, sealed with our seals, dated this day of 1833.

“Whereas the said , at the request of the said William Morgan, agreed to lend him the sum of £10,000, and upon the trust of the said loan it was agreed that the repayment thereof should be secured by the joint and several bond of the above bounden William Morgan, and of Mary Philippa Whitton as his surety, in a sufficient penalty, at the time and in the manner mentioned in the condition hereunder written: Now, the condition of the above-written obligation is such, that if the said William Morgan and Mary Philippa Whitton, or either of them, their or either of their heirs, executors, or administrators, do and shall well and truly pay or cause to be paid unto the said

his executors, administrators, or assigns, the sum of £10,000 of lawful money of Great Britain, on or before the day of , which will be in the year 1834, with interest thereon, in the meantime, after the rate of for every £100 by the year, by equal half-yearly [336] payments, etc., then the above-written obligation shall be void, otherwise to be and remain in full force and virtue.”

This instrument was signed, sealed, etc., by “William Morgan” and “Mary P. Whitton,” in the presence of “Charles Morgan, 18, Bedford-row, London,” and “Samuel Tinkler, servant to Mrs. Whitton.”

On the 10th of August, 1833, Mr. William Morgan, with his son Charles, went to Mrs. Whitton's, at Stonewall, taking with them the bond; and in the interview which he then had with her, apart from his son, he stated to her, as he alleged in his answer, that the object of his visit was to procure her execution of the bond, to enable him to borrow the £10,000, and his confident expectation that Mr. Beauchamp would lend him that sum upon her joining him in the bond, whereupon she expressed her willingness to join in such a bond. On the following morning, being Sunday, he had another interview in private with her, and she having again expressed her consent to join in the bond as a security to the person who should lend him the £10,000, Mr. Charles Morgan was then called into the room, and desired by his father to read aloud the engrossment of the bond preparatory to the same being executed, and he accordingly proceeded to do so in the presence and hearing of both; and on his coming to the blanks in the engrossment which had been left for the name of the obligee, he stated to Mrs. Whitton, that these blanks were for the name of the person who was to lend Mr. Morgan the £10,000, and would be filled up with his name when the money was advanced, or to that effect; and on his coming to the other blank, he stated to her that the same was for the rate of interest to be made payable on the bond, and would also be afterwards filled up. After he had read the whole of the engrossment, he explained to her the nature of the liability she would incur by executing the same, and that if the amount to be secured by the bond was not paid [337] by Mr. W. Morgan, she would be liable for the same; and he made use of this expression, “The effect of which is, that if my father cannot pay, you must.” The bond was then executed with the blanks.

On the 12th of August, 1833, Mr. Beauchamp's reply to the application made to him on the 9th, was received in London by Mr. John Squire. It was as follows:—

“Walford House, 11th August, 1833.

“My dear Squire,—Your letter of the 9th has completely upset me. I am indeed grieved beyond measure. What a distressing circumstance for poor Mr. and Mrs. Morgan, who deserve a better fate. You say that you and Rothschild have agreed to lend him each £5000, and I will with much pleasure do the same, provided you take care to see me perfectly secure. You say his friend Mrs. Whitton will join in a bond, or give a mortgage, which I doubt not is quite good; but you must ascertain if the

property is at her own disposal and unencumbered, and if so, I would even advance the £10,000, provided he cannot procure it through any other channel, first, on bond, because you say there is not time to prepare the mortgage, and afterwards on mortgage, at four and a half per cent. Recollect, I propose to lend stock, and not money, and for this reason, because I intend you to sell as much of the trust stock as you may require for this purpose. Of course the mortgage must be taken in your name and that of poor Morgan. Upon the first blush of the thing I had made up my mind to go to town, but I have had so much gout in my foot lately, that I do not feel quite equal to the journey, not being able to wear a boot. Do pray tell him this, and say how very much both Mrs. Beauchamp and myself feel for him and Mrs. Morgan. Recollect the trust stock stands in the joint names of yourself and Morgan. As a proof that Mrs. Beauchamp with myself is anxious to assist them at this critical moment, she will add her sig-[338]-nature to this letter, acquiescing in the sale of part of the trust stock, relying on your friendship and care in seeing the security is what it ought to be. Do pray let me hear from you very soon. I am so anxious, and feel so much for him, that I shall not be at rest until I know everything is made straight. With our united regards to all your circle, I remain yours, etc.,

“R. F. Beauchamp, Eliza. Beauchamp.”

The trust stock alluded to in this letter consisted of two sums of £10,000, £3 per cent. consols, comprised in the marriage settlement of Mr. and Mrs. Beauchamp, one of which sums was then standing in the bank books in the joint names of Richard Williams, deceased, the appellant John Squire, and the said William Morgan; and the other in the joint names of the same Morgan, Williams, and Squire, who were the trustees of the settlement.\*

Mr. Squire, upon the receipt of the letter, directed so much of the stock to be sold as produced £10,000, and that sum [339] was paid to Mr. W. Morgan. This took place on the 14th of August, 1833. The money was raised by sale of the whole of one of the said sums of £10,000 consols, and of £1235 19s. 1d., part of the other sum. The bond, as executed by Mrs. Whitton, was on the receipt of the money handed over by Mr. W. Morgan to Mr. Squire, who afterwards filled up the blanks for the name of the obligee, by inserting the name of Robert Farthing Beauchamp. Mr. W. Morgan regularly paid the interest which accrued due thereon to the bankers of Mr. Beauchamp, to the credit of his account.

Mr. R. F. Beauchamp died in January 1841, having by his will appointed the appellants his executors, who shortly after his death proved the will, and in the month of August then next ensuing they applied to Mr. Wm. Morgan to repay the £10,000, and on discovering his inability to do so, application was made to Mrs. Whitton by letter from John Squire, dated Nov. 10th, 1841, saying:

“Mrs. Beauchamp having called on the trustees of her marriage settlement to reinstate, before the end of this month, the stock which is at present represented by your bond to her late husband for £10,000, I am under the necessity of applying to you for the discharge of the same, together with interest, from 5th of July last, up to which period it has been paid by Mr. Morgan; and you will oblige me by letting me know when it will be convenient for you to enable me to carry Mrs. Beauchamp's wishes into effect.”

\* The trusts of the settlement were, as to one sum of £10,000 consols, settled by Mr. Beauchamp himself, to pay to him the dividends for his life, and after his death, if the wife should survive him, to her for life; and as to the second sum of £10,000 consols, settled by J. Westbrook, the lady's father, to pay the dividends according to her appointment, and in default of appointment, to her separate use for life; and after her death, if Mr. Beauchamp should survive her, to him for life. The trusts of the capital of both sums after the death of the survivor of Mr. and Mrs. Beauchamp, were for the benefit of the issue of the marriage; and in default of issue (which was the event), the £10,000 settled by Mr. Beauchamp was, after the death of the wife, to revert to him absolutely, and the other sum of £10,000 was to be held in trust for Mrs. Beauchamp absolutely, if she survived her husband, and if she died in his lifetime, then subject to a power of appointment, which she was thereby empowered to exercise by deed or will, and, in default of such appointment, in trust for Mr. Beauchamp absolutely.

In consequence of this application, Mrs. Whitton consulted Mr. Gregson, her solicitor, and in the correspondence which then took place between him and John Squire, the appellants were apprised of the legal invalidity of the bond. They then filed their bill against W. Morgan and Mrs. Whitton, praying "that it might be declared by the decree of the Court, that Mrs. Whitton, as well as W. Morgan, was liable to pay to the appellants, as [340] such executors as aforesaid, the said sum of £10,000, together with the interest due and to grow due thereon at the rate of £4 10s. per cent. per annum; and that it might be also in like manner declared that the said bond so executed as aforesaid was valid and ought to be enforced in equity against Mrs. Whitton, as well as W. Morgan, or otherwise that Mrs. Whitton, together with the said other defendant, might be decreed to execute to the appellants, as such executors as aforesaid, a good and valid joint and several bond for the said sum of £10,000, and interest thereof, at the rate aforesaid, in the place of the said other bond; and that at all events Mrs. Whitton, as well as the said W. Morgan, might be decreed to pay the appellants, as such executors as aforesaid, the sum of £10,000, together with the interest due and to grow due for the same, at the rate aforesaid, and that all necessary and proper accounts might be taken," etc.

Mrs. Whitton, by her answer to the bill, stated, among other things, that in August 1833, she, then being of the age of seventy years or thereabouts, and being upon terms of intimate friendship with, and having great confidence in, W. Morgan, who was a co-executor with her of the will of her late husband, and took an active part in the administration of his affairs, received from him a letter (the letter of the 7th of August, 1833, before set out); that her memory being somewhat impaired by age, she did not, at that distance of time, distinctly recollect whether she made any, or what answer, to the said letter, or what was the purport of such answer, if any; however, she believed that she (believing his representations contained in the said letter to be true, and that her compliance with his request was only a matter of temporary arrangement, and would not subject her to any real or permanent liability, and having entire confidence in him), did, in some manner, intimate to him that she would comply with his request; and she admitted, that W. Morgan, together with his son [341] Charles, came to her, at her house at Stonewall; and, from reference to a diary then kept by her, she believed that they so came to her on the 10th of August, 1833, and that they left her the succeeding day; and she stated, that in the course of such visit, the said bond, having such blanks therein as in the bill stated, was produced by W. Morgan, and presented to her for execution, but she could not, from failure of memory, speak positively as to the particular circumstances which took place on the occasion; she, however, believed that W. Morgan might, upon presenting the bond for execution, have told her that the blanks therein would be filled up, when the money (meaning the £10,000) was advanced; and, speaking to the best of her recollection, she believed and admitted, that in the course of the visit the bond was produced and presented to her for her execution by W. Morgan, and she did sign and seal, and, as her act and deed, deliver the same with such blanks therein as aforesaid; and she admitted that the bond, upon being so executed by her, was taken away by William and Charles Morgan, to London, for the purpose, as she supposed, of being handed over to the person who should advance the said sum of £10,000 to W. Morgan, as a security for that sum and the interest; she also admitted, that W. Morgan afterwards told her that Mr. Beauchamp had lent him the £10,000; that subsequently to the time when the bond was executed by her, and prior to the month of November 1841, she had many interviews with W. Morgan, and that in the course of such interviews she frequently adverted to the subject, and requested him to realise his securities, and to make the other arrangements alluded to in his letter of the 7th August, 1833, for the purpose of bearing her harmless, according to his promise, from whatever liability she might have incurred by joining in the bond, and she believed that in some of such conversations W. Morgan told her that he had paid the interest due on the £10,000 to Mr. Beauchamp, as the obligee in the bond, [342] and that no part of the principal sum had been paid by him; and she stated, that W. Morgan had been in the habit of representing to her, that some time in the year 1826 he had advanced the sum of £4000 on behalf of Richard Whitton, deceased, the son of her late husband William Whitton; in order to extricate him from difficulties in which he had been involved, and that she intended to make good such

sum of £4000 to W. Morgan at her death; and she believed that she inquired of him whether, if she provided the said sum of £4000, it would enable him to pay the said alleged debt (meaning the said bond debt); but, except as aforesaid, she denied that she ever offered to pay any part of the principal sum to Mr. Beauchamp, or ever meant to admit her liability to pay it.

W. Morgan in his answer stated facts, to the effect before stated. Numerous witnesses were examined, the substance of whose evidence is comprised in the judgment of the Vice Chancellor of England, before whom the cause was heard in May 1844. when his Honour decreed that the bill should stand dismissed as against Mrs. Whitton, with costs; and that the defendant, W. Morgan, should pay to the appellants, as executors of Mr. Beauchamp, the sum of £10,000, together with interest thereon, from the 12th of August, 1841; and also the costs of the suit, together with what the appellants should pay to Mrs. Whitton for her costs.\*

\* The following are extracts from the short-hand writer's notes of the judgment, printed in a joint appendix to the appeal cases, and admitted on both sides to be correct:—

The Vice Chancellor.—I have considered this case very deliberately, and attended to all the evidence, and the statement in the bill and in the answers, and it does appear to me that it is much to be lamented the transaction originally was set on foot without the intervention and advice of Mr. Gregson; for my belief is, that if that gentleman had been advised with, what I will call the subsequent calamitous events would never have happened. It appears to me to be a very hard and cruel case on Mrs. Whitton. I cannot think that she has been quite fairly dealt with; and when I use that expression, I desire that it may be taken with every possible modification which may arise from this consideration, which I believe is founded in fact, that the parties who were dealing with her, one and all, were not exactly aware of what they were about, and that they did not understand the grounds on which they proceeded.

The opinion that I have formed on the case is quite irrespective of any question that may arise as to whether the bond being void at law might not, as an agreement, have operation in equity, because I apprehend such a general proposition cannot be disputed; and not only could a bond that was void at law have operation in equity as an agreement, but a bond good at law, and having a definite form at law, may nevertheless be taken in equity as evidence of an agreement for beyond what is expressed in the condition; and the case to which I alluded during the argument, and which afterwards went to the House of Lords (*Logan v. Weinhold*, 1 Clark and Finnelly, 611), is decisive on that point. But the circumstances of this case are very peculiar. (His Honour stated them as above, p. 334, *et seq.*, and proceeded.) Now, there is a distinct statement made by Mr. Morgan, that if Mrs. Whitton would assist him in the way proposed, he would save her harmless; and what answer she wrote we do not know; probably she answered by return of post; in consequence of which letter, if it was written on the 8th, it would come to town on the 9th, and would therefore most probably give rise to that letter of the 9th which was written by Mr. Squire to Mr. Beauchamp, and which is noticed in Mr. Beauchamp's letter, by its allusion to the date. What the letter was, we do not know. Then Mr. Beauchamp writes the letter of the 11th of August to Mr. Squire. Now, with reference to that and to another circumstance that occurred in the cause, inasmuch as the cause turns mainly upon the deed of settlement, I requested that I might be furnished with that settlement, or a copy of it; and I have had an abstract of the settlement and the original itself. It appears that there was a settlement made, of what I will call the two sums of £10,000 consols, which in a given event, were to go in a different manner; (*vide note supra*, p. 338.) This is to be observed, that there was a power of sale of the stock given to the trustees, with the consent, in writing, of Mr. and Mrs. Beauchamp, and the trust for dealing with the proceeds was to invest them in either Government or real securities. Now, Mr. Beauchamp writes this letter, evidently adverting to that power in the settlement. (His Honour read the letter, *supra*, p. 337.) It is manifest to my mind that what Mr. Beauchamp meant was that there should be a mortgage security taken. This also is evident, that inasmuch as this letter was written on the 11th to Mr. Squire, and as Mr. Morgan, in pursuance of what passed between him and Mrs. Whitton, went with his son to her on the 10th. and was with her on the 11th, the contents of this letter could

[343] W. Morgan's circumstances making it impossible to have the benefit of the decree against him, the appeal was brought against so much of it as dismissed the bill with costs as against Mrs. Whitton.

[344] After the appeal was lodged, W. Morgan died intestate, and the suit in Chancery and the appeal were revived against his administrator, *ad litem*, who however did not appear to the appeal.

[345] Mr. Kindersley and Mr. Stuart (Mr. Toller was with them) for the appellants.

not have been communicated to him, and the reasonable presumption is, that though he might be aware of what had been passing in the mind of Mrs. Whitton, he did not on the 11th know the contents of this letter. What passed between Mr. Morgan and Mrs. Whitton it is impossible to tell; there is no evidence upon it, except so far as that may be considered evidence, which appears, not in a very satisfactory form, in the evidence of Mr. Charles Morgan, because it struck me that there was a slight inconsistency. The consequence therefore is, that the only representation that we have in evidence of what was stated by Mr. Morgan to Mrs. Whitton is his own letter of the 7th of August, in which he states, that he asked for assistance, that he wanted time to realise his securities, and that she might depend upon it he would save her harmless. Well, then, it appears that this bond did pass from the hands of Mr. Morgan to Mr. Squire; we have no evidence to show the time when it was transmitted, and how or what was the representation, if there was any, that accompanied the transmission of the bond; but it must have come to Mr. Squire's hands, because Mr. Squire himself filled up the blanks in his own handwriting; and the other part of the transaction is this, that though the bill proceeds to state that the stock was sold and the proceeds paid to Mr. Beauchamp, and that then Mr. Beauchamp advanced the money to Mr. Morgan; the real fact appears to have been, that the whole use of the money was effected without the personal intervention of Mr. Beauchamp at all. Mr. Morgan was the stock-broker, and the stock virtually stood in the names of Mr. Squire and Mr. Morgan, for the difference between the husband's stock and the wife's stock is determined by the position of the three names in which the stock stood. Well, therefore, no person was necessary for the actual making of the sale except Mr. Squire and Mr. Morgan; and a sufficient quantity of the stock was sold to produce the sum of £10,000, which, by the ordinary course of the transaction, as I presume, Mr. Morgan would have received.

It appears that Mr. Morgan, from time to time, paid the interest into the bankers of Mr. Beauchamp, upon whose death his executors, the plaintiffs, conceiving that his estate was bound to the trustees, discharge the debt which they thought was so due from the estate of Mr. Beauchamp to the trustees, by purchasing in the names of the trustees a sum of stock equivalent to that which had been sold out, and then they file their bill. That bill represents the transaction as one in which the money was paid by the trustees to Mr. Beauchamp, and then by Mr. Beauchamp lent to Mr. Morgan; that is the statement on the bill.

It occurred to me that it was the duty of Mr. Squire, and, of course, of Mr. Morgan, to have taken care that they followed the authority given to them by Mr. Beauchamp, which clearly was an authority not to take, and rely on, a bond; but if they took a bond at all, to take it as the first thing, and then to obtain a mortgage security; but they do not do that, and it is perfectly true that the authority which was signed (that is, the letter of the 11th of August), by Mr. and Mrs. Beauchamp, would authorize the trustees to sell; in that there was no breach of trust, but the breach of trust was actually made in not doing the very thing which Mr. Beauchamp had directed Mr. Squire to do, namely, to see that the security was sufficient, to see that it was unencumbered, and to see that Mr. Beauchamp was made secure by a mortgage in their names; and when the executors thought proper to pay what they conceived to be the debt of Mr. Beauchamp to the trust fund, the question is rather, whether Mr. Squire was not in effect doing this, applying the fund which he and his co-executor had, as executors of Mr. Beauchamp, in shielding himself and Mr. Morgan from the consequences of their own breach of trust. As the fact now stands, there was no original debt from Mrs. Whitton to Mr. Beauchamp, because the real transaction was that the trust fund, as Mr. Beauchamp understood it, was to make the advance; but the trust fund was to be indemnified by the mortgage which Mr. Squire was to obtain.

There is distinct evidence, by the respondent's admissions in her answer, as well as by the recitals in the bond, [346] as executed by her, that she agreed to join Mr. Morgan in a bond to secure the re-payment of £10,000 with interest to the person, whosoever he might be, who should advance that sum to Morgan. Although she does not re-[347]-collect all that passed in the conversations between herself and Mr. Morgan on the 10th of August, 1833, she does not deny that she agreed to become surety for him. She admits that the instrument, signed and sealed by her, [348] was taken away by Mr. Morgan, for the purpose of being handed over to the person who should advance him the £10,000, as a security for that sum; and it is proved that it was so handed over, and that the money was advanced by Mr. Beauchamp on the faith of the instrument so executed by her, and on the faith of her agreement, to be surety for its repayment.

It appears to me that, inasmuch as this is a claim by means of the equity, which was obtained by having the bond filled up by Mr. Squire, which manifested the agreement, such as it was, that Mrs. Whitton had made; that those who take the agreement, take it affected by the equitable circumstances under which it was made; and one of the inducements of Mrs. Whitton to give the security, such as it was, unquestionably was the promise in the letter of the 7th of August, that Mr. Morgan would see her indemnified. Now, I should like to know whether, if it had been stated to Mr. Beauchamp that Mrs. Whitton never meant herself to be the person who should pay him, but that she relied on the representation made by Mr. Morgan, that he would indemnify her, whether the transaction, as far as Mr. Beauchamp or his executors were concerned, is not affected by the equitable notice of that indemnity, the promise of which was the sole inducement, as far as the evidence goes, to Mrs. Whitton, to give the security in the form in which we find it.

It seems to me that Mr. Squire and Mr. Morgan, cannot, as the executors of Mr. Beauchamp, claim a right to be indemnified, when, in point of fact, they have not fulfilled the instructions of Mr. Beauchamp, and the estate of Mr. Beauchamp has come into a situation that there may be a question whether the payment made by his executors to the trust fund is one that they can maintain against the parties entitled to his personal estate, of which I know nothing. It appears to me that Mrs. Whitton was not properly dealt with; for my opinion is, that she ought to have been told at the time that the bond was proposed to be executed, that it was, as it stood, waste paper, and that in order to make herself bound, without question, it would have been necessary that she should give some other security than that; instead of which she is allowed to do as she did, without the intervention of her solicitor; without a due explanation, as I take it; for C. Morgan, by the transaction as he represents it, shows that he was not capable of explaining the matter, and did not explain it.

I think the case has been mistaken on the pleadings. The case that is proved, is not the case that is alleged. You may argue about it, and say that it comes to the same thing; but then it is the argument that is to give the identity, and about the argument people may differ; the facts of the case are totally different; and I cannot but think that, without imputing moral blame to these parties (who are ignorant, as it appears, of law, who were ignorant of their duty as trustees, who seem not to have thought that to an aged lady it was at least due that she should be protected by the advice of her solicitor), that the whole thing was done in a hurry for the sole purpose of assisting Mr. Morgan, who made representations which turned out not to be true, and the assertion of which has given rise to the whole transaction; and it really does appear to me, that the only thing that I can do is to dismiss the bill with costs, as against Mrs. Whitton.

There is one thing which I wish to observe, in case this should go further, and that is this; on reading over that mass of letters which were handed up to me; in the letter No. 9, there certainly are statements made which lead one to infer that, supposing there had originally been a perfectly good liability on the part of Mrs. Whitton as surety, the liability was discharged by Mr. Beauchamp giving time to Mr. Morgan without her knowledge. That was a letter written by Mr. Squire, the 26th of November, 1841, to Mr. Gregson; it is not on the pleadings, but if this case is carried farther it might be a consideration whether some inquiry should not be directed in respect of it, and any one will read it and consider whether, if the statement be true, time was not given by Mr. Beauchamp to Mr. Morgan.

It appears quite clear from Mr. Beauchamp's letter of the 11th of August to Mr. John Squire, that he would not lend the money without the security of the respondent, by bond first, and mortgage afterwards. The circumstance, that no mortgage was obtained or asked from her, as originally contemplated by Mr. Beauchamp in that letter, cannot diminish her liability, if the money was advanced, as it certainly was, on the faith of her agreement to join as surety for its repayment, that agreement being admitted by her, and proved against her.

Although the bond turned out to be invalid at law, it is, nevertheless, as connected with the admissions and proofs in this case, a good agreement, under hand and seal, and such as a court of equity can enforce; *Crosby v. Middleton* (Prec. in Ch. 309), *Nurse v. Frampton* (1 Salk. 214). It was an agreement entered into by the respondent deliberately, as an act of friendship towards Mr. Morgan, and his failure to save her harmless, as he had promised, is no sufficient reason for absolving her from her act, on the faith of which another party advanced his money.

The Vice Chancellor's decree, proceeding on the view [349] that the respondent executed the instrument on the understanding that she would never be called upon for payment, is clearly a miscarriage, as that doctrine, if admitted, would put an end to suretyship altogether. It cannot be said that there was any misrepresentation, or any surprise practised on this lady: it is admitted that she was a woman of strong mind and conversant with business, having acted for several years as executrix of her husband. It would have been better, certainly, if her solicitor had been present or consulted on the occasion, if the urgency of Morgan's affairs could admit of delay; but no suspicion can arise from his absence, or from his not being consulted, to lessen or affect the binding obligation of the instrument executed by her. It is not quite certain that Mr. Gregson was then her solicitor: she had, some time before, employed another solicitor to draw her will. The answer of Mr. Morgan, and the evidence given by his son, shew that everything material for her to know was explained to her, and that she perfectly understood the nature and extent of the obligation—that if “Morgan could not pay, she must.” It never occurred to her that she was not liable, until apprised of the legal flaw in the bond; for she admits in her answer that she intended to leave Mr. Morgan £4000 by her will, to compensate him for losses he had sustained by assisting Mr. Whitton's son, and that she would pay him that sum in her lifetime if it would rid her of all liability in respect to the bond.

The defences set up to this claim on the Statute of Frauds and Statute of Limitations are not available. It is a sufficient answer to the first that this is an obligation or contract in writing; and being an instrument under seal, the second does not apply. In *Crosby v. Middleton* it was said, “forty-nine years was not sufficient time to ground presumption in equity;” and although Mrs. Whit[350]-ton was joined only as a surety with Morgan, she was severally liable; *Rawstone v. Parr* (3 Russ. 424, and 539).

It may also perhaps be argued on behalf of the respondent here, as it was in the Court below, that Mr. Beauchamp or his personal representatives were not the proper parties to sue, for that the money was advanced, not by Mr. Beauchamp, but by the trustees of his marriage settlement, Morgan himself, the borrower, being one of them. But the £10,000, although produced by the sale of the trust stock, was lent by and on behalf of Mr. Beauchamp, and not by the trustees, and the debt contracted by Morgan was contracted by him to Mr. Beauchamp, and not to the trustees. Mr. Beauchamp's letter shews that he was the lender, and that he and the trustees always considered him to be the creditor is further proved by Morgan's payments of the interest to his account at his bankers'.

Mr. Turner and Mr. Wigram (Mr. Baily and Mr. Jackson were with them) for the respondent:

The only agreement into which Mrs. Whitton entered was the agreement contained in the bond. The bond is void in law, there being no obligee; and it is void also as an agreement, there being no second contracting party. In *Laythoarp v. Bryant* (2 Bing. N.C., 742), Chief Justice Tindal states the law thus: “An agreement is not perfect unless in the body of it, or by necessary inference, it contains the names of the two contracting parties, etc.” That is a clear proposition: it is equally clear that a Court of Equity will not enforce a void instrument beyond its legal operation, especially against a mere surety, by construing it to be an instrument



of a different nature, and binding on the party in another way; *Sheffield v. Lord Castleton* (2 Vern. 393), *Simpson v. Field* (2 Cas. in Ch. 22); there being no ground to infer mistake in the nature of the instrument, and no previous equity in the party seeking to enforce it; *Sumner v. Powell* (2 Mer. 30; Tur. and R. 423), *Hebblewhite v. M'Morine* (6 Mees. and W. 200), *Clarke v. Bickers* (14 Sim. 639). The alleged bond is also, both upon the principle of the authorities and the Statute of Frauds, void as a guarantie for the debt of Morgan, as not being complete at the time when it was executed; *M'Iver v. Richardson* (1 Mau. and S. 557).

The case of *Crosby v. Middleton* (Prec. in Chan. 309; and 2 Eq. Cas. Ab. 188), cited for the appellants, turns out, upon comparing the reports of it with the registrar's book, not to have any application to this case. There was fraud in that case, there is none in this.

The trustees of Mr. and Mrs. Beauchamp's settlement were themselves the parties who advanced the money to one of themselves; and this suit, though instituted in the name of Beauchamp's executors, was really for the purpose of protecting Squire, the surviving trustee of his settlement, against the breach of trust committed by him and Morgan in selling out the trust fund. That was the real object of the suit, and such was the view taken of it by the Vice Chancellor,—whose judgment in all its parts it is not necessary to defend. The suit, if maintainable at all against the respondent, ought to have been brought in the names of the trustees.

At the time when the bond was executed, the respondent had no reason to believe, either from the form of the instrument or the representations made to her, that the loan of money to Morgan was intended to be made by himself and his co-trustee, and therefore she was misled as [352] to the real nature of the intended transaction, and her position and liability as a surety.

The Courts would not enforce even a valid bond against a surety unless satisfied that all necessary explanations of the nature of the transaction had been given him before he entered into the bond. The non-communication of any fact within the knowledge of the party obtaining the bond, and material for the surety to be acquainted with, is undue concealment, and releases the surety; *Pidcock v. Bishop* (3 Barn. and C. 605), *Stone v. Compton* (5 Bing. N.C. 142), *Railton v. Mathews* (10 Clark and Fin. 934), *Davidson v. Cooper* (13 Mees. and W. 343).

If Mrs. Whitton had been informed that the money was to be advanced out of a trust fund by Morgan himself, one of the trustees, would she not naturally object that he would not, of course, enforce the bond against himself, the principal, but that she, the surety, would have to pay it? Again, if she had been informed that the security was to Mr. Beauchamp, would she not reasonably say, "Why should I be surety for Morgan to Beauchamp who is more the friend of Morgan than I am?" She, on the other hand, did no act to enable Morgan to deceive his co-trustee or Beauchamp. They knew that the bond was imperfect: they were not misled by any one, but had full knowledge of all the circumstances.

Mr. Kindersley in reply:

The truth and honour of the case are with the appellants, while on the other side, an ingenious argument is raised upon the technicalities of the law. It was impossible to inform Mrs. Whitton of the name of the obligee at the time of executing the bond, because it was not then known by whom the money would be advanced. It was proposed to her to be surety for Morgan, and to that pro-[353]-posal she agreed. It was immaterial to her to know by whom or out of what fund the money was to be advanced; and therefore the cases cited upon the non-communication of all the circumstances are not applicable to this case, which must be governed by the principle of *Crosby v. Middleton*, a case not in the least invalidated by *Sheffield v. Lord Castleton* (2 Vern. 393), or the other cases referred to on the other side (*ante*, pp. 350, 351).

The Lord Chancellor.—The object of this appeal is to reverse a decree of the Vice Chancellor of England, dismissing the appellants' bill, he being of opinion that they had not made out such a case against Mrs. Whitton as would justify him in granting the relief prayed.

The case set up by the bill was that Mrs. Whitton was indebted in the sum of £10,000 to the representatives of Mr. Beauchamp, with interest thereon at four and

a half per cent., in consequence of a bond executed by her, as security for Mr. William Morgan, to enable him to raise money under circumstances of pressing necessity, which sum was advanced by Mr. Beauchamp on that security. The bill prayed that, etc. (His Lordship read the prayer).

Now this sum of £10,000 was never a legal debt from the defendant, Mrs. Whitton, to the plaintiffs; it is not pretended that it was; but the question is, whether the circumstances which are detailed in this suit are such as make her liable to pay this sum of £10,000.

It appears that Mr. William Morgan, who, unfortunately for Mrs. Whitton, was on terms of great intimacy with her, and had been a friend of her husband's, had got into great difficulties, and was under the necessity of borrowing a sum of money to make good his engagements. [354] Mr. Morgan, it appears, and Mr. Squire were the surviving trustees of Mr. Beauchamp's marriage settlement, and in that character had invested, in their names, sums of money, of which the £10,000 formed a part. Being pressed by the exigencies of his affairs, Mr. Morgan applied to Mrs. Whitton by a letter (which I do not find stated in the bill, although it is alluded to, but which is printed in the appellants' case), in which he represents to her his situation, and states that he had to make up a sum of money in seven days, and says, "in order to give me time to realise other securities, may I ask the favour of you to join me in a bond for £10,000, which will give me time to make arrangements."

No one reading this letter could possibly avoid understanding what the meaning of it was; that his object was to borrow £10,000, and that he wished the signature of Mrs. Whitton to a bond for £10,000, in order to facilitate the raising of that sum of money. What Mrs. Whitton's answer was, does not appear: she could not recall to her recollection the circumstances, in consequence of the failure of her memory, she being seventy-nine years of age when she put in her answer to this bill. Whether a letter in reply was returned she does not know, but her statement in her answer is, that she in some way or other expressed her wish to comply with the application that had been made.

It happened that Mrs. Whitton had for her solicitor a respectable gentleman (Mr. Gregson), who had been a great friend of her husband's, and who managed her concerns after her husband's death; and it happened, unfortunately for her, that a son of Mr. Morgan was a clerk in that gentleman's office, and that instead of Mr. Morgan desiring her to consult her solicitor, he sent his own son, a clerk in that solicitor's office, down to Mrs. Whitton for [355] the purpose of carrying the transaction into effect, for his own individual benefit. As to what passed between them on this occasion we have only the information given us by his son. The result, however, was, that in the very office of Mr. Gregson, and without his knowledge, was prepared this document by young Mr. Morgan, not as Mr. Gregson's clerk, on which the plaintiffs seek to recover this money, but which was wholly and entirely inoperative,—because, though in the form of a bond executed by Mrs. Whitton, it is a document in which she covenants with some person, whose name is not mentioned, as the obligee of the bond, to make good and pay the £10,000. The very foundation of the plaintiffs coming to a Court of Equity is that the instrument is invalid at law, as being a contract under seal, to which there is only one party, that is the party contracting to pay, but with blanks for the name of the person with whom the contract is made; therefore it is an instrument entirely void at law. This bond so made, got, as naturally it would, into the hands of Mr. Morgan, with blanks in it for the name of the obligee and the rate of interest on the principal sum.

The next transaction we find passing is, not a letter from Mr. Morgan to Mr. Beauchamp, but the answer of Mr. Beauchamp to a letter of Mr. Squire, which letter is not produced. As the bill was filed by the executors of Mr. Beauchamp, Mr. Squire, who is one of them, would naturally be in possession of any letter written to Beauchamp by Morgan; but there is no such letter produced, although the transaction was one which, as appears by the answer, had much engaged his attention. We have that answer, to the letter of Mr. Squire by Mr. Beauchamp, dated the 11th of August; the bond bearing date the 12th. It is said, though it was actually executed on the 11th, being Sunday, it bears date on the 12th, Monday. I think [356] much importance is attached to that date in this way:—Beauchamp wrote the letter on the 11th; he could not, therefore, have had a knowledge of the document

which Morgan had obtained from Mrs. Whitton the same day. In this letter of Mr. Beauchamp, dated the 11th of August, from Somersetshire, he says, "Recollect, I propose to lend stock, and not money, and for this reason, because I intend you to sell as much of the trust stock as you may require for this purpose," which proves to demonstrate that the *cestui que* trust of the settlement must have been entirely ignorant of Mrs. Whitton's having put her hand and seal to an instrument for the purpose of inducing him or any one else to advance the money, because he speaks prospectively of what may hereafter take place, and not of a transaction that had already taken place. "Recollect the trust stock stands in the joint names of yourself and Morgan. As a proof that Mrs. Beauchamp with myself is anxious to assist them at this critical moment, she will add her signature to this letter, acquiescing in the sale of part of the trust stock, relying on your friendship and care in seeing the security is what it ought to be." [His Lordship read the letter, *ante*, p. 337.]

Now this has been relied on by Mr. Kindersley, as proving that the original proposal by Mr. Morgan was that Mr. Beauchamp himself should advance the money. It appears to me to prove very strongly the contrary. There is not any allusion in his letter to the effect that he was personally to advance the money. If he had been asked to advance the money, he would have said, "You ask me to advance the money, I have not got it, but there is another mode in which it may be raised out of the trust fund." The plaintiffs ought to have been in possession of the letter of the 9th, to which this is an answer on the 11th, which does not allude to any advance by Beauchamp [357] personally, but proposes to sell a part of the trust fund in order to raise the £10,000; and therefore the natural inference is, that in the letter to which this is an answer, the proposition of Mr. Morgan was merely to do what is suggested, and not that Mr. Beauchamp himself should advance the money. It is not unlikely that Mr. Morgan who had no scruples in committing a breach of trust in selling the trust property, the moment Mr. Beauchamp consented, should himself have been the author of the suggestion, as a ready means of furnishing the money of which he was in want, and he was not likely to meet with any great impediment from his colleague Mr. Squire; he indeed also consented, and the stock was sold, and I conceive so far from its being proved that it was the intention of Mr. Beauchamp to advance this money himself, and himself only to be a creditor, there is every reason to suppose (though it is not proved, except so far as there is an inference from the letter) that from the beginning to the end there was no intention of raising the money except by a breach of trust so to be committed by Mr. Morgan and Mr. Squire.

However, this breach of trust was committed, and it does not appear that any communication on the subject was made to Mrs. Whitton; but the money was obtained, as the evidence proved, from the trustees of the settlement, of whom Mr. Morgan was one, and in order to give it a better appearance than it would have had if Mr. Morgan had appeared both as the borrower and as the lender; and that it might not be easily detected that the whole transaction was founded on a breach of trust, machinery was resorted to for making it appear that the loan came from Mr. Beauchamp. But the transaction, so far as a legal obligation was created, whether the trustees were to advance the money directly to Morgan or to Beauchamp for the [358] purpose of advancing it to Morgan, is not very material. Morgan was the person who prepared the plan, and Mrs. Whitton was to be made liable to the very man who was the principal obligor and debtor, as the evidence proves; and we have reason to suppose he had not any intention but to give himself the trust money, and with Mr. Squire's approbation to apply the fund at once to his own particular purposes.

It appears that nothing more was done, and no farther security was obtained. This instrument is executed; Mr. Morgan obtains the money, the whole of which is lost by his inability to pay, and then the plaintiffs come and ask a Court of Equity as against Mrs. Whitton to direct that she shall be ordered to pay the £10,000, or substitute for this admitted invalid bond some other security on which she may be made liable.

The first question which the House has to consider is, what is the plaintiff's right to sue Mrs. Whitton? Have they any right to sue her? The second is, have they a right to say she is liable to the demand? Now the House will ascertain what is

the plaintiffs' right, either of suing on the contract, or on any equity arising out of the nature of the transaction under which the defendant became responsible. The House will not give effect to this, which is an inoperative instrument, not only proved, but admitted to be inoperative as a bond; because there is no contract made with any person, and if there be an infirmity in the instrument as a bond, it equally applies to it as an agreement. For a party cannot have an agreement with the whole world; he must have some person with whom the contract is made. If that is so, the document is equally invalid as an agreement as it is as a bond; and the document therefore, as it stands, is perfectly inoperative, not [359] amounting to any contract between the defendant sought to be affected by the demand of £10,000, and the plaintiffs by whom the claim is made.

Then it is said, though this is not a perfect instrument or a contract as between the plaintiffs and Mrs. Whitton, yet there are circumstances in the case which would raise an equity against her, which would make her responsible to the party advancing the money. If he never did advance the money, if it never came out of his pocket at all, but came from the trust fund by a manifest breach of trust, the plaintiffs cannot come to a court of equity to ask for its interference against Mrs. Whitton, for they have shown no contract, and no equity as against her; no privity between the plaintiffs and Mrs. Whitton has been shewn; for the bond, which, it is said, was the inducement for advancing the money, was not made till after the letter had been written proposing the sale of the stock, which was afterwards carried into effect.

This case cannot be compared to the case of *The Duke of Beaufort v. Neeld* (12 Clark and Fennelly, 248). [His Lordship stated the principle of that decision.] Here it is clear that this document was not the inducement for Mr. Beauchamp to advance the money, for his letter shows that he did not know of this document at the time he gave the power to advance the money. In point of fact the parties advancing the money, beyond all doubt, were Mr. Morgan and Mr. Squire; but if Mr. Morgan was Mr. Beauchamp's agent for that purpose, it is clear that having given directions to carry that into effect, he being his agent, he knew at the moment that Mr. Beauchamp was to be the obligee of the bond, and he knew that Mrs. Whitton was not bound by anything the document contained. Such being the contract, can he call on Mrs. Whitton to pay the money on such a docu-[360]-ment, which is actually void, and which he well knew was not the inducement to Mr. Beauchamp to advance the money, and the effect of which he well knew at the time of preparing it?

There are reasons to believe that the transfer of the stock by Mr. Beauchamp's executors, was done in order to enable them to file this bill.

It is said that Mr. Gregson at a subsequent time had seen this bond in the hands of Mr. Beauchamp. The fact is not material. We are entirely without any evidence as to the time when Mr. Beauchamp's name was inserted; it is admitted that the mode in which his name was introduced is such that it did not give any validity or force to the document, which was before inoperative. There is a blank left for the name of the obligee, and that, in the absence of any proof of his having advanced the money, is quite sufficient to dispose of this case, and of the right of the plaintiffs to sue in a Court of Equity. But, independently of that, the respondent has a good defence upon her own case, for upon the face of the instrument, as well as upon the whole transaction, it appears that she intended only to be a surety. That is not disputed—it is in terms admitted—Mr. Morgan was the principal obligor, and it is now asked that Mrs. Whitton should pay the whole amount as if upon a legal contract. If the bond is liable to be impeached as a legal contract, it is for the same reason invalid as an agreement. But it is possible that the bond may be supported by some parol agreement: then the parol agreement must be made out. There is no doubt that Mr. Morgan at that time calculated upon the expectation of raising the money by a sale of the trust fund, and not by borrowing money from a third person. No doubt, when he ultimately did that, he was bound to state the fact to Mrs. Whitton. The letters show that Mr. Morgan had been entertaining the notion of sel-[361]-ling the trust fund at that time. Nobody can read the letters and suppose that he intended to borrow the money—and, beyond all doubt, if ever that was his intention, he did not subsequently act upon it—he no longer intended to borrow the money and to give a bond as a security for repayment of it. The liability which he

was under as a trustee, making those advances, was of a totally different nature from that which had been represented to Mrs. Whitton. If the bond had been valid he would no longer have been a party in that obligation—he was no longer the party bound as the principal debtor for the payment of the debt. Nobody could suppose that that would not destroy the act of the surety. It might have been that if Mr. Beauchamp had been alive and had to pay the money, it would have been a different thing, whether the party had a claim against his estate on the bond for the money which had been advanced by him as money coming from his estate, or for the money which had been advanced by the trustees.

It remains for your Lordships to say whether there is not an end of this case upon this ground, that the bill asserts as a fact that the defendant acted upon the representation made to her, and the representation made to her was contrary to the facts of the case, and that that is quite sufficient to disentitle the plaintiffs to the relief which is prayed against her. The case of *Crosby v. Middleton* (Prec. in Chan. 309; 2 Eq. Cas. Ab. 188), which was cited to your Lordships, is not at all analogous to the present case, the facts of that case being not at all similar to the present. There was an obligor and an obligee named in that case. There were parties to the deed, and the parties' hands and seals were affixed to it. That case was very different from this, and we must know more of the facts of that case, before we can come to the conclusion sought to be [362] drawn from it in favour of the plaintiffs in this case. Here there is an absence of the name of the obligee, which is quite sufficient of itself to invalidate the instrument. There is nothing in the contract—independently of the question of fraud—there is nothing in the position in which this matter stands that would make the defendant liable to the demand made by the plaintiffs. This case must be disposed of according to the strict rules of law. This is a claim to have a payment of the sum of £10,000, advanced to Mr. Morgan, arising out of a breach of trust, the £10,000 being a fund over which he exercised a power which he was not justified in doing—a fact which the defendant, Mrs. Whitton, was not made acquainted with, and it is clear there is nothing in the transaction to attach a liability to her. Therefore I advise your Lordships to dismiss the appeal with costs.

The appeal was accordingly dismissed, and the decree affirmed, with costs.

[363] WILLIAM FLEMING and others,—*Appellants*; WILLIAM HOOD NEWTON,—*Respondent* [Feb. 10, 11, 17, 1848].

[*Mews' Dig.* v. 552, 575, 576. S.C. 6 Bell, 175. Considered, on point as to privilege, in *Williams v. Smith*, 1888, 22 Q.B.D. 134; and *Searles v. Scarlett* (1892), 2 Q.B. 56; *Reis v. Perry*, 1895, 64 L.J., Q.B. 566. On point as to restraining publication of libel, commented on in *Dixon v. Holden*, 1869, L.R. 7 Eq. 492; *Mulkern v. Ward*, 1872, L.R. 13 Eq. 621; *Prudential Assurance Co. v. Knott*, 1875, L.R. 10 Ch. 145. As to interlocutory injunctions in like cases, see *Monson v. Tussaud* (1894), 1 Q.B. 671.]

#### *Libel—Interdict—Practice—Costs.*

The register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the Scotch acts of 1681 and 1696, and the 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, is a public document, to which every body has a right of access, and the publication of which in a printed paper does not constitute a libellous publication.

A person whose name was upon this register, applied to the Court of Session for an *interim* interdict to prevent, so far as his own name was concerned, the publication of a copy of the register. The Court decreed for the application: Held by the Lords, reversing that decree, that the interdict ought not to have been granted, and also that the costs in the court below should be given.

An interdict, though in form *ad interim* only, must be treated as a final judgment, and may be the subject of appeal to this House.

This was an appeal against a decree of the Court of Session, by which suspension

and interdict had been granted against the appellants under the following circumstances. The appellants were the directors of the Scottish Mercantile Society, and the printer to that society. The Society had been formed of merchants and traders, and its object was declared to be "to concentrate and bring together, from time to time, a body of information for the exclusive use of the members, relating to the mercantile credit of the trading community, with the view of diminishing the hazards to which mercantile men were exposed." The third rule of the society was to the following effect:—"The secretary shall collect from the general records of protests, hornings, and other records of diligences kept for Scotland at Edinburgh, the names and designations of debtors in trade, and otherwise, appearing in these records. The secretary shall likewise excerpt [364] from the *Edinburgh Gazette* the names and descriptions of sequestered bankrupts, and all notices of applications for *cessio bonorum*. The whole information so collected shall be printed and forwarded monthly, or oftener, as the general committee of directors shall think proper, to each member of the society respectively." The 5th rule declared that "the information contained in the printed record, so forwarded to members, shall be confined to themselves for business purposes, and no member shall communicate or use such information for other purposes, under the penalty of deprivation of membership." The society printed the information thus obtained in a book called "The Scottish Mercantile Society's Record." This book was known among the trading community as the "Black List." The respondent had dishonoured two promissory notes for £48 and for £100, and Andrew Miller, the payee of the same, had had them duly protested and the protests registered according to the Laws of Scotland.

By the act of 1681, c. 20,\* it was directed, "that in case of any foreign bill of exchange from or to this realm, duly protested for not acceptance, or for not payment, the said protest having the bill of exchange prefixed, shall be registrable within six months after the date of the said bill in case of non-acceptance, or, after the falling due thereof in case of non-payment, in the books of Council and Session, or other competent judicature, at the instance of the person to whom the same is made payable, or his order, either against the drawer or indorser in case of a protest for non-acceptance, or against the acceptor in case of a protest for non-payment, to the effect it may have the authority of [365] the judges thereof interposed thereto, that letters of horning on a simple charge of six days and other executorials necessary may pass thereupon, for the whole sums contained in the bill, as well exchange as principal, in form as effairs."

By an act of 1696, c. 36, the statute of 1681 was extended to inland as well as foreign bills, but no registration was provided for by these statutes except as against the acceptor. By the 12 Geo. III., c. 72, ss. 42, 43, the provisions of the previously existing Scotch acts were extended to notes as well as bills, and to drawer and indorser as well as to acceptor; and by the 23 Geo. III., c. 18, s. 55, the previous statute was made perpetual. An act of 1617, which established the Register of Sasines, had directed that such Register "shall be patent to all the lieges," and the "act of regulations" (Art. 12, printed Acts of Sederunt, 1695, p. 211) declared "that the Registers immediately under the clerk register's keeping, in the lower Parliament House, or any where else, be patent to all the lieges;" and then it settled the fees for searching and taking minutes. The 55 Geo. III., c. 70, regulated the keeping of the various public registers in Scotland, and the 1 and 2 Geo. IV., c. 38, providing for making indexes to them for the purpose of easy reference.

The society had in the usual manner taken a copy of the Register in which the protests for non-payment of the respondent's bills had appeared, and his name was about to be published, together with those of other persons, in the society's book, which was a mere copy of the Registers, when he applied to the Court of Session for an interim interdict to prevent the publication. The case came before Lord Robertson as Lord Ordinary, when his Lordship granted the interim interdict, and ordered the case to be reported for the opinions of the Lords of the second division

\* In the "acts of the Parliament of Scotland," printed by order of Geo. IV., in 1823, the number of the act in the margin of the year, 1681, is marked 86, and the number of the act in the margin of the year 1696, is marked 38. In the ordinary editions of the acts they are marked as stated in the text.

of the Court of Session. The other judges were con-[366]sulted, and six of them, the Lord President, and Lords Fullerton, Cunningham, Ivory, Wood, and Robertson, thought that the interdict ought to be granted; Lords Jeffery, Mackenzie, and Murray were of a different opinion. When the Judges of the Second Division decided the case, the Lord Justice Clerk and Lord Moncreiff concurred in opinion with the majority of the consulted judges; Lord Cockburn agreed with the minority, and Lord Medwyn declined giving an opinion. Under these circumstances the Court decreed for the respondent. The present appeal was entered against this decree.

Sir F. Kelly and Mr. Wortley (Mr. Gordon was with them) for the appellants. In the statement of the facts there is no allegation of malice on the part of the appellants, nor of injury sustained by the respondent. There is, on the other hand, evidence which rebuts the presumption of malice. The extract complained of is taken from a public record, and was made for a limited purpose, and for the use of a body of persons having an interest in the contents, and for the purpose of their protection. Under such circumstances the case of *Goldstein v. Foss* (6 Barn. and Cress. 156; 4 Bing. 489) shows that no action is maintainable, and consequently no injunction can be maintained.

The law of Scotland gives a peculiar character to bills of exchange and promissory notes. A protest for non-payment is nearly equivalent to a judgment in the Scotch Courts, and a summary execution may issue thereon. But in order that a protest should have that effect, it must be registered under the provisions of several acts of Parliament. In Erskine's Institutes (Bk. 2, tit. 5, s. 54), it is said, "It is a general rule that no creditor can use diligence on his obligation without the previous sentence of a judge. But because it was thought unnecessary where the obligation was [367] clear, to have a formal warrant, in order to diligence, the expedient was fallen upon that most deeds should bear a clause, by which the granter consents to their registration in the books of any competent court. This registration, in consequence of the granter's consent, is in the judgment of the law a decree, as to the special effect of execution, and indeed it carries the essential character of a decree, for the deed bears to be registered by the authority of that judge in whose court it is recorded; the extract is signed by the clerk of Court, and mentions the appearance of the granter's procurator or advocate consenting to the decree. Bills of exchange and inland bills are registered by stat. 1681, c. 20 (see note, *ante* p. 364); 1696, c. 36 (c); though their style admits of no clause of registration." The first of these acts is that of 1681, which relates in terms to foreign bills only; its operation was extended by the act of 1696 to inland bills. Both these acts apply to the acceptor only; but the 72 Geo. III., c. 18, s. 42, extends the same provisions to the drawer and acceptor. This registration therefore is authorized by statute, and the publication complained of is merely the publication of a judicial record. It is impossible to contend that that which is publicly registered under the authority of a statute can be a libellous publication, and if not, it cannot become so by being repeated by a private individual, especially as the law of Scotland expressly makes all these registers "patent to all the lieges." The law itself intended them to be public.

But assuming the publication to be libellous, still a proceeding by way of interdict is not valid in law. This point may fairly be tried by reference to an injunction in this country. No injunction could be granted here to prevent the publication of a libel. An injunction is granted to prevent an interference with property. The well-known case in which an injunction was issued to prevent the [368] publication of certain private letters, was one in which that publication was sought to be prevented, on the ground that it was an interference with property. Such an injunction as that which is now asked is wholly without precedent. The granting of an injunction under such circumstances would be a usurpation of the authority of a jury and a court of law. Libel or no libel is a question of law, and the assumption of the authority to decide such a question by a court of equity would be the assumption of a new jurisdiction. Within these few days an application by Sir James Clark to prevent the continued publication of advertisements that certain pills were approved of and recommended by him, has been refused, on the ground that no question of property was involved, and the Court said that the application was, in substance, an application to prevent by injunction the publication of a libel, and must, therefore, be refused. The same reason applies here with greater force. The pub-

lication here is sought to be prevented, because the matter is alleged to be injurious to the reputation of the applicant. But that only shews that the publication may subject the publisher to an action for damages. That is the proper remedy and not a proceeding by way of interdict. Such a proceeding is prejudging the case, and prejudging it too in a manner contrary to law; for, admitting the publication to be injurious to character, no damages could be obtained in respect of it if it was true, for the defence of truth is an answer to a claim for damages. Now, it is clear, that equity would only interfere where the matter published was actionable. Equity, since truth is a defence to such an action, would, therefore, first enquire if the matter was true. But that implies an inquiry of fact—one which is not to be made upon affidavit, but by an issue. A court of equity could not exercise the functions of a jury, nor will it set up to be a court for the trial of questions of libel, nor to decide questions of fact, which can only be properly decided by an issue.

[369] This argument supposes (and the supposition is made in favour of the respondent), that this publication could not bear the character of a libellous publication. Even then the proceeding by interdict would be incompetent. But the publication cannot be treated as libellous. There was no personal motive hostile to the respondent in making it; no selection of a particular individual's name was made; no malice against him was proved; but there was a publication of all the names found in a certain Register, and that Register was itself a judicial document. The Register is a public document, created by the law, in which, by the terms of two acts of Parliament, these protests for non-acceptance or non-payment are to be entered; it is open for the inspection of every body; it is therefore essentially public, and the printing it in this list could not divest it of its public character, nor make it the subject of a private action.

In whatever way therefore this case is viewed, the want of authority to grant the interdict is manifest, and the judgment of the Court below must be reversed.

Mr. Bethell and Mr. Anderson for the respondent.—It is necessary, in the first place, to call attention to the stage of the proceedings where the question arose, and to consider first whether there is not on the face of the application itself sufficient to justify the Court in entertaining it? and next, whether, as the decree of the Court below is not a final decree, this appeal is not incompetent? The interlocutor is an *interim*, and not a final interlocutor. It merely suspends the case till the time of trial. Bell's Dictionary (Tit. Bill Chamber) fully explains this proceeding. After granting the interdict, the questions raised between the parties remain for further consideration. Erskine, in his Institutes of the Law of Scotland (Book 4, tit. 3, s. 20), shows that to be the case. It is there said, "Where there is no decree, there [370] may be suspension, though not in the strict acceptation of that word; for suspension is a process authorised by law for putting a stop, not only to the execution of iniquitous decrees, but to all encroachments either on property or possession, and in general to every unlawful proceeding." The Court of Session acted on this principle in the case of *Müller v. Mitchell* (13 Shaw and D. 644), where the dismissed cashier of a bank printed a statement of the bank's accounts, which he said he intended only as instructions for his own counsel in a suit in which he was engaged against the bank, but copies of which got into other hands, and the numbers printed exceeded those which he could have required for the use of counsel. The Court there granted the interdict, and made him pay all the costs, on the ground that the publication was an unlawful proceeding. That case is precisely in point with the present. The Court, by granting the interdict, merely declares that there is enough to raise a serious ground for judicial consideration.

Under such circumstances can this House treat the proceeding as other than merely interlocutory? If so the appeal is not competent. But suppose the appeal to be competent, then it is impossible for this House to say that there is no ground for further consideration. If not, then the judgment of the Court below cannot be reversed.

The facts of the case show that there was a good ground for making the application, so far as those facts were concerned, and no one judge in the Court below doubted the existence of the jurisdiction of the Court of Session. That jurisdiction is not now denied in direct terms, but it is contended that no injunction would be granted in such a case by the Court of Chancery in England, and therefore that it ought not



to be granted by the [371] Court of Session. But that argument cannot be maintained; for all the Judges of the Court of Session speak of such a proceeding as one familiar to them. Lord Fullerton says, "This is a case in which the party is entitled to claim the protection of the Court. He is not bound to await the threatened injury by the publication, but has a manifest interest, and a legal right to take the competent measures to prevent it. It is one of the cases in which interdict is most appropriate and least objectionable. The one party may be materially injured by that which is threatened to be done, while the other can specify no possible injury which he can sustain from the prevention." These are the principles which govern the Courts in cases of applications for injunction, and where they occur the injunction is never refused. The Lord Justice Clerk says, "I am not of opinion that an intention to injure another, or as we call it in law, express or direct malice, or even constructive malice, is in any degree necessary in order to make the act complained of the proper subject for the cognizance and interference of a court of law, whether for the redress or for the prevention of the injury which may arise from that act."

[The Lord Chancellor.—Is not that asking the Court to exercise the powers of a censor?]

It may be that that argument of the Lord Justice Clerk carries the law to an extreme point, but the principle on which he proceeds is correct. The test of recovering damages is not a proper test by which to decide whether an interdict is maintainable. Suppose a man writes a letter, a jury might not give the writer one farthing damages, though a person wrongfully published that letter, but still the Court might grant an interdict to prevent the publication. The Lord Justice Clerk speaks positively as to that being the law of Scotland. He says, "An application for interdict against any act which may [372] injure or prejudice, or seriously wound the feelings, or affect the interests of another, is not at all to be judged or disposed of by the consideration whether the act if done will give rise to a claim of damages." The case of the publication of a private letter is a case in point.

[The Lord Chancellor.—But there the right of property in the letter is involved.]

Still that is a case where damages could not be afterwards recovered. And then again the observation arises that that is a case taken from the law of England. Now it is clear that this appeal is not to be decided on the law of England, but on the law of Scotland; and not one of the Judges of the Court below felt the slightest doubt about the jurisdiction of the Court in such a matter. And the case of bankruptcy furnishes an analogy in favour of the respondent; for the publication of an advertisement will be restrained where it appears to the Court that the publication would be improper.

The only question remaining is the question whether that jurisdiction can, in this case, be properly exercised. In the first place this publication is attempted to be justified, because it is said that the Register is a public record. Secondly, it is said that the publication was without malice, and that it was made for a legitimate purpose.

As to the first of these points:—Is this a publication of a sentence or decree of a court of justice? It cannot be assimilated to a fair and impartial report of the proceedings of a court of justice, for here this is but an *ex parte* proceeding in a matter which has not terminated. Such a publication is never held to be protected. This is not like an argument *in foro contentioso*, where the statements on both sides are set forth. How can the public know the reasons (and there may be very good and sufficient reasons), why these notes were not paid when due? The thing published is the statement of one party only, which may convey a very erroneous impression as to [373] the fact. If a record of the Court of Chancery had been used in this way, that Court would interfere. The ground of that interference might be that such a dealing with a record of the Court was a contempt of Court. But the ground of interference is immaterial, if the Court would interfere. The publication of writs issued against a man, or of a declaration in an action, would not be justifiable, for both, though parts of a judicial proceeding, would be merely *ex parte* statements. The purpose of these Registers was to give a legal right to judgment in favor of certain parties who had proved a title thereto, not to make known to all the world what had been done with regard to a particular bill of exchange or promissory note.

The Registers were only meant for the use of the parties directly concerned in the transaction.

The next point made by the appellants is, that the publication was without malice, and was for a legitimate purpose. But the motive of the act is immaterial, if the act is one which must of necessity be detrimental to another person. The person who makes the publication must, in law, be answerable for the consequences of it, and if those consequences are injurious, he must be supposed to have known that they would be so. The only exception to this rule is in the case of an act done in the execution of a legitimate authority. That was not the case here. The fact that the parties claimed to be interested in the matter did not give them authority to make the publication. The case of *Goldstein v. Foss* (6 Barn. and Cr. 154; 4 Bing. 489), as reported in Barnewall and Cresswell's Reports, is not in point to justify the publication, for that case was decided on the form of the pleadings alone, and left the right of publication untouched. But there is another report (2 Carr. and Payne, 252) of that case when it occurred at Nisi Prius, which shews that a publication of this sort was held to be libellous.

[374] The facts were these:—A Society had been formed, called "The Society for the Protection of Bankers and others." By its rules all fair traders were admissible. The secretary sent round a circular to the members, in which he said that he was directed to inform them that the plaintiff (and two other persons whom he named), were not deemed eligible to be members of that Society. It was proved that that form of writing was understood to mean that he pointed out the plaintiff as a swindler. Lord Tenterden told the jury that there could be no doubt that such a publication was libellous, and the plaintiff obtained a verdict for £150 damages. That case is an authority to shew that this publication is not one which is justified by law, but is one that may be the subject of a claim for damages. If so, the publication cannot be justified as one made under the authority of the law.

Then it is said that this publication might be shewn to be true, and that the proof of truth would be a complete defence for publishing it. But that argument, even if correctly stated, can only apply to English cases, for in Scotland the truth of a defamatory publication is not an answer to the right of action by the party injured.

Mr. Wortley replied.—The Registers are meant for the information of every body else; no directions would be given to make indexes to them for the purpose of facilitating searches. Such a labour would be quite unnecessary, if they were merely intended as records of judgments for the benefit of the parties making them. Then as to a decree of interdict and suspension being merely an interlocutory and not a final proceeding, the case of *Fleming v. Dunlop* (7 Clark and F. 43.; M'Lean and R. 547) establishes that it is a final decree, and as such may be made the subject of appeal to this House. The case of *Goldstein v. Foss*, as reported in Carrington and [375] Payne (vol. 2, p. 252), shews that the jury considered the publication there to be libellous; but that case either does not affect the present, or is an authority in favour of the argument for the appellants; for the question of libel or no libel is one which is peculiarly for the decision of a jury, and which cannot be decided by a court of equity. Nor can a court of equity anticipate the verdict of a jury on such an issue. The law of Scotland does not differ from the law of England on the subject of the truth being an answer to an action of libel; Bell's Principles (page 759, s. 2057). The case of *Miller v. Mitchell* (13 Shaw and D. 644), does not establish that an interdict would lie in a case like the present. There the thing published was not a public document, but a private statement, and the subsequent report of the same case, under the name of *Smith v. Mitchell* (14 Dunl. B. and M. 172), shews that the proceeding was one for contempt of Court, and that the question of the right to issue an interdict was never discussed. The same case, reported in another book (8 Scottish Jurist, 105), is reported under the title "Contempt of Court."

Mr. Bethell, in reply on the case of *Fleming v. Dunlop*, now first cited:—That case furnishes no analogy to the present. The remedy there sought by the interdict was final in its nature. It was the decision of a right to a seat in a corporation, the proceeding being the same as our *quo warranto*. Here the Court is not asked to decide anything, but merely to stop something till a certain matter has been decided upon. That is clearly an interlocutory proceeding.

The Lord Chancellor (Feb. 17).—If it was necessary to lay down a rule respect-

ing the jurisdiction which has been exer-[376]-cised in this cause by the Court of Session in granting interdict against the publication of libels, this cause would be one of the highest importance, and, in the present state of information submitted to this House, of the greatest difficulty; for it is impossible to read the observations of the learned Judges in the Court below without seeing that there is much want of precision in their observations upon the subject. But being, as I am, of opinion that the general question is not necessarily involved in the consideration of this appeal, I think it expedient, under the circumstances, to avoid giving any opinion upon that general question. I cannot, however, avoid expressing an earnest hope that, if this question should arise and require a decision in the Court of Session, and no distinct rule should be found already to exist upon the subject, the consequences of any rule to be established for the first time will be most carefully considered before such a rule is laid down; and particularly that it may be considered how the exercise of such a jurisdiction can be reconciled with the trial of matters of libel and defamation by juries under the 55 George III., cap. 42, or indeed with the liberty of the press. That act appoints a jury as the proper tribunal for trial of injuries to the person by libel or defamation; and the liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels, public or private. But if the publication is to be anticipated and prevented by the intervention of the Court of Session, the jurisdiction over libels is taken from the jury, and the right of unrestricted publication is destroyed. And I must add, that, according to the doctrine attributed to the Lord Justice Clerk, in the printed report of his judgment, the exercise of this power would be quite arbitrary; for he considers that the right to claim damages, if the act had been committed, is not the test according to which the interdict must be granted or refused.

[377] I do not pursue this question further because, assuming the jurisdiction of the Court in matters of interdict to be as extensive as it is claimed, I think that in this particular case it has been improperly exercised.

Bills and notes dishonoured and protested are by certain acts of Parliament to be registered. From this register the appellants are in the practice of publishing lists, copy, or excerpts, and the object of the interdict is to restrain the appellants from printing in such lists the name of the respondent: that is, he, admitting the fact that the two notes in question have been dishonoured by him, prays that that fact may not be published. He himself, by the application for the interdict, not only admits the fact, but gives to that fact a greater degree of publicity than would have attended it if his name had been inserted in the list.

If the publication intended had been a narrative or statement injurious to the party complaining, and which he had a right to prevent, the observation might not apply; but in this particular case, the jurisdiction by interdict being to prevent a wrong, we find it exercised in a case in which it could not possibly have any such effect. I found my opinion upon this, that the publication of the fact proposed to be inserted in the appellants' lists, has been made by the act of Parliament in certain Registers, the contents of which are public property, and the publication of them authorised.

The act of 1681, chapter 20, enacts that foreign bills, shall be registrable in the books of Council and Session "to the effect that it may have the authority of the judges for the process to issue in like and in the same manner as upon registered bonds and decret of registration proceeding upon consent of parties." Subsequent acts extended these provisions to inland bills and promissory notes. The result of them all is to give this registration the effect of a decree or judgment of the Court of Session. It is [378] equivalent to what, in this country, we call a judgment upon a warrant of attorney. In neither case does the Court interfere, but in both, as in cases of judgment by default and decret in absence, the party having a right to the authority of the Court to confirm his claim, obtains the judgment as of course. Whether that judgment is obtained by authority of Parliament, or by the consent of parties, or by the practice of the Court, appears to me to be immaterial. It is for all purposes a judgment of the Court until altered or reversed, and entitled to all the attributes of any judgment after the longest and most contested litigations.

This indeed is not in dispute. The Lord Justice Clerk says in his judgment, "I hold the Register to be a proper record of Court, as much as the actual book of procedure now on the table, and entered up from day to day by the clerks. The

party appears with his protest, and asks the Court for a certain decree upon it; which decree is not obtained by deliverance which leaves the Court, but by an entry in the book of Court."

Is it then unlawful to state or publish the decrees or judgment of Courts of justice? If their proceedings are public, so must be the result of such proceedings, namely, the judgment. For although the steps preliminary to the judgment are not transacted in open Court (the whole being incontestable in that stage), yet the whole is supposed to be the result of regular proceedings in court. The Register, therefore, is in its nature public; but it is especially made so for purposes distinct from the object of giving effect to the right of the party. So Lord Bankton states in the passage referred to, 4, 4, 18. The Act of Registration of 1696 provides that the Register under the clerk register's keeping, "shall be patent to all the lieges." This includes the books of council and session in which the entry of protests is kept. The 55th Geo. III., c. 70, regulates the keeping of registers of deeds and instruments [379] of protest; section 27 of the 1 and 2 Geo. IV., c. 38, provides for making indexes to certain and divers registers, and amongst others, to adjudications recorded in the books of council and session for the purpose of easy reference, and that they may be made accessible to the public. It appears that in fact no index was made of the Register of Protests, but by the table of fees a different fee is payable for searches where there is and where there is not an index; so that the contents of all the registers, whether with indexes or not, are open to the public upon payment of a certain fee.

So far are any proceedings of the Court from being considered shut against the public, that by the 1 and 2 Vict., c. 118, s. 22, it is provided that the minute book of the Court of Session Teind Court, the record of edictal citations, the weekly calling list of causes, and the weekly printed roll of outer house and teind causes, shall be printed by the respective keepers thereof, and shall be sold to the public at the lowest rate which will repay the necessary expense of printing the same.

From these references it appears to me clear that the legislature has thought that the public at large ought to be able to have recourse to this Register, and of all the public the appellants have the highest interests in the knowledge of its contents. They are engaged in mercantile affairs, in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the Register is not disputed, and that they might communicate to each other what they had found there is equally certain. What they have done is only doing this by a common agent, and giving the information by means of printing. No doubt, if the matter be a libel, this is a publication of it, but the transaction disproves any malice, and shews a legitimate object for the act done.

[380] I think, therefore, that upon this view of the case alone the respondent has failed to establish any title to the interdict, which, though *ad interim* only, must be discharged, unless shown to rest upon some tenable ground. Now, it must be admitted that no case can be produced in which such an interdict as the present has been supported. The proceeding is in its nature, much in the discretion of the Court, and most so when the case is perfectly new. In the exercise of that discretion I think the Court of Session ought to have refused the interdict; and, therefore, I advise your Lordships to reverse this interlocutor.

Sir Fitzroy Kelly.—I am humbly to ask for judgment that the interdict be recalled, with costs below.

Mr. Anderson.—The costs of the consultation of the judges ought not to be included. Lord Cunningham referred the bill and answer to the whole of the judges, as considering it a difficult question, and all the judges are with us upon the competency, and eight out of twelve are so upon the merits.

The Lord Chancellor.—Unless there has been some course of practice in the Court of Session to the contrary, no doubt the party who succeeds here is entitled to his costs below.

Mr. Anderson.—It is quite discretionary.

The Lord Chancellor.—Then I am quite sure that the interlocutor ought to be reversed with costs below.

Interlocutor reversed; the cause to be remitted with directions, to the court below to recall the interdict, and to refuse the note of suspension and interdict; and the costs in the Court below directed to be paid to the appellants.

[381] DUNLOP and Others,—*Appellants*; VINCENT HIGGINS and Others,—*Respondents* [February 21, 22, 24, 1848].

[*Moss*' Dig. iv. 13; v. 281; S.C. 12 Jur. 295; 6 Bell, 195. Considered on point as to contract by post in *Hebb's Case*, 1867, L.R. 4 Eq. 12; *Harri's Case*, 1872, L.R. 7 Ch. 587; *Taylor v. Jones*, 1875, 1 C.P.D. 90; *Byrne v. Van Tienhoven*, 1880, 5 C.P.D. 384; *Gurney v. Townsend*, 1888, 36 W.R. 532; and see *In re London and Northern Bank* (1900), 1 Ch. 220; *Stevenson v. M'Lean*, 1880, 5 Q.B.D. 351.]

*Contract—Acceptance by Post Letter—Damages.*

A letter offering a contract does not bind the party to whom it is addressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract; an answer, posted on the day of receiving the offer, is sufficient.

A contract is accepted by the posting of a letter declaring its acceptance.

A person putting into the post a letter declaring his acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the Post Office.

In an action for damages for breach of contract in the sale of goods, the measure of damages is not merely the amount of the difference between the contract price, and the price at which such goods could be bought at the moment when the contract was broken; but likewise a compensation for such profit as might have been made by the purchaser had the contract been duly performed.

This was an appeal against a decree of the Court of Session, made under the following circumstances:—Messrs. Dunlop and Co. were iron masters in Glasgow, and Messrs. Higgins and Co. were iron merchants in Liverpool. Messrs. Higgins had written to Messrs. Dunlop respecting the price of iron, and received the following answer:—"Glasgow, 22nd January, 1845. We shall be glad to supply you with 2000 tons, pigs, at 65 shillings per ton, net, delivered here." Messrs. Higgins wrote the following reply:—"Liverpool, 25th January, 1845. You [382] say 65s. net, for 2000 tons pigs. Does this mean for our usual four months bill? Please give us this information in course of post, as we have to decide with other parties on Wednesday next." On the 28th Messrs. Dunlop wrote,—"Our quotation meant 65s. net, and not a four months bill." This letter was received by Messrs. Higgins on the 30th of January, and on the same day, and by post, but not by the first post of that day, they dispatched an answer in these terms.—"We will take the 2000 tons pigs, you offer us. Your letter crossed ours of yesterday, but we shall be glad to have your answer respecting the additional 1000 tons. In your first letter you omitted to state any terms; hence the delay." This letter was dated "31st January." It was not delivered in Glasgow until two o'clock, p.m., on the 1st of February, and, on the same day, Messrs. Dunlop sent the following reply:—"Glasgow, 1st February, 1845. We have your letter of yesterday, but are sorry that we cannot now enter the 2000 tons pig iron, our offer of the 28th not having been accepted in course." Messrs. Higgins wrote on the 2d February to say that they had erroneously dated their letter on the 31st January, that it was really written and posted on the 30th, in proof of which they referred to the post mark. They did not, however, explain the delay which had taken place in its delivery. The iron was not furnished to them, and iron having risen very rapidly in the market, the question whether there had been a complete contract between these parties was brought before a court of law. Messrs. Higgins instituted a suit in the Court of Session for damages, as for breach of contract. The defence of Messrs. Dunlop was, that their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a lawful and binding contract; that their letter having been delivered at Liverpool before eight o'clock in the morning of the 30th of January, Messrs. [383] Higgins ought, according to the usual practice of merchants, to have answered it by the first post, which left Liverpool at three o'clock p.m. on that day. A letter so dispatched would be due in Glasgow at two o'clock, p.m., on the 31st of January; another post left Liverpool for Glasgow every day at one o'clock, a.m.,

and letters to be dispatched by that post must be put into the office during the preceding evening, and if any letter had been sent by that post on the morning of the 31st, it must have been delivered in Glasgow in the regular course of post at eight o'clock in the morning of the 1st of February. As no communication from Messrs. Higgins arrived by either of these posts, Messrs. Dunlop contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in Glasgow at two o'clock p.m., of Saturday the 1st of February (at which time Messrs. Higgins' letter did actually arrive), before they entered into other contracts, the taking of which would disable them from performing the contract they had offered to Messrs. Higgins.

The cause came before Lord Ivory, as Lord Ordinary, who directed an issue, which he settled in the following terms:—

"Whether, about the end of January, 1845, Messrs. Higgins purchased from Messrs. Dunlop 2000 tons of pig iron, at the price of 65s. per ton, and whether Messrs. Dunlop wrongfully failed to deliver the same, to the damage, loss, and injury of the pursuers? Damages laid at £6000." This issue was tried before the Lord Justice General, when it appeared that the letter of Messrs. Higgins, accepting the offer, was written on the 30th; that it was posted a short time after the closing of the bags for the dispatch at three o'clock, p.m., on that day, and consequently did not leave Liverpool till the dispatch at one o'clock in the morning of the 31st; that in consequence of [384] the slippery state of the roads, the bag then sent did not arrive at Warrington till after the departure of the down train that ought to have conveyed it, and that this circumstance occasioned it to be delayed beyond the ordinary hour of delivery. The Lord Justice General told the jury, "that he adopted the law as duly expounded in the case of *Adams v. Lindsell* (1 Barn. and Ald. 681), and which is as follows:—A., by a letter, offers to sell to B. certain specified goods, *receiving an answer by return of post*; the letter being misdirected, the answer notifying the acceptance of the offer arrived two days later than it ought to have done; on the day following that when it would have arrived, if the original letter had been properly directed, A. sold the goods to a third person," and in which it was held "that there was a contract binding the parties from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for not completing his contract."

The counsel for Messrs. Dunlop tendered the following exceptions:—The first exception related to evidence, and alleged "that no evidence to shew that the letter, purporting to be dated on the 31st, was really written on the 30th of January, ought to have been admitted." The other exceptions related to the charge, and were as follow:

2. In so far as his Lordship directed the jury, in point of law, that if Messrs. Higgins posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the Post Office establishment.

3. In so far as his Lordship did not direct the jury, in point of law, that if a merchant makes an offer to a party at a distance, by post-letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and [385] posted his letter within the time allowed, the offerer is free, though the answer may have been actually written and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer.

4. In so far as his Lordship did not direct the jury, in point of law, that in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and arrives by a mail, and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he be not in the knowledge that the answer received was truly written of an earlier date, and delayed in its arrival by accident.

5. In so far as his Lordship did not direct the jury, in point of law, that in case of failure to deliver goods sold at a stipulated price, and immediately deliverable, the true measure of damage is the difference between the stipulated price and the market price, on or about the day the contract is broken, or at or about the time when the purchaser might have supplied himself.

These exceptions were afterwards argued before the judges of the First Division, who pronounced an interlocutor, disallowing the exceptions; and that interlocutor was the subject of the present appeal.

Mr. Bethell and Mr. Anderson for the appellants.

The question raised in this case is one of considerable importance, and the decision of it in accordance with the judgment of the Court below, will have the effect of rendering the acceptance of contracts a matter of doubt and uncertainty. If the decision of the Judges of the Court of Session is right, a contract is complete when the acceptance of the offer to enter into it is posted, although such acceptance may not reach the person who made the offer till long after the time at which, by the usage of trade, he is entitled to expect it. Such a decision, if [386] unreversed, will leave the person making an offer under the necessity of waiting for an indefinite time in order to know whether his offer has been accepted. During all this time he will be restrained from freely dealing with his own property.

The exceptions here ought to have been sustained by the Court. The first of them relates to the evidence offered at the trial. That evidence was improperly admitted. The Court ought not to have received evidence to contradict a written document. When a letter is sent to a party, he has a right to assume that it is properly written, and is entitled to rely on its contents. He is at least entitled to do so as against the writer of the letter. The writer is not at liberty to shew those contents to be erroneous: at all events he is not at liberty to do so after the person receiving it has acted upon it, and thus to affect the rights of that party, and to give himself rights to which, if the letter had been correctly written, he would not have been entitled. To admit such evidence is to unsettle all the rules of business, and to prevent commercial men acting with that certainty and confidence which are necessary for the proper conduct of commercial affairs.

[The Lord Chancellor.—When a party sends a letter, actually sent on the 30th, but dated by mistake on the 31st, may he not shew that that date has been put in by mistake?]

It might be difficult to maintain the simple negative of that question, but in considering the admissibility of such evidence, all the circumstances of the case must be referred to. In the present case, for instance, as the letter was received on a day after that of its date, and when, therefore, the person receiving it had no reason to suspect that the date was erroneously given, his rights ought not to be affected by a subsequent explanation; and the evidence intended to afford that explanation ought not therefore to have been admitted.

[387] Then as to the second exception: if a letter sent is posted in due time, but is not received in due time, who is to bear the loss consequent upon its non-delivery? Certainly not the person to whom it is sent. The fact that it is sent by the Post Office makes no difference in the matter.\* It is the same as if the letter was sent by a special messenger, in which case it is plain that the person sending the messenger would be responsible for any accident or delay. The appellants are not to be made responsible for the casualties of the Post Office, and surely they cannot be made so in a case in which the persons sending an answer to an offer which they had made, totally disregarded the ordinary usages of commercial houses as to the time of sending such answer.

The clear principle, set forth in the third objection, is that which ought to be adopted in all cases of this kind. Where an individual makes an offer by post, stipulating for, or, by the nature of the business, having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavouring to

\* But see *Kufh v. Weston*, 3 Esp. 54. There a letter, containing a bill of exchange, drawn on a house at Genoa, was put into the London Post Office on the first Italian post day, but, from the disturbed state of Italy, did not arrive at Genoa till a month after the bill became due. Lord Kenyon held that sufficient notice had been given, for that the parties could not foresee that the post would be interrupted.

excuse himself from a liability. The question of reasonableness of notice, which may be admitted in cases of bills of exchange, cannot be introduced in a case where one party seeks to enforce on [388] another the acceptance of a contract. A bill of exchange is already a binding contract; no new right is acquired by notice; it is merely a necessary proceeding to enable the party giving it to enforce a right previously created.

Then as to the exception. In the case of a contract, the acceptance of the offer creates the contract; the acceptance implies that both parties have knowledge of all the circumstances. On principle, it is plain that the acceptance should be immediate, and that if there is a delay in making that acceptance known, the offerer is free. In order to make the contract perfect, there ought to have been a co-existing assent. *Countess of Dunmore v. Alexander* (9 Shaw and Dunl. 190). There, a lady having written to another to engage a servant for her, and then sent a second letter to countermand the first, and the two letters having been delivered to the servant simultaneously, it was held that there was not a complete contract, and that the servant was not entitled to wages. The Court of King's Bench, in *Head v. Diggon* (3 Man. and Ryl. 97), acted upon the same principle. There, A. and B. being together, B. offered goods to A. at a certain price, and gave A. three days to make up his mind. The Court held that this was not an absolute bargain, and that within the three days B. had a right to retract.

Such are the principles which ought to govern this case. Then as to authority. It is curious enough that this exact question seems never to have arisen. That circumstance is some proof of the clearness of the principle which is applicable to such transactions, for had there been any question as to that principle—had it been doubtful whether delay might be excused, and whether, in spite of delay, a party guilty of it might not still insist on a contract being complete, cases must have arisen as to the degree of laxity permitted by the law in the acceptance of contracts. None such is to be found. The case of *Adams v. [389] Lindsell* (1 Barn. and Ald. 681), was the authority adopted by the Lord Justice General in his direction to the jury: but that case does not justify his ruling. [The Lord Chancellor.—If the letter of acceptance is sent in the usual way, is the sender still responsible for its due delivery?] If not, then both parties are free. One cannot be bound while the other is free. Each party takes an equal risk. But supposing delay is to be permitted, to what extent is it to be allowed? May the delay last one, two, or three days, or a week, or a fortnight, or a month? If any delay is to be permitted, the extent of it must be defined. Otherwise, all commercial matters will be in a state of perpetual uncertainty. But, in fact, no delay is allowed. Each party is bound to write by return of post, and each is liable to the consequences of his own letter arriving in time. Such appears to be the mercantile usage on the subject. When an offer is made by one merchant to send to another a particular commodity which varies in price, that offer is made subject to the obligation of its being answered by return of post. It is therefore an offer subject to a condition. It is conditional, in point both of time and manner of acceptance. As to time, the offer enures till it can be answered by return of post. If it is made on a condition, then it is clearly not binding till that condition shall be accepted. Here, too, the condition is a condition precedent. Nothing, therefore, can be substituted for it.

[The Lord Chancellor.—Where is this condition imposed?]

In mercantile usage, founded on law. The legal condition is to return an answer in a particular time. Mercantile usage has fixed that time as the return of post. No decision has ruled, as a point of legal principle, that, if an individual addressed fails in performing this condition, still that the person making the offer is bound. The [390] principle of the Scotch law, as stated in M'Douall's Institutes, is the other way. It is there said (Bk. 1, tit. 4, p. 98, fol. ed.), "conditional obligations, properly so termed, are presently binding and irrevocable, and only the effect is suspended, but sometimes the obligation is only to be contracted upon a condition which affects the very substance of it. Thus an offer has an implied condition of acceptance, whereby, alone the consent of the other party accedes and converts the offer into a contract; so that it is not binding, but ambulatory or revocable, till it is accepted, and therefore either revocation by the offerer, or death of either party before acceptance, voids it. The same rule holds in mutual contracts—the one party sub-



scribing is not bound till the other subscribe likewise." The law of England is in conformity with the principle of the Scotch law.

As the revocation by either party before acceptance makes the offer void, the acceptance of the other side must be notified within a definite period of time; *Stair's Institutes* (Tit. 2, s. 8). This rule of notification is a condition precedent in the English as well as the Scotch law. This principle was acted on by the Court of King's Bench in the case of *Davison v. Mure* (3 Doug. 28). That was the case of a ship which was captured by the Americans while under convoy. The condition there was that the master should make the best defence, and without it appeared to a court-martial that he had done so, he was not to be allowed to recover. It was held that this condition was a condition precedent. The same doctrine was applied by that Court to the condition in a policy of insurance against fire, that the party should obtain a certificate from the rector of his parish, and a certain number of the inhabitants, before entitling himself to payment of his claim for loss; *Worsley v. Wood* (6 Term Rep. 710). If this is a condition precedent, then it [391] must be exactly performed, and nothing can be substituted for it. In this respect there is a difference between a condition precedent and a condition subsequent. The former must be performed before an estate can vest; while the performance of the latter, which is intended to defeat an existing estate, may be dispensed with. The act of God, the king's enemies, or the impossibility of performance, will furnish an excuse as to a condition subsequent. This is a settled principle of our law, and the case of *Brodie v. Todd* (17 Fac. Col. Dec. 20, May 1814) shows that the law of Scotland recognises the same rule. In that case, Arnot, a merchant of Leith, agreed to purchase from Todd and Co. of Hull, goods which were to be paid for by his acceptance. They put the goods on board a vessel at Hull; enclosed a bill of lading and a draft for the price, in a letter, advising Arnot of the shipment, and requesting him to return the draft accepted "in course." This letter was received by Arnot on the morning of the 24th of April, and if answered by him by return of post, the answer might have been received by Todd and Co. on the morning of the 26th. Arnot, however, did not answer it till that day, when he sent back the draft accepted. In the course of the 26th, Todd and Co. not having received the draft as expected, re-landed the goods. Arnot brought an action; and the question was, whether the request to return "in course," meant a return by the earliest post, and constituted a condition precedent. The Lords held that the words meant by return of post, and did constitute a condition precedent, and consequently that no action was maintainable by Arnot, since he had not complied with the condition on which the bargain was made. That case is completely decisive as to what is the doctrine of the Scotch Law, and must govern the decision here.

(The Lord Chancellor.—Is it not a question of fact, [392] whether the posting of the letter, in this case, on the 30th of January, was not a compliance with the duty of the party? Here is no distinct stipulation—it is all matter of inference. The question is, whether putting in the post is not a virtual acceptance, though by the accident of the post it does not arrive. In the case quoted, one whole day was allowed to intervene. But in this case, if putting the letter in the post is a compliance with the condition, there is an end of the question.)

That would be so, if it was a condition subsequent, for then something could be substituted for actual performance. But this is a condition precedent, and must be literally performed.

In considering this question, Lord Jeffrey observed,—“The party here only says, ‘If I do not hear by return of post.’ I have yet to learn that the return of post is like the return of the sun to the meridian at a particular time. I do not think that the use of such a phrase is equivalent to the stipulation of a particular time. I am inclined to hold that the return of post means the actual return of the post. And the *species facti* here was, the letter accepting the offer having been sent in due time to the Post Office, that it did come to hand at the hour at which, according to the usual time required for its transmission, it should have come. But the actual course of that post was not till the morning of the 1st February.” And the learned judge justifies his doctrine by referring to the case of the post coming by sea, where a general average time is fixed, but where return of post is not calculated by that average, but by the actual arrival of the post; and then he supposes a universal

snow storm affecting the delivery by land, and argues that if matter of that general notoriety would affect the question, so does any other accident to the post although not so generally known. But surely this is giving an entirely new interpretation to mercantile contracts, and is making accidental circumstances or natural [393] delays, always counted upon, furnish ground for the construction of a delay occasioned by an accident which neither party anticipated. Besides, it is clear on the facts here, that had the letter been put into the early post of the 30th January, this accident would not have befallen it; so that the accidental delay in the Post Office was really the consequence of the delay in posting the letter, and was so far attributable to the respondents.

They cannot, therefore, claim any advantage, from their acceptance of the contract, which acceptance they did not notify, nor condemn the other parties for non-performance of a contract, the acceptance of which they did not know. It is the acceptance which completes the contract. The agreement is not suspended till the offerer has actually received notice of the acceptance, but only until he might have received notice, had that notice been forwarded at the earliest moment. This is the rule declared in Bell's Principles of the Law of Scotland (page 35, s. 78), and this rule must be applied to, and must govern the decision of the present case.

Then as to the question of damages: There was no proof that there had been one shilling of special damage arising from the non-performance of the contract by the appellants; the damages must therefore be calculated in the ordinary way. The fifth exception shows that there was a complete breach of the agreement on the 2nd of February, and the damages should have been calculated on the price of pig iron at that time.

(The Lord Chancellor.—But was not that simply a question for the jury, and not ground for a bill of exceptions?)

It was not. It was a question on which the jury should have received a direction as to the law; *Watt v. Mitchell* (1 Dunl., Bell, and M. 1157). The cases of *Gainsford v. Carroll* (2 Barn. and Cres. 624), and *Shaw* [394] v. *Holland* (4 Railway Cas., 150; 15 Mee. and Wels., 136), clearly show what is the law on this subject, namely, that in an action for the non-delivery of goods on a given day, pursuant to contract, the proper measure of damages is the difference between the contract price and the market price on the day when the contract was broken, allowing the purchaser however a reasonable time to purchase the article for which he had contracted.

Mr. Stuart Wortley and Mr. Hugh Hill for the respondents, were not called on.

The Lord Chancellor.—My Lords, everything which learning or ingenuity can suggest on the part of the appellants, has undoubtedly been suggested on the part of the learned counsel who have just addressed the House; and if your Lordships concur in my view, that they have failed in making out their case, you will have the satisfaction of knowing that you have come to that conclusion after having had everything suggested to you that by possibility could be advanced in favour of this appeal.

The case certainly appears to me one which requires great ingenuity on the part of the appellants, because I do not think that, in the facts of the case, there is anything to warrant the appeal. The contest arises from an order sent from Liverpool to Glasgow, or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins, bearing date the 31st of January. A proposition had been made by the Glasgow house of Dunlop, Wilson, and Co., to sell 2000 tons of pig iron. The answer is of that date of the 31st of January:—"Gentlemen, we will take the 2000 tons, pigs, you offer us." Another part of the letter refers to other arrangements; but there is a dis-[395]-tinct and positive offer to take the 2000 tons of pigs. To that letter there is annexed a postscript in which they say, "We have accepted your offer unconditionally; but we hope you will accede to our request as to delivery and mode of payment by two months' bill."

That, my Lords, therefore, is an unconditional acceptance, by the letter dated the 31st of January, which was proved to have been put into the post office at Liverpool on the 30th; but it was not delivered, owing to the state of severe frost at that time, which delayed the mail from reaching Glasgow at the time at which, in the

ordinary course, it would have arrived there. The letter having been put in on the 30th of January, it ought to have arrived at Glasgow on the following day, but it did not arrive till the 1st of February.

It appears that between the time of writing the offer and the 1st of February, the parties making the offer had changed their minds; and instead of being willing to sell 2000 tons of pig iron on the terms proposed, they were anxious to be relieved from that stipulation, and on that day, the 1st of February, they say, "We have yours of yesterday, but are sorry that we cannot enter the 2000 tons of pig iron, our offer of the 28th not having been accepted in course."

Under these circumstances, the parties wishing to buy, and by their letter accepting the offer, instituted proceedings in the Court of Session for damages sustained by the non-performance of the contract. And the first question raised by the first exception applies not to the summing up of the learned Judge, but to the admission of evidence by him; for connected with that admission of evidence is the first exception. I need hardly say but little on this point, but as it formed part of the proceedings on which the judgment must ultimately be pronounced, I will very shortly call your Lordships' attention to the proposition presented for your decision by that first exception.

My Lords, the exception states, "that the pursuers [396] having admitted that they were bound to answer the defenders' offer of the 28th, by letter written and posted on the 30th, and the only answer received by the defenders, being admitted to be dated on the 31st of January, and received in Glasgow by the mail, which in due course ought to bring the Liverpool letters of the 31st, but not Liverpool letters of the 30th, it is not competent in a question as to the right of the defenders to withdraw or fall from the offer, to prove that the letter bearing date the 31st of January, was written and dispatched from Liverpool on the 30th, and prevented by accident from reaching Glasgow in due course, especially as it is not alleged that the defenders were aware (previous to the 3rd of February) of any such accident having occurred."

The counsel for the pursuer answered, that nothing had been stated, but that the pursuers were bound instantly to answer the defenders' offer of the 28th of January, and that according to the practice of merchants, it was sufficient if that letter was answered on that day on which it was received.

The Lord Justice General did overrule the objection, and admitted the evidence.

The exception is that the learned Judge was wrong in permitting the pursuer to explain his mistake. The proposition is, that if a man is bound to answer a letter on a particular day, and by mistake puts a date in advance, he is to be bound by his error, whether it produces mischief to the other party or not. It is unnecessary to do more than state this proposition in order to induce you to assent to the view I take of the objection, and to come to the conclusion that the learned Judge was right in allowing the pursuer to go into evidence to show the mistake.

I pass on then to the fourth exception which is connected with this point, and which states that his Lordship did not direct the jury in point of law; that in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and [397] arrives by a mail, and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he was not in the knowledge that the answer received was duly written at an earlier date, and delayed in its arrival by accident; that is to say, that if a letter bears a date which, on the face of it, shows that it was written erroneously, nevertheless the party is bound by the date so written on the face of the letter, and you cannot go into the circumstances to explain how it happened that the letter did not arrive in time, but that you are bound to assume that it arrived on the day mentioned, and the party cannot give any evidence in explanation.

My Lords, that falls with the other exception, and the two together go for nothing. I merely state it for the purpose of asking your Lordships to concur in the opinion that I have formed—that the learned Judge was correct in the mode in which he left the question to the jury, and consequently that on that point the bill of exceptions cannot be supported.

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is,

that his Lordship did direct the jury in point of law, that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the Post Office establishment.

Now, there may be some little ambiguity in the construction of that proposition. It proceeds on the assumption that, by the usage of trade, an answer ought to have been returned by the post, and that the 30th was the right day on which that answer ought to have been notified. Then comes the question, whether, under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so [398] putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course?

I cannot conceive, if that is the right construction of the direction of the learned Judge, how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing he was bound to do? How can he be responsible for that over which he has no control? It is not the same as if the date of the party's acceptance of the offer had been the subject of a special contract: as if the contract had been, "I make you this offer, but you must return me an answer on the 30th, and on the earliest post of that day." The usage of trade would require an answer on the day on which the offer was received, and Messrs. Higgins, therefore, did on the 30th, in proper time, return an answer by the right conveyance—the Post Office.

If that was not correct, and if you were to have reference now to any usage constituting the contract between the parties a specific contract, it is quite clear to me that the rule of law would necessarily be that which has been obtained by the usage of trade. It has been so decided in cases in England, and none has been cited from Scotland which controverts that proposition; but the cases in England put it beyond all doubt. It is not disputed—it is a very frequent occurrence, that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he [399] has put the letter into the post, and whether that letter be delivered, or not, is a matter quite immaterial, because, for accidents happening at the Post Office he is not responsible.

My Lords, the case of *Stocken v. Collen* (7 Mee. and Wels. 515), is precisely a case of that nature, where the letter did not arrive in time. In that case Mr. Baron Parke says, "It was a question for the jury whether the letter was put into the Post Office in time for delivery on the 28th. The Post Office mark certainly raised a presumption to the contrary, but it was not conclusive. The jurors have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonor into the post, so that in due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his if delay occurs in the delivery." Mr. Baron Alderson says, "The party who sends the notice is not answerable for the blunder of the Post Office. I remember to have held so in a case on the Norfolk circuit, where a notice addressed to Norwich had been sent to Warwick. If the doctrine that the Post Office is only the agent for the delivery of the notice, was correct, no one could safely avail himself of that mode of transmission. The real question is whether the party has been guilty of laches."

There is also the other case which has been referred to, which declares the same doctrine, the case of *Adams v. Lindsell* (1 Barn. and Ald. 681). That is a case where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it, so far as he was concerned, in proper time. The party, however, who originally sent the offer not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question [400] was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, "I withdraw my offer."

Therefore he said, "before I received your acceptance of my offer I had withdrawn it." And that raised the question when the acceptance took place, and what constituted the acceptance. It was argued, that "till the plaintiff's answer was actually received, there could be no binding contract between the parties, and that before then the defendants had retracted their offer by selling the wool to other persons." But the Court said, "If that was so, no contract could ever be completed by the post, for if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered, in law, as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

Those two cases leave no doubt at all on the subject. Common sense tells us that transactions cannot go on without such a rule, and these cases seem to be the leading cases on the subject; and we have heard no authority cited which in the least degree affects the principle on which they proceed. The law of Scotland appears to be the same as the law of England, for Mr. Bell's Commentary lays down the same rule as existing in Scotland, and nothing has been stated to us in contradiction of his opinion.

Now whether I take that proposition as conclusive upon the objection, or whether I consider it as a question entirely open, whether the putting the letter into the post was, or not, in time to constitute a valid acceptance, it appears to me that the learned judge was right in the conclusion to which he came, that he was right in the mode in which he left the question to the jury, and that he was not bound to lay down the law in the manner alleged in the bill of exceptions.

The next exception is the third, which says, "In so far as his Lordship did not direct the jury in point of law, that if a merchant makes an offer to a party at a distance, by post letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and posted his letter within the time allowed, the offerer is free, though the answer may have actually been written and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer."

That, my Lords, raises first of all a proposition that does not arise in this case at all. It assumes a contract that requires an answer within a certain stipulated time, and it assumes (which is already disposed of by what I have said in answer to the second exception) that the putting a letter into the post is not a compliance with the requisition of the offer. But there is no special contract here, and therefore this exception cannot be maintained.

We have now come to the fourth exception, which I have already disposed of; and it therefore only remains to call your Lordships' attention to the fifth exception: that exception is, "in so far as his Lordship did not direct the jury in point of law, that in case of failure to deliver goods sold at a stipulated price and immediately deliverable, the true measure of damage is the difference between the stipulated price and the market price, on or about the day when the contract is broken, or at or about the time when the purchaser might have supplied himself."

That exception raises the proposition generally, and not, as the learned counsel have put it at the bar, on the absence of any proof of special damage. If that was the law, [402] as almost every case must differ as to the amount of damage, and the circumstances which gave rise to that damage, no certainty could ever exist as to the law. The proposition here is, that if a party proposed to deliver goods at a certain time, the damage against him by a party who suffers by his default, is to be measured by the market price at or about the time of the failure of the contract. They say you are to take it within the time of the failure, or at the time when the failure takes place and the contract is broken. It is asserted as the rule of law, that that is the measure of damage that the party is to receive.

Now, in the action and the proceedings here for damage, the party comes to receive compensation for the damage that he has sustained. If there is a rule established that in a certain case a certain measure of damage alone ought to be given, the jury ought not to be permitted to go out of that general rule; but if it is

a question in the breasts of the jurors, I do not understand how you can tell them that whether they give £1000 or £10,000, they have not done what is proper. The learned counsel for the appellants felt the force of that difficulty. What does the party come into Court for? To obtain compensation for the other party not having performed his contract. What was there for the pursuers to shew here? That they had, by the contract between themselves and the defenders, become entitled to 2000 tons of pig iron, and that the defenders had subjected themselves to make compensation for the damage sustained by their breaking that contract. It is said that the judge should have told the jury that when the pursuers first heard that the defendants would not perform their contract, the pursuers might by their own activity have put themselves into a situation to sustain a smaller amount of loss than they have sustained here, and that they are not entitled to recover more than that smaller amount. But were the pursuers bound to do this? They had entitled themselves to 2000 tons of pig [403] iron; the jurors had to ascertain the damage that had arisen from the non-fulfilment of this contract, and, in my opinion, they have properly performed the duty that belonged to them in ascertaining the amount of that damage. Suppose, for instance, a party who has agreed to purchase 2000 tons of pig iron on a particular day, has himself entered into a contract with somebody else, conditioned for the supply of 2000 tons of pig iron to be delivered on that day, and that he, not being able to obtain those 2000 tons of pig iron on that particular day, loses the benefit arising from that contract. If pig iron had only risen a shilling a ton in the market, but the pursuers had lost £1000 upon a contract with a railway company, in my opinion they ought not only to recover the damage which would have arisen if they had gone into the market and bought the pig iron at that increased price, but also that profit which would have been received if the party had performed his contract. No other rule is reconcilable with justice, nor with the duty which the jury had to perform—that of deciding the amount of damage which the party has suffered by the breach of his contract. Most cases of contract vary from each other, and whatever general rules there may be as to awarding damages, they must be modified by the particular cases to which they come to be applied.

We have nothing to do here but to look to the law of Scotland, and by the case of *Watt v. Mitchell* (Cas. in Ct. of Session (1839), 1157), no doubt is left as to what is the rule of law in Scotland, namely, that the measure of damages is a question for the jury upon the circumstances of each particular case. Lord Medwin, in that case, goes very laboriously through all the early authorities in Scotland on the subject, and after having done so, draws this result from those early authorities; he says (*id.* 1163), "these are all the Scots cases referred to, and I certainly deduce from this that our Court rejects [404] the plea of the defenders, that the price at the time of the delivery, as the time when the breach of contract takes place, should be the measure of the damages due, where the defender has failed to implement." He, therefore, in terms, on the authority of the many cases he refers to, ultimately lays down, that that is not the law of Scotland; that the law of Scotland is to look into all the circumstances; that the law of Scotland will do what now a jury is called on to do *there*, or what a jury is called on to do *here*, to effectuate and sanction the reimbursing of the party who has sustained loss by the original contract, and that without reference to what the price of the article at the particular time will produce.

In what I have now said I have wished to confine myself to the law of Scotland; I have not had an opportunity of saying anything on the subject of the law of England. I am contemplating now what I find to be the established law of Scotland, and the question is, whether in the face of that law, and in defiance of all the authorities referred to in the law of Scotland, and in the absence of any authorities in the law of Scotland raising a contrary proposition, your Lordships are to adopt a principle which would go to destroy that rule, and to lay down another, which, according to my opinion, is less calculated to do justice to all parties than the one upon which the Court has proceeded. It is very desirable, no doubt, that the law between the two countries should be assimilated. But that is no ground why your Lordships should introduce into the law of Scotland a rule, which, if your Lordships were to introduce, would do great violence to the law of Scotland, and which you do not altogether approve of here. My Lords, I think that the learned judge most

properly, at the trial, decided that he was not bound to put the questions in the way the defenders suggested, and that there was sufficient to lead him to the [406] conclusion at which he arrived, that the jurors were at liberty to look into all the circumstances for the purpose of measuring the damage.

I believe that in these remarks I have exhausted the whole of the objections made, and my advice to your Lordships is to affirm the judgment of the Court from which this is appealed.

It was ordered that the interlocutor complained of should be affirmed, with costs.

[406] WILLIAM BOUGHTON, JOHN HENRY BOUGHTON, and FREDERICK WINTLE BOUGHTON,—*Appellants*; WILLIAM BOUGHTON, JOHN JAMES, and JOHN JAMES the Younger, The Rev. JOHN PROSSER and his Children, HENRY K. WHITHORN and Wife, JOHN BOUGHTON, ALICIA JOYCE BOUGHTON, JANE BOUGHTON, EDWARD VAUGHAN BOUGHTON, GEORGE HOUGH and LUCY his Wife, MARY JANE BOUGHTON, ELIZABETH JONES BOUGHTON, and ELLEN YOUNG BOUGHTON (First Appeal),—*Respondents*; and WILLIAM BOUGHTON (the first above-named Respondent),—*Appellant*; JOHN JAMES, and all the other above-named Respondents and Appellants (Second Appeal),—*Respondents* [Feb. 15, 17, 21, 28, 1848].

[*Mews* Dig. i. 147, 234, 235; x. 998; xiv. 1610; xv. 909, 1650. S.C. *sub nom. Boughton v. James*, 1 Coll. 26; 8 Jur. 329. Followed in *Tench v. Cheese*, 1855, 6 De G. M. and G. 453; *In re Roberts*, 1881, 19 Ch. D. 525, and *Wainright v. Miller* (1897), 2 Ch. 255. Commented on in *Allan v. Gott*, 1872, L.R. 7 Ch. 444; *Bellairs v. Bellairs*, 1874, L.R. 18 Eq. 517; *In re Finch*, 1881, 17 Ch. D. 222; *In re Dumble*, 1883, 23 Ch. D. 368. Distinguished in *Disney v. Crosse*, 1866, L.R. 2 Eq. 595; *Howard v. Dryland*, 1877, 38 L.T. 24.]

*Will—Construction—Remoteness—Personal estate the primary fund for legacies.*

A testator, after devising and bequeathing all his real and personal estates to trustees, on trust, from time to time to receive the rents and profits, and therewith to pay various legacies and annuities, directed that they should invest the surplus rents and profits at interest, and suffer the same to accumulate: and he declared that they should stand seised of his said trust estate and the accumulations, upon trust, that when and as soon as any son of either of his nephews, A. and B., should have attained the age of twenty-five years, a valuation of his said trust estate should be made, and that the same should then be divided into as many equal lots as there should be sons of his said nephews then living, and thenceforth separate accounts should be kept of the respective portions; and that each of his said nephews' sons, when and as they should re-[407-spectively arrive at the age of twenty-five years, should choose one of such portions as the share to be allotted to him and his children, and that thenceforth the said portion or share should be held by trustees, upon trust for the person so selecting the same for his life, and after his decease upon trust, as to one equal moiety, for his eldest son, and his heirs, executors, etc.; and as to the other moiety for the rest of his children, and their heirs, executors, etc., in equal proportions, and if but one child, both moieties for such child absolutely; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others and other of the said nephews' sons; and if all but one should die without leaving issue, the trustees should stand seised and possessed of the

whole trust estate, in trust for such one surviving nephew's son for his life, and for his children and child as aforesaid; but if all the testator's said nephews' sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death, A. and B. had several sons living, and B. had another son born afterwards:—

Held, upon the construction of the will, that the trusts for accumulation and division of the property comprised all the sons of the nephews, who should be living when the first of them should attain twenty-five; and as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, and therefore void: And the testator's real estates upon his death became vested in his heir.

Held secondly, that under a bequest of real and personal estates, upon trust to receive the rents and profits, and to pay legacies and annuities, and vest the surplus rents, etc., for other purposes, the personal estate is the primary fund liable to the payments, there being no direction to discharge it, or to sell the real estate, so as to constitute a mixed fund.

The suit, which gave rise to these appeals, was instituted by the respondent, William Boughton, as the heir-at-law [408] and customary heir of the Rev. William Boughton, claiming his real estates, on the ground that the trusts declared thereof by his will were void for remoteness.

The testator, by his will, dated the 1st of July, 1831, devised and bequeathed unto John James the elder, and John James the younger, their heirs, executors, etc., all his messuages, lands, tenements, and hereditaments real, and all other his personal estate and effects, upon the trusts and subject to the annuities and charges after in his will or any codicil thereto, bequeathed, "that is to say, upon trust from time to time to receive the rents, issues, interests, dividends, and profits thereof, and to retain thereout every year the sum of £10 as some remuneration for their trouble."

The testator, after declaring trusts for the investment and payment of the legacies in the will mentioned, and, in particular, a legacy of £1500 for the benefit of his niece, Elizabeth Prosser, and her husband, the Rev. John Prosser, and their children; and a legacy of £1500 for his niece, Susannah, wife of Henry K. Whithorn, for her separate use, proceeded to declare further trusts as follows:—

"And also upon further trust to pay to and for the use, education, and maintenance of each of the daughters of my two nephews, John Boughton and Joseph Boughton, whether born in my lifetime or afterwards, the yearly sum of £40 a-piece, until they shall respectively attain the age of twenty-five years, or be married with the consent of their respective parents or surviving parent, and on their respectively attaining that age or being previously married with such consent as aforesaid, in trust to pay each of them the sum of £1500 for their respective uses and benefit."

The testator then, after declaring trusts for the payment of six life annuities, amounting together to £1180, and for payment out of his personal estate of a legacy of £100 to [409] the Society for Promoting Christian Knowledge, £100 to the Society for Propagating the Gospel in Foreign Parts, and £100 to the treasurer of the Gloucester Infirmary, proceeded thus:—"And I do direct that my said trustees or the survivor, etc., do and shall, out of the rents and profits of my said trust estate and premises, pay the following sums for the education, maintenance, or benefit of each of the sons of my said nephews, John Boughton and Joseph Boughton; that is, the sum of £30 a-piece per annum, till they respectively attain the age of ten years; the sum of £50 a-piece per annum from that age, till they respectively attain the age of fifteen years; the sum of £80 a-piece per annum from that age, till they respectively attain the age of eighteen years; and from that age the sum of £150 a-piece per annum, till they respectively attain the age of twenty-five years; but in the event of the death of any or either of them under such respective ages, the provision intended for such one, etc., shall no longer be paid or payable."

"And I direct my said trustees to invest all and singular the surplus of the rents, issues, and profits of my said trust estate and premises (if any), after payment of the several annuities, legacies and charges hereinbefore expressed, at interest, in the name or names of my said trustees or trustee for the time being, in or upon Government



security, and to suffer the same to accumulate: And I declare my will and mind to be, that they do and shall stand seised of my said trust estate, and the accumulations thereof, subject as aforesaid, upon the further following trusts (that is to say): upon trust, *when and so soon as that any son of either of my said nephews, John Boughton and Joseph Boughton, shall have attained the age of twenty-five years, a valuation of my said trust estate, subject as aforesaid, shall be made* " (by the trustees, or such persons as they should appoint) " and that the same shall be then divided into as many equal lots or shares as [410] *there shall be sons of my said two nephews then living*, and that thenceforth distinct and separate accounts shall be kept of the respective portions; and that each of my two nephews' sons, subject to the proviso hereinafter contained, when and as they shall respectively arrive at the age of twenty-five years, shall choose one of such portions as the share or property to be allotted for him and his children as hereinafter mentioned, and that thenceforth the said portion or share shall be held by my said trustees or trustee for the time being, or shall be by him or them, by good and effectual conveyances and assurances in the law, conveyed and transferred to two or more proper trustees " (to be nominated by the nephews' sons, respectively, and approved of by the trustees), " upon trust for the person so selecting the same for his life; and from and after his decease, upon trust, as to one equal moiety, for his eldest son and his heirs, executors, and administrators; and the other moiety for the rest of his children and their heirs, etc., in equal shares and proportions; and if but one, both moieties for such child, his or her heirs, executors, or administrators absolutely."

Then followed a declaration that if any of the nephews' sons should die under twenty-five, or after that age, without leaving issue, their shares should go to the survivors equally, in addition to their original shares, and subject to the same contingency and accruer; and if all the nephews' sons but one should die without leaving lawful issue, then the trustees should stand seised and possessed of the whole of the trust estate and premises, subject as aforesaid, in trust for such one surviving nephew's son for his life, and for his children or child as aforesaid; but if all the nephews' sons should die without leaving lawful issue, then upon trust for such person or persons as should at that time be the testator's heir at law, and to whom, in such event, he devised and bequeathed all his real and personal estate and the accumulations thereof, absolutely.

[411] The testator, after directing that in the apportionment of the trust estates, the eldest son of his nephew John, and the eldest son of his nephew Joseph, who should respectively attain the age of twenty-five, should have the option of choosing certain estates (which he named) to be conveyed to them respectively, upon the trusts aforesaid, and in case these estates should exceed in value their equal portions, that the difference should be respectively charged on them, appointed the said James the elder, and James the younger, executors of his will.

The testator afterwards, on the same 1st of July, 1831, made a codicil, and thereby, —after reciting that by his will he had, after bequeathing certain legacies and annuities, directed his trustees to divide his real and personal estate, in the event in his will mentioned, into as many equal lots or shares as *there should be sons of his two nephews then living*, in order that each such son should, for his life, have the rents, issues, and profits of one lot or share of his real and personal estate,—he directed the trustees in his will named, or the trustees to whom the several and respective shares of his trust estate should be conveyed, or transferred, as in his will mentioned, to pay out of the interest or dividends of the *personal estate*, which should be payable to each of the sons of his nephews for the first year after they should severally attain the age of twenty-five years, the sum of £50 to the treasurer of the Gloucester Infirmary, for the benefit of that institution, such payment to be made on account of the sons of his nephews, and to the end that they might thereby be and become governors of the said institution.

The testator died, without issue, in August 1831, leaving his said two nephews, his sister, Ann Boughton, and three nieces, Mrs. Prosser, Mrs. Whithorn, and Mrs. Wintle, his only next of kin.

At the time of the testator's death, his nephew, John [412] Boughton, who was then his heir at law and customary heir, had two sons and three daughters, and no more, then living, namely, William Boughton, the respondent in the first appeal (born the 15th of September, 1814), John Boughton, another of the respondents (born the 17th

of June, 1819), Ann Boughton, since deceased, and the respondent, Jane Boughton, and Elizabeth, since deceased. Their father died in January 1834, intestate, without having had any other child.

At the time of the testator's death, his second nephew, Joseph Boughton, had four sons and two daughters then living, namely, the three appellants (born respectively in September 1822, June 1824, and March 1831), and Joseph Boughton (born in 1827, and since deceased), and the respondents, Lucy, wife of Mr. Hough, and Mary Boughton. He, the said Joseph, had, after the testator's death, another son and two daughters, namely, the respondents, Edward Vaughan Boughton (born in June 1835), and Elizabeth and Ellen Boughton, and died intestate in September 1839.

On the death of the nephew, John Boughton, the respondent, William Boughton, became his heir at law and customary heir, and also the heir at law and customary heir of the testator. In October 1839, he filed his bill in Chancery against the other respondents (including the said trustees and executors) and the appellants, and also against Mrs. Prosser and Mrs. Wintle, since deceased, stating, among other things, as or to the effect hereinbefore stated, and praying a declaration that the trusts declared by the said will of the testator's real and personal estates, and the surplus rents, issues, and profits thereof, after paying the annuities, legacies, and charges by the will created, were void, as being too remote; and that such real estates (subject to a proper proportion of the said annuities, legacies, and charges, in case, and to [413] the extent only, of a deficiency of the personal estate to satisfy the same), and the investments and accumulations made from the surplus rents, issues, and profits thereof, since the death of John Boughton, the nephew, had become vested in the respondent, William Boughton, as the heir at law and customary heir of the testator; and that the investments and accumulations of such surplus rents and profits might be ascertained, and so much thereof as should be found to have been derived from the testator's real estates since the decease of his nephew, John Boughton, might be ordered to be paid to the said respondent; and that the real estates, subject to so much, if any, of the several subsisting annuities, legacies, etc., charged by the will on the testator's real and personal estates, as the personal estate might be insufficient to satisfy, might be conveyed to the respondent; and that it might be ascertained whether the testator's real estates or the rents and profits thereof had been applied in payment of the said several annuities, legacies, and charges in relief of the personal estate; and if it should so appear, then that the real estate might be recouped out of the personal estate of the testator, etc.

The several defendants to the bill put in their answers thereto, and the appellants (who are the surviving sons of the nephew, Joseph Boughton, born in the testator's lifetime), being infants, put in the usual answer, submitting their rights and interests to the care and protection of the Court.

There were afterwards bills of revivor and supplement by reason of the deaths of parties. The causes coming on to be heard in December 1841, before Vice-Chancellor Knight Bruce, a decree was made referring it to the Master to make the usual preliminary inquiries.

The Master made his report in July 1843, and thereby found the facts as to the next of kin, the heirship and [414] customary heirship of the testator, and the deaths of his two nephews and who were their sons and daughters to the effect before stated; and he found that, of the next of kin, all except Mrs. Whithorn were dead, and that the respondent, James, the younger, was the personal representative of Ann Boughton and of Mrs. Wintle; that the respondents, Alicia Joyce Boughton, Lucy Boughton, and John Prosser were the respective legal personal representatives of John Boughton, Joseph Boughton, and Mrs. Prosser.

The causes came on to be heard before Vice Chancellor Knight Bruce, for further directions, and on the Master's report, on the 28th of February, 1844 (1 Collyer, p. 26), when his Honor made a decree by which it was declared; 1st, "That the trusts declared by the said will of and concerning the real, copyhold, customary, and personal estates, thereby devised and bequeathed, and the surplus rents, issues, and profits and accumulations thereof, subject to and after paying the several annuities, legacies, and charges by the will given or created, were void, as being too remote."

2dly. "That the trust or bequest in the will, to pay to each of the daughters of the testator's two nephews, John Boughton and Joseph Boughton, whether born in the

testator's lifetime or afterwards, the sum of £1500, for their respective uses and benefit, on their respectively attaining the age of twenty-five years, or being previously married with such consent as therein mentioned was void, as being too remote, with respect only to such of the daughters of the testator's said nephews respectively as came into existence after his death."

3dly. "That the trust or bequest in the said will to pay to and for the use, education, and maintenance of each of the daughters of the testator's said two nephews, whether [415] born in the testator's lifetime or afterwards, the yearly sum of £40 a-piece, until they should respectively attain the age of twenty-five years or be married with the consent therein mentioned; and the trust or bequest to pay the various sums in the will mentioned for the education, maintenance, and benefit of each of the sons of his said nephews, at and from the different periods therein mentioned, are valid trusts or bequests, and ought to be carried into execution; and that this last trust or bequest extends to, and comprises sons of the nephews, whether born in the testator's lifetime or afterwards."

4thly. It was declared "that, according to the true construction of the said will, the annuities and legacies thereby given, except the legacies directed to be paid out of the personal estate, were thereby charged upon the testator's personal estate and his freehold, copyhold, and customary estates; and that such legacies and annuities, except the legacies directed to be paid out of the personal estate, and also except the legacies given for the benefit of the poor of the parishes of Blockley and of Westbury respectively, ought to be paid out of the said personal estate, and the freehold, copyhold, and customary estates, *pari passu*, according to their respective values."

And, 5thly, It was declared "that the real copyhold and customary estates, subject to a proper proportion of such of the annuities and legacies as, according to the last declaration, ought to be paid out of the testator's personal estate and his freehold, copyhold, and customary estates, *pari passu* (such proportion to be ascertained as after directed), and also so much of the surplus rents, issues, and profits as accrued from the real copyhold and customary estates since the death of the testator's nephew, John Boughton, and the investments and accumulations thereof (subject to the rateable contribution, which, according to the declaration aforesaid, ought to be paid thereout in respect of the said annuities and legacies, the amount of such contribu- [416]-tion to be ascertained as after directed), had descended to and become vested in the plaintiff (the respondent, William Boughton), as heir-at-law and customary heir of the testator. And it was declared that the surplus rents, issues, and profits of the freehold, copyhold, and customary estates, which accrued in the lifetime of John Boughton, the nephew (subject to such rateable contribution as aforesaid), and the investments and accumulations thereof, belonged to and formed part of his personal estate."

The decree proceeded to give various directions to the executors, and to direct further inquiries before the Master, consequential on the said declarations.

The first appeal was brought by the surviving sons of the testator's nephew, Joseph Boughton, born in the testator's lifetime, against so much of the decree as declared that the trusts declared by the will of the real and copyhold and personal estates, and the surplus rents, issues, and profits, and accumulations thereof, subject as in the decree mentioned, were void as being too remote, and against the directions consequential on such declarations; and against so much thereof as declared that the trust or bequest for the maintenance of the sons of the two nephews extended to sons, whether born in the testator's lifetime or afterwards; and as declared that the legacies and annuities ought to be paid out of the personal estate and the freehold, copyhold, and customary estates, *pari passu* (which is the subject of the second appeal); and as declared that the real copyhold and customary estates, and also so much of the surplus rents, etc., as were in the decree in that behalf mentioned, and the investments and accumulations of such rents and profits since the death of the nephew, John Boughton, subject as therein mentioned, had descended to and become vested in the respondent William Boughton, as heir-at-law and cus- [417]-tomary heir of the testator, and that the surplus rents, issues, etc., and the investments and accumulations thereof, before the death of the said John Boughton, formed part of his personal estate, etc.; and against the directions consequential on those declarations.

The second appeal was brought by William Boughton, the heir-at-law of the testator, and first respondent in the first appeal, against so much of the decree as declared

that the testator's real and copyhold estates were subject to the payment of his legacies and annuities, *pari passu*, with the personal estate, and against the directions consequential thereon (as in the fourth declaration, *ante*, p. 415).

Mr. Hodgson and Mr. Bethell (Mr. Chandless was with them), for the appellants :

The declarations contained in the Vice Chancellor's decree, *first*, that the trusts of the real and personal estates, and of the surplus rents and profits, and the accumulations thereof, are void for remoteness ; and *thirdly*, that the bequests for the education and maintenance of the sons of the two nephews of the testator extended to sons, whether born in the testator's lifetime or afterwards, are erroneous. It is clear, upon the true construction of the will, that such sons only of the nephews as were in existence at the testator's death, would be entitled to the bequests " for the education, maintenance, and benefit of each of the sons of my said nephews." That construction, plainly arising from these words taken by themselves, is confirmed by the circumstance, that, in this bequest, the words of futurity contained in the bequest for the education and maintenance of the daughters of the nephews, " whether born in my lifetime or afterwards," are omitted. That distinction between the two bequests is decisive, that after-born sons were not contemplated, and are not comprised in this bequest, and therefore the Vice Chancellor's declaration on that point must be varied.

[418] If then, as it is confidently submitted, the trust for the education and maintenance of the sons of the nephews extend only to those sons who were born in the testator's lifetime, they must be the same sons, and not a different and larger class, to whom shares are given in the real and personal estates, and the accumulations of the rents and profits under the subsequent trust, " when and so soon as that any son " of either of the nephews should have attained the age of twenty-five years (*vide supra*, p. 409). No expression is found in the whole of this trust concerning the residue of the real and personal estates and the accumulations of them, nor in any other part of the will, affording any ground for the Vice Chancellor's declaration that the trust comprised sons born after the testator's death.

But independently of the reasons and inferences derived from the different manner, in which the several bequests for the maintenance and education of the sons and of the daughters of the nephews are expressed in this will, it is a general rule of construction that a gift to a class vests in such persons only as constitute the class at the time of the testator's death ; *Dodson v. Hay* (3 Bro. C. C. 404) ; *Farmer v. Francis* (2 Bing. 151 ; S. C., 2 Sim. and Stu. 505) ; *Kevern v. Williams* (5 Sim. 171). But here, it is said, there is no prior particular estate, and the words " each of the sons of my said nephews " are ambiguous expressions, and must be held to include all the sons, not only those whom the nephews had at the time of the will, but those also whom they might afterwards have, as in *Bateman v. Roach* (9 Mod. 104), and other cases of that class. The rule against perpetuities is not questioned here ; that is too well established to contend against it ; and its validity and stringency were enforced in recent decisions of this House ; *Cadell v. Palmer* (1 Clark and F. 372) ; *Lord Dungan*—[419]—*non v. Smith* (12 Clark and F. 546) ; but restriction, and not extension, of the rule is the practice in equity, while the courts of law try to escape from it altogether.

The trusts in this case depend on the vesting of the gifts ; the rule applicable to them is pointed out by Chief Justice Best in communicating to this House the opinions of the judges in *Duffield v. Duffield* (1 Dow and Clark, 310-11) ; " Until these estates become vested, they and the rents derived from them pass to the heir-at-law of the testator as estates not disposed of by the will. Whilst estates remain contingent, those in whom they are at a future time to be vested have no interest in them or the rents and profits. Such estates must descend to the heir, if they are not given to any person to hold until the events happen, on which they are to become vested," etc. " Testators that create contingent estates often forget to make any provisions for the preservation of them, and for the disposition of the rents and profits in the intermediate period between their deaths and the vesting of their estates. In such cases the estates descend to the heirs," etc. " If the parents attaining a certain age, be a condition precedent to the vesting the estates, the children, by the death of these parents before they are of that age, lose estates which were intended for them," etc. " In consideration of these circumstances, the judges, from the earliest times, were always inclined to decide that estates devised were vested ; and it is the established rule in construing devises that all estates are to be holden to be vested, except when

there is a condition precedent to the vesting, so clearly expressed, that the courts cannot hold the estates to be vested without deciding in direct opposition to the tenor of the will; but if there be the least doubt, advantage is to be taken of the circumstances," etc. There is a class of cases in support of that doctrine, as *Whitbread v. Lord St. John* (10 Ves. 152).

[420] By holding in this case, that the gifts vested in the children that were living at the time the eldest of them attained twenty-five, the House will give effect to the testator's intention, and save his will. That construction is certainly opposed to the case of *Leake v. Robinson* (2 Meriv. 363), which has never been impeached, but is not inconsistent with *Mogg v. Mogg* (1 Meriv. 654), a prior decision by the same judge. There are numerous decisions on this point, besides *Dodson v. Hay* (3 Bro. C. C. 404) and *Farmer v. Francis* (2 Bingh. 151); *Murray v. Addenbrook* (4 Russ. 407), *Bingley v. Broadhead* (8 Ves. 415), and *Bland v. Williams* (3 Myl. and K. 411), are very strong cases in favor of vesting, and against failure for remoteness; but there is a still stronger case of *Doe v. Ward* (9 Adol. and E. 582), with which, as well as the last mentioned cases, the judgment, which is the subject of this appeal, is wholly irreconcilable. The rules of construction stated by Mr. Jarman, in his edition of *Powell on Devises* (2 vol. p. 8, *et seq.*), "words occurring more than once in a will shall be presumed to be used in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject," etc., are to be applied here; and the word "sons" in the trust of the accumulations, and division of them among sons attaining twenty-five, must be read the "said sons," or "such sons," as were before mentioned in the gift of the annuities, meaning the same and not a different class; *Trickey v. Trickey* (3 Myl. and K. 560); and *Ellicombe v. Gompertz* (3 Myl. and C. 127; see other cases there cited). These cases were not referred to in the argument before the Vice Chancellor. There, as here also, the argument was (1 Col. 39, 40) that the testator, in the gift of annuities and legacies to the daughters [421] of his nephews, expressly mentioned daughters "then born or afterwards to be born," but omitted the latter words in the gift of annuities for the education and maintenance of the sons: and from that omission the legitimate inference was, that in the subsequent trust for the accumulations and division of the property among the sons who should attain twenty-five, the testator meant the same sons for whom he had before provided the annuities, and who were the sons born at his death. That argument was supported by the citation from Jarman on Wills (vol. 2, p. 74, *et seq.*), and by the cases of *Singleton v. Gilbert* (1 Cox, 68) and *Love v. L'Estrange* (5 Bro. P. C. 59), to which is now added the late case of *Kevern v. Williams* (5 Sim. 171), between which and the present case there is no material distinction.

But whether the class of sons be confined to such only as were living at the death of the testator, or be considered as comprehending such only as might come into *esse* before the first should attain the age of twenty-five years, it is submitted that according to the true construction of the will, regard being had especially to the gift over to the testator's heir-at-law, each individual of either class would, immediately on the testator's death, or on his own birth, take an estate vested in interest, though postponed with respect to the period of enjoyment. And as the testator declared his intention that his heir-at-law should take an interest in his real and personal estates, only in the event of all his nephews' sons departing this life without leaving lawful issue them surviving, the sons of the nephews take, by implication, interests if not absolute, at least for life, in such real and personal estates, and the accumulations of them.

The appellants, assuming that so much of the Vice [422] Chancellor's decree as declared that the trusts of the will concerning the real and personal estates and the accumulations of them are void for remoteness, is erroneous and must be reversed, further, and in that event, complain of his Honor's declaration that the annuities and legacies ought to be paid out of the real and personal estates, *pari passu*, according to their respective values, and of the directions consequential on that declaration. But they submit that, unless the first declaration be reversed, the latter, against which the respondent William Boughton also has appealed, ought to be affirmed.

Mr. J. Parker and Mr. Lloyd, for W. Boughton, the heir-at-law, the principal respondent in the first appeal, and sole appellant in the second:

The Vice Chancellor stopped the argument against the validity of the trusts of

the accumulations, observing that *Hunter v. Judd* (4 Simons, 455), decided the point; and though his Honor afterwards heard it argued, he repeated, in his judgment, that he entertained no doubt on it. There can be no difference of opinion on the general principles applicable to this case, that in gifts to a class, if the period of vesting exceeds twenty-one years from the death of one or more persons living at the death of the testator, the gifts are void for remoteness. It was the express intention of this testator, that his gifts to the grand-nephews should not come into their enjoyment until the first attained the age of twenty-five years. The grand-nephew first attaining that age might not be born at the testator's death. In *Leake v. Robinson* (2 Meriv. 382), in which the same question arose, Sir W. Grant says, "the first point to be determined is, who are included in the description of brothers and sisters of W. R. Robinson and of children of Mrs. Robinson; whether those only who were in being at [423] the time of the testator's death, or all who might come *in esse*, during the lives of the respective tenants for life. Upon that point I do not see how a question can possibly be raised." "Indeed, I believe wherever a testator gives to a parent for life, with remainder to his children, he does mean to include *all the children* such parent may at any time have." According to the plain grammatical interpretation of this testator's will, from which there is neither necessity nor reason to deviate, the trust or bequest declared of his real and personal estates, and the surplus rents and profits thereof, comprehends sons of his two nephews, whether born in his own lifetime or afterwards. There are numerous decisions establishing that construction, besides *Hunter v. Judd*. There is no conflict between that case and the previous decision of the Vice Chancellor in *Titcomb v. Butler* (3 Sim. 417).

Even if the testator's intention was clear in this case, that all his grand-nephews should take shares, that would have no weight with a court of construction, which, in applying the rules of construction, disclaims all regard to the intentions of testators. In *Jee v. Lord Audley* (1 Cox, 324), Lord Kenyon, after stating the settled principle, says he would not "strain it to serve an intention, at the expense of removing the landmarks of the law." The judgment in that case is in all respects applicable to this. The cases of *Farmer v. Francis* (2 Bing. 151), and *Kevern v. Williams* (5 Sim. 171), cited for the appellants, are of doubtful authority; no reasons are given for the judgment in the latter; and as to *Dodson v. Hay* (3 Bro. C. C. 404), *Murray v. Addenbrook* (4 Russ. 407), and *Lord Dungannon v. Smith* (12 Clark and F. 546), they are all distinguishable from this case. The judgment of Sir J. Leach, in *Bland v. Williams* (3 Myl. and K. 411), also cited for the appellants, is [424] not generally approved of, as it clashes with Lord Gifford's judgment in *Bull v. Pritchard* (1 Russ. 213), which has been upheld by Vice Chancellor Wigram upon a new bill (5 Hare, 567) with reasons applicable to this case. He says (*id.* p. 571) "there are two classes of cases, one, where the devise is to a party at a given age, and the property is given over if the devisee dies under that age; the other where the description of the devisee is such as to make the given age part of the description, etc. In the second class the court has held the devise contingent upon the ground that no one could claim who was not of the age required, that otherwise he did not answer the description." And his Honor adds, that a clause for maintenance and education cannot be allowed to have any effect upon the description of the devisee, the devisee not being "to the children at, in, when, or if, but in effect to such only as attain the age of twenty-three years." In *Doe v. Ward* (9 Adol. and E. 582), which is much relied on by the appellants' counsel, it was held that under a devise to S. for life, and after her death to such of her children as she had or might have, if a son or sons, *at his or their age or ages of twenty-three*, the rents to be applied in the mean time to their maintenance and education, the surviving children of S. took vested interests at her death, and the devise was not void for remoteness. That case is cited in *Newman v. Newman* (10 Simons, 51) and the Vice Chancellor said it fell within the terms of Boraston's Case (3 Co. Rep. 19), and the other cases of the same class, in which there was a gift to a party "at, when, or if" that party should attain a particular age; those words being held to be used to point out the time at which the devisee was to take in possession, whereas in the case then before him there was no gift except to such of the testator's grandchildren as should attain the age of twenty-four, and his Honour held that gift void [425] for remoteness. That case resembled this, but *Doe v. Ward* does not. In a later case, *Watson v. Hayes* (5 Myl. and C. 125), a testator devised his

estate to trustees to sell the same, and vest the proceeds in real securities, to be disposed of as follows:—That his executors should pay £25 a-year for the maintenance of his daughter till she should attain twenty-one, or be married, “when” they were required to pay her £500. The legatee died before twenty-one or marriage, and the Lord Chancellor, reversing part of the Vice Chancellor’s decree, declaring the £500 to have vested in the legatee, said “there was no gift of the £500, except in the direction to pay that sum to the daughter when she shall attain twenty-one, or be married. ‘When,’ applied to the gift itself, and not to the time of payment, to which Sir W. Grant’s judgment in *Hanson v. Graham* (6 Ves. 235), is directly applicable; and there is also the absence of any terms of gift, except in the direction to pay at a time which never arrived, or in an event which never took place, to which Sir W. Grant’s observations in *Leake v. Robinson* (2 Meriv. 387) directly apply, and which doctrine has been frequently recognised as a settled rule.” His Lordship then discusses the effect of the gift of £25 a-year for maintenance on the vesting of the £500, and comes to the conclusion that the £25 a-year was not a gift of the interest of the legacy of £500, which would effect the vesting of the legacy according to the last mentioned cases, and the case of *Vawdry v. Geddes* (1 Russ. and M. 208), but a distinct gift for maintenance, which therefore had no effect upon the vesting of the gift of £500.

These cases govern the construction of the trusts of the will in the present case, where an accumulation of the surplus rents and profits of real and personal estate is directed to be made, until some son of the testator’s nephews [426] should attain the age of twenty-five years. Until that event, which might not happen until the expiration of the lives in being at the testator’s death and twenty-five years afterwards, nothing is given, either to be vested or enjoyed. The will contains no provisions, which can either expressly or by implication confer a vested interest in the residuary estates, or the accumulations of the surplus rents, until the time when the accumulations are directed to cease, and until then, the class of persons among whom the division is to be made is not ascertainable.

With reference to that passage of the will preceding the trust for the testator’s heir-at-law, (viz., “And if all such nephews’ sons but one should die, without respectively leaving lawful issue them surviving, then the trustees should stand seised and possessed of the whole of the trust estate, for such surviving nephew’s son, for his life and for his children; but if all the nephew’s sons should die without leaving lawful issue surviving, then upon trust for such person as should at that time be the testator’s heir at law,”) upon which the counsel for the appellants contended that they take life estates by implication; it is confidently submitted that such an interpretation is inconsistent with the general scope of the will, and is therefore inadmissible. The ultimate gift is not to the heir-at-law of the testator, but to the person who should be his heir at the time when the ultimate gift should take effect. The whole series and order of limitations, relating to the testator’s real and personal estate, and the surplus rents and profits, is postponed for a period which, in the event, might have transgressed the limits permitted by law.

The question in the second appeal is, whether the testator’s personal estate is not the fund primarily liable to the payment of the annuities and other legacies given by his will, to the exemption, in the first instance, of his real estate, which the decree adjudged to belong to this appeal-[427]-lanc. This question, like that in the first appeal, is a question of construction. The general rule in the administration of assets in courts of equity is that, in the absence of express declaration or necessary inference, the personal estate shall be first applied in satisfaction of those charges which are thrown by the will on both the real and personal estates; *Harewood v. Child* (Cas. temp. Talb. 204), *Lord Inchiquin v. French* (1 Cox, 1; 1 Amb. 33), *Samuel v. Wake* (1 Bro. C. C. 144; Dick. 597), *Boote v. Blundell* (19 Ves. 517; 1 Mer. 193), *Rhodes v. Rudge* (1 Sim. 79), *Roberts v. Roberts* (13 Sim. 336, 349). This rule is properly applicable to all cases in which a testator making his real and personal estate the fund out of which debts and legacies or annuities are to be paid, is silent as to the order in which they shall be applied; for, although the question to be determined in cases of this kind is a question of intention, yet the intention is to be collected, not merely from the language of the will, but from its language in connection with the general rule that determines the order of application of real and personal assets.

Several legacies given for charities by this will are directed to be paid out of the personal estate, because the testator knew the real estate could not be properly charged with them. No inference can be drawn from that direction to exempt the personalty from the other legacies. No directions being given as to the order in which the real and personal estates should be applied in discharging the other legacies, the fair legal inference is, that it was not the testator's intention to exclude the application of the general rule.

The rule was first departed from in *Roberts v. Walker* (1 Russ. and M. 752), by Sir J. Leach admitting, that "in order to throw upon the real estate any part of the burthen, to which the personal estate is primarily liable, the intention of the testator must be manifest," but deciding for apportionment of [428] the burthens, in that case, upon the real and personal estates, according to their respective values, on the grounds that the testator directed a conversion of the real estate, and created out of the proceeds thereof and the personalty a mixed and general fund charged with debts and legacies. On the same ground proceeded the decisions in the subsequent cases of *Dunk v. Fenner* (2 Russ and M. 557, 567), *Foudrin v. Gowdey* (3 Myl. and K. 383), *Johnson v. Woods* (2 Beav. 409), and the *Attorney General v. Southgate* (12 Sim. 77: see p. 83, and 12 Law Jour., N.S., 147).

Those decisions have not received general approbation (see 12 Sim. p. 82), and the grounds on which they proceeded do not exist in this case. There is here no direction to sell or mortgage the real estates to form with the personalty a mixed fund; on the contrary, there are manifest traces of intention to preserve them in specie, so that the personalty is the first available fund, and it is sufficient. In *Robinson v. Taylor* (1 Ves., jun., 44), where the real estate was directed by the will to be sold, and the money to arise therefrom and the personal estate were given to trustees to discharge debts and legacies, Lord Thurlow held, that as the personal estate alone was sufficient, and the residue was undisposed of, there was a resulting trust, as to the real estate, for the heir-at-law. Had that case and *Digby v. Legard* (3 P. Wms. 22 n.) been cited before Sir J. Leach, in *Roberts v. Walker*, he would not have decided as he did in that case, which is inconsistent with the prior authorities.

Mr. Turner (with whom was Mr. Wickens) and Mr. Anderdon, for several of the representatives of the testator's next of kin, respondents in both appeals; but having conflicting interests with the heir-at-law and among themselves, supported the decree on both the disputed points.

[429] As to the first appeal, the terms of the codicil, reciting that the testator had by his will directed his trustees "to divide his real and personal estate in the event therein mentioned into as many equal shares as there should be sons of his two nephews then living," etc., left no room to doubt that the trusts so referred to comprised all sons of the nephews, whether born before or after the testator's death; *Hughes v. Hughes* (3 Bro. C. C. 352, 434; and 14 Ves. 256). As it was possible that the first son who should attain the age of twenty-five years, the event on which the division of the property was to be made, might be an after-born son, the limitations were too remote, and therefore void. There was no previous estate given, and no gift at all to the grand-nephews, except in the direction to the trustees to divide and convey the shares among such of them, including those born after the testator's death, as should be living at the period named, so that there could be no vesting of interest before that period, notwithstanding the provision for maintenance and education; *Batsford v. Kebbell* (3 Ves., jun., 363), *Watson v. Hayes* (5 Myl. and Cr. 125).

As to the second appeal, the question is, whether, upon the construction of the will, it can be ascertained to have been the testator's intention to create, from the real and personal property, a common fund for payment of his legacies and annuities, which he charged upon both estates. He by one and the same clause gave his trustees his real and personal estate, subject to the annuities and legacies; he treated the rents, interest, and produce arising from the trust estate, as a mixed and common fund, out of which he, by various successive provisions, directed the annuities and legacies to be paid, except the charity legacies, which he directed to be paid out of the personal estate, thereby manifesting an intention that, with that exception, both estates should be [430] charged with them, without any direction, express or implied, to make one part of the common fund applicable before the other, and there being



no gift of the legacies and annuities, distinct from the declaration, affixing the trust on the general body of the property. The necessary presumption therefore is, that he intended the two estates to be applied in payment of them, *pari passu*, and in proportions to be determined by their respective values; *Bootle v. Blundell* (19 Ves. 494, 517); *Young v. Hassard* (1 Dr. and W. 638); *Roberts v. Walker* (1 Russ. and M. 752); *Attorney General v. Southgate* (12 L. Jour., N. S., 147); *Christian v. Foster* (2 Phillips, 161); *Sturge v. Dimsdale* (6 Beav. 462).

Mr. J. Parker, for the heir-at-law, in reply to the arguments for the representatives of the next of kin of the testator, said they all agreed that he died intestate as to so much of the real and personal estate as was comprised in the trusts for the grand-nephews (which failed for remoteness), but they differed as to the application of the real estate to the payment of the legacies and annuities until the personal estate should be exhausted. The difficulty was caused by Sir J. Leach's decision in *Roberts v. Walker*, and other cases which followed it, including the *Attorney General v. Southgate*. These cases are supposed to have broken in upon the rule, which had always governed the administration of assets in courts of equity—first applying the personal estate in payment of debts and legacies, and resorting to the real estate only in case of deficiency of the personalty.

Mr. Bethell, in reply for the appellants in the first appeal, referred to the state of the families of the testator and of his nephews at the date of the will. He would not rely solely on the clause for maintenance and education of the nephews' sons in favor of the vesting of their shares of [481] the trust estate, however acceptable to his clients such a decision would be; but he contended that as those sons only who were born in the testator's lifetime were included in that clause, no other sons were comprehended in the direction for the division of the trust estate among "the sons" of the two nephews then living. These words must have reference to the same sons that were referred to in the preceding clause, and were equivalent to "the said" or "such sons;" *Wild's Case* (6 Co. Rep. 16); *Ellicombe v. Gompertz* (3 Myl. and Cr. 127). That is the rational construction of the two clauses, and is well illustrated by the rules of construction and cases stated in Mr. Jarman's Treatise on Wills (Vol. 2, p. 74, etc.); *Butler v. Lowe* (10 Sim. 317); and not varied or affected by the cases cited on the other side, of *Morse v. Lord Ormonde* (5 Madd. 99; and 1 Russ. 382); *Tidcomb v. Butler* (3 Sim. 417); *Eyre v. Marsden* (2 Keen, 564). The nature and effect of these cases are stated most clearly in the same Treatise of Mr. Jarman, and the conclusion which they, and especially *Ellicombe v. Gompertz*, support, is, that the words "any son" and "the sons then living of my said nephews," mean the sons before referred to in the clause providing annuities for maintenance and education. In *Langston v. Langston* (3 Clark and Fin. 194, see p. 317), this House applied the universal rule of giving effect to a deed or other instrument, and, with that view, supplied by implication, from the whole context of a will, a devise to the first son, who was not at all mentioned in it. The expressions, attributed to Lord Kenyon in the case of *Jee v. Lord Audley* (1 Cox, 325), must be taken to apply to the facts of that case, and do not support the argument for the respondent in this. Here the sons of the nephews are provided [432] with maintenance until they attain the age of twenty-five; until then the trustees were to invest the surplus rents and profits of both estates for accumulation upon trust, "when and so soon as any son" attain that age, there was to be a valuation and division. All that was required to preserve this clause and the whole will from being destroyed, was to read "any son," as "any such son," or "any of the said sons," before spoken of, which would be equivalent to any son living at the testator's death. The numerous cases, from *Wild's Case* down to *Tidcomb v. Butler*, and *Ellicombe v. Gompertz*, shew how readily the courts adopt liberal interpretations of instruments for the purpose of giving full effect to them. If the House agree in the decision of the Vice Chancellor, that the gifts of the annuities for maintenance of the sons, until they attain twenty-five, are good—and there is no appeal from that decision—the same construction ought to be put on the gifts of the accumulations of the surplus rents and interest. If a strict adherence to the words of the clause would defeat it, then the House ought not to adhere to them, but give them a liberal interpretation according to the established canons of construction (2 Jarm. Pow. on Dev. p. 7, etc.).

The Lord Chancellor (Feb. 28).—Two questions are raised by these appeals: first,

whether the gift of the trust property in favor of the sons of the testator's nephews be void as too remote, as declared by the decree; and, secondly, whether the decree be correct in declaring that the testator's real and copyhold estates are subject to the payment of his debts, legacies, and annuities, equally with and in the same degree as his personal estate.

Upon the first point there is no doubt as to the rule of law; the question, if any, is as to the application of the [433] rule to the facts of this case. If the gift to the sons of the nephews include sons who might be born after the testator's death, then the gift to them is too remote. The rule is so clearly expounded by Sir William Grant in *Leake v. Robinson* (2 Meriv. 363), that it is sufficient to refer to that case. The only question, therefore, is as to the construction of the will. The gift to the sons of the testator's nephews is in the direction that the trustees shall hold the surplus of the trust property upon trust, "when and so soon as that any son of either of his nephews, John and Joseph Boughton, shall have attained the age of twenty-five years, a valuation should be made, and that the same should be divided into as many equal lots or shares as there should be sons of his two nephews then living; and that each of his nephews' sons, as they should respectively arrive at the age of twenty-five years, should choose one of such shares;" which was to be conveyed and transferred as directed by the will.

There cannot, I think, be any doubt as to the construction of this gift. The parties to take are sons of the two nephews, who should be living when the first of them should attain twenty-five; but such son, who should first attain twenty-five, might not be born until after the testator's death; and the case would therefore fall directly within the rule as expounded by Sir W. Grant in *Leake v. Robinson*.

But it was argued that this obvious construction of the gift is controlled by other parts of the will, and that upon the true construction of the whole together the shares were given to sons living at the testator's death, and vested in them before twenty-five, though the payment or enjoyment was intended to be postponed till that age.

[434] It cannot be said that any words can be so strong in a will as to preclude the qualification of them by other parts of it; but it would be very hazardous to permit terms, perfectly unambiguous in themselves, to be so qualified by anything short of a very clear exposition of the testator's meaning.

It was first said that the gift of annuities for the maintenance of the sons of the nephews was evidence of an intention to vest those shares. These annuities are given without reference to the amount of the shares; and in *Leake v. Robinson* Sir W. Grant says, that although the gift of the whole interest had always been held to furnish a strong presumption of an intention to vest the capital, such a presumption was not afforded by a direction for maintenance out of the interest. There is nothing in the gift over to the heir to affect the obvious meaning of the terms of the gift; for the testator is obviously and in terms speaking of the sons to whom he had before given the property, and the attempt to introduce the words "such" or "the said" into the description of the parties to take the surplus, upon the authority of *Ellicombe v. Gompertz* (3 Myl. and C. 127), is, I think, hopeless. In that case the event upon which the gift over was to take effect, was clearly within the legal period; but the time at which it was, according to the terms used, to come into operation might be too remote; and to reconcile these inconsistencies, I thought that the word "such" or "the said" might be understood. In this case there is no such inconsistency. I am therefore of opinion that there is nothing in the other parts of the will to affect the obvious meaning of the words used in the gift, and that the direction is to divide the property amongst such of the sons of the two nephews as may be living, when the first of such sons shall attain twenty-[435]-five; and that such gift is too remote and therefore void, and that therefore the decree in that respect is correct.

The next question is, whether the decree is right in declaring that the real estate ought to be applied in payment of the legacies and annuities, *pari passu* with the personal estate; that is, whether it ought, *pro tanto*, to be applied in exoneration of the personal estate, the primary fund for such payment.

Upon this subject the earlier cases are very numerous and very contradictory. It is, therefore, satisfactory to be relieved from the necessity of investigating them by

looking for the rule, as properly extracted from these earlier authorities, and as correctly laid down by Lord Eldon in *Boottle v. Blundell* (19 Ves. 518). Lord Eldon there lays down the rule in these words:—"It is clear that it is not enough that the real estate is charged with, or devoted in any form to, the payment of the debts; but the construction must be one that aims at finding, not that the real estate is charged, but that the personal estate is discharged:" which in substance comes to this, that the *onus probandi* lies upon those who contend that the real estate is to be applied in exoneration of the personal estate, the rule of law prevailing unless a contrary course be directed by the will.

In this case the testator devises and bequeaths all his real and personal estate to the same persons whom he afterwards appoints executors; and, there being no direction to sell, he directs his trustees to hold such real and personal estate upon the trust, and for the ends, intents, and purposes, and subject to the several annuities and charges thereafter given; that is to say, upon trust to receive the rents, interest and profits thereof, and thereout to retain £10 per annum for their trouble, and upon [436] further trust to pay certain legacies and certain annuities, and to invest all and singular the surplus of the rents, issues, and profits of his said trust estate and premises, if any, after payment of the several annuities, legacies, and charges before expressed, and to stand possessed of the trust estate, and the accumulations thereof, for the sons of his nephews, and by good and effective conveyance and assurance in the law, to convey and assure for each of them such share as they should become entitled to. And he provided that, in the apportionment and division of his trust estates, the eldest son of his nephew John should have the option of choosing a particular estate to be conveyed for him, and, if the value should exceed his share, that the difference should be charged upon the same for the benefit of the others. And there was a similar provision for the eldest son of his nephew Joseph, with respect to another estate.

By a codicil he recites that he had, by his will, after bequeathing certain legacies and annuities, directed his trustees to divide his real and personal estate, so that each of the sons of his nephews should for his life have the rents, issues, or profits of one lot or share of his said real and personal estate.

There is no charge of debts upon the real estate. The question, therefore, applies only to legacies and annuities. It was argued that the testator must have intended that the £10 to the trustees, who were also executors, should be paid out of the joint income, because the trouble was incident to both descriptions of property. That is only a conjecture as to the motive, which, according to the rule laid down in *Boottle v. Blundell*, is inadmissible in the consideration of this subject. It was then contended that the direction for payment of the charity legacies out of the personal estate was indicative of the intention that all other legacies should be payable in part out of the real [437] estate. It is only indicative of a proper precaution that no part of such legacies should fail in the event of the contemplated necessity of calling in the real in aid of the personal estate. It is a provision therefore inapplicable to either construction, and inoperative for the purpose.

The result, therefore, is, that this is simply a case in which both the real and personal estates are vested in the same persons, who are directed to pay certain annuities, and to invest certain legacies, and to divide the surplus of the whole, without any direction to sell any part of the real estate. I cannot find in this disposition, or in any expression in the will, any direction or evidence of intention that the ordinary rule of administration should be departed from and the real estate applied in payment of the legacies and annuities, *pari passu* with the personalty. It is indeed incredible that he should have entertained any such intention. His intention was that the surplus of the whole property, real and personal, should go to the same persons. It is clear that he did not contemplate the sale of his real estate; but, on the contrary, the appropriating particular estates to the eldest sons of his nephews, proves that he contemplated their continuing in their integrity; and it appears that he intended, in any event, to charge the rents and income of his estates. Could he therefore have intended, there being a fund of the personalty, that the rents of his lands should be applied in preference to the unemployed personalty, both funds being destined for the same persons? The judgment of the Vice Chancellor (1 Collyer, 36) seems to have proceeded upon the ground that the testator

had intended that the whole of his property should form one mass for the purpose of paying rateably the annuities and legacies; but I do not find anything in the will indicating such an intention, except the vesting of both descriptions of pro-[438]perty in the same persons, and directing them to pay the legacies and annuities, without saying how or out of what part of the funds in their hands such payment should be made.

I cannot infer from the vesting of both funds in the same persons, any intention that they should apply them otherwise than according to the course of law; and indeed, as is observed by Lord Eldon in *Bootle v. Blundell*, that circumstance has been much relied upon as negating an intention to exonerate the personal estate.

The Vice Chancellor does not refer to the case of *Roberts v. Walker* (1 Russ. and Myl. 752), and others which followed it, but they were relied upon in the argument; and the expression of "making one mass" seems to imply that his judgment was influenced by those cases. Those decisions, whether right or wrong, are not at present under consideration; for the ground upon which they all proceeded, and which was new, does not exist in the present case. In all those cases there was a direction to sell the real estate, and to make the payments out of the mixed fund so created, and the Master of the Rolls founded his judgment upon that fact in *Roberts v. Walker*.

The same occurred in *Dunk v. Fenner* (2 Russ. and Myl. 557), although the disposition was more complicated. *Fourdrin v. Gowdey* (3 Myl. and K. 383) was the same, and so was *Johnson v. Woods* (2 Beav. 409). In those cases the testators made one mass of property, by directing the sale of the realty and the application of the proceeds, together with the personalty. In the present case no alteration is made in the character of the funds; each part retains its original character, and, as I conceive, its original liabilities, in the absence of any direction to the contrary. The land, so far as the will has charged it, is [439] made chargeable with the legacies and annuities; but it has never been held that a mere charge of legacies upon the real estate is a discharge of the personalty. The question is, as Lord Eldon puts it in *Bootle v. Blundell*, not whether the real estate is charged, but whether the personal estate is discharged. The present case does not, in my opinion, fall within the principle of those decisions; leaving them therefore untouched by any observations I have made, or by the course I shall advise your Lordships to adopt, and looking to the rule as it existed before those decisions, and as expounded by Lord Eldon in *Bootle v. Blundell*, I am of opinion that there is nothing in this will to exonerate the personal estate from its ordinary legal liability to pay the legacies and annuities given by the will; and I advise your Lordships therefore to make the necessary alteration in the decree to effect that purpose.

Ordered, that the first appeal be dismissed, and that so much of the decree of February 1848 as was therein complained of be affirmed; and that the appellants pay to the respondents who appeared to the appeal the costs incurred by them.

And, as to the second appeal, it was *declared* and adjudged that the legacies and annuities given by the will, and not expressly directed to be paid out of the personal estate, are primarily chargeable on and payable out of such estate, and that the decree be in that respect varied by omitting all such parts thereof as are inconsistent with this declaration, or which exempt such personal estate from the ordinary legal liability of personal estate to pay such legacies and annuities; and also by omitting all such directions to the Master as are inconsistent with this declaration; and that, subject to such variations, the said decree be affirmed; and that the costs of the applicant W. Boughton, and of certain of the respondents, be paid out of the fund in the Court of Chancery; And that with these variations, the cause be remitted to the Court below. (See the Lords' Journals for 28th of February 1848).

[440] The MAYOR, COMMONALTY, and CITIZENS of LONDON,—*Appellants*;  
HER MAJESTY'S ATTORNEY GENERAL,—*Respondent* [March 7, 9, 13,  
1848].

[*Mews' Dig.* v. 8, 72. S.C. below, 8 Beav. 270; 14 L.J. N.S. Ch. 305; 9 Jur. 570. On point as to jurisdiction of Court of Equity, discussed and followed in *A.-G. v. Edmunds*, 1868, L.R. 6 Eq. 392. On the question of costs, commented on in *A.-G. v. London (Corporation of)*, 1849, 2 Mac. and G. 247; and *Saunders v. Jones*, 1877, 7 Ch. D. 443; and cf. *A.-G. v. Newcastle-upon-Tyne Corporation* (1897), 2 Q.B. 384. On point as to statutes binding the Crown, see *A.-G. v. Constable*, 1879, 4 Ex. D. 173; *A.-G. v. Barker*, 1871, L.R. 7 Ex. 177; *Dixon v. Farrer*, 1886, 18 Q.B.D., 43.]

*Information—Jurisdiction—Pleading—Costs.*

The Attorney General (after the passing of the statute 5 Vict., c. 5), filed an information in Chancery against the Mayor and Commonalty of London, alleging that the Crown was seised of the bed and soil of the river Thames; that the defendants were conservators thereof, and in breach of their duty as such conservators, had granted to divers persons (also made defendants) licences to embank parts of the river, and had received fines for such licences, and that such embankments were nuisances; and the information prayed that the rights of the parties might be ascertained, that the licences might be declared void, and that injunctions might issue to prevent the completion of the embankments. The defendants denied that the embankments were nuisances, and demurred to the rest of the bill for want of equity:

Held, affirming an order of the Master of the Rolls, that, upon these pleadings, the information was maintainable.

If a bill or information discloses, upon the facts stated in any part of it, ground for a decree in equity, it is maintainable. *Per* the Lord Chancellor, pp. 464—6—7.

A bill, which raises a legal question, may be so framed as not to be open to demurrer on that account, but, on the real nature of the question appearing at the hearing, the court of equity will refuse to interfere. *Per* the Lord Chancellor, p. 468.

As the Crown would not be liable to costs in this case, the judgment of the Court below was affirmed without costs.

*Quære*: Whether, when an act of Parliament transfers jurisdiction from one Court to another, or grants an extension of the jurisdiction of an existing Court, it is necessary, in order to make the act binding on the Crown, that the Crown should be named therein?

On the 15th day of February, 1844, Sir Frederick Pollock, as Attorney General, filed an information in the Court [441] of Chancery, which information was afterwards amended and stated as follows:—

That by the royal prerogative, the ground and soil of the coast and shores of the sea round this kingdom, and of every port, haven, and arm of the sea, creek, pool, and navigable river thereof into which the sea ebbs and flows, and also the shore lying between the high water mark and low water mark, at ordinary tides, belonged to her Majesty, who had also a right of empire or government over the navigable rivers of this kingdom; and that her Majesty was seised, in right of the Crown of England, of and in the port and haven of London, and of the river Thames, the same being an arm of the sea, into which the sea always flowed and reflowed; and that the said river was and had been an ancient royal and navigable river and king's highway for all persons, with their ships, vessels, boats, and crafts to pass, repass, and navigate at their free will and pleasure, and to moor their vessels in convenient parts of the river, not impeding the navigation thereof: that the Mayor or the Corporation of the City of London had for a long period, either by prescription or under some grant from the Crown, held and exercised the office of bailiff or conservator of the river Thames, the said office being exercised by the Mayor for the time being

or his sufficient deputies, from time to time for ever, in, upon, or about the Thames, from a short distance above the bridge of Staines to the bridge of London, and thence to a certain place called Yantleet, towards the sea and in the port of London; and that the duty of the said mayor, bailiff, or conservator, was to see to the navigation of the river Thames, and to prevent the erection of obstructions and nuisances in the said river, and also to regulate the fishing thereof; but the said Mayor did not, in virtue of such office, take or acquire any estate or interest in the ground and soil of the bed or shores between high and low water mark of the said river.

[442] The information then alleged that the Mayor, Commonalty, and Citizens of the City of London, had of late claimed to be seized or entitled of or to the freehold of the ground, bed, and soil of the said river, and of the shores thereof between high and low water mark, within the same limits in which the Mayor exercised the office of bailiff or conservator, and had assumed to exercise such acts of ownership over the soil and shores of the river as were beyond the power and authority of the bailiff and conservator; and that in particular the said Mayor, Commonalty, and Citizens, had lately taken upon themselves to make grants to parties possessed of wharves or land on the banks of the river, or to such other persons as they thought fit, to licence them to embank the strand and soil of the said river, and build thereon between high and low water mark.

That in particular the said Mayor, Commonalty, and Citizens had granted such licence or authority to embank to William Cubitt, one of the defendants thereafter named, by an indenture made the third day of May, in the year of our Lord 1843, between the Mayor and Commonalty and Citizens of the City of London, of the one part, and William Cubitt, of Gray's Inn Road, in the county of Middlesex, builder, of the other part, by which in consideration of the sum of two pounds to the Mayor, Commonalty, and Citizens, paid by Cubitt, they granted unto Cubitt, for the benefit of himself and all other the persons (if any) who then were and who might for the time being be entitled to or interested in the wharf and premises thereafter described as adjoining the river Thames, and in the occupation of Cubitt, full and free permission, licence, and authority to embank so much of the strand or soil of the said river as lay between the high and low water mark thereof, situate, etc., on the north side of the river, opposite the Isle of Dogs; and it was provided that this licence was granted upon the express condition that the embankment should be completed within the [443] space of eighteen calendar months from the date thereof, under the superintendence and to the satisfaction of the said Mayor, Commonalty, and Citizens, or of an officer to be appointed by them for that purpose; and that the front or river wall, and the side walls of the said embankment, should at all times be kept in good and substantial repair.

The information, after stating covenants by Cubitt in accordance with these provisions, and that he was preparing to execute the embankment according to the terms of the indenture, further stated that the said Mayor and Citizens had also granted to other persons therein named a licence to embank part of the shore of the river Thames, between high and low water mark, in front of a wharf called Durrand's wharf, in the parish of Rotherhithe, in the county of Surrey. It then set out the licence, and alleged that the parties to whom this licence had been granted had already begun to erect the embankment upon the soil of the river, between high and low water mark, and were proceeding to complete the embankment, in order to make use of the land so taken from the shore or bed of the river as a wharf; that this embankment would be detrimental to the river Thames, and a nuisance and injury to her Majesty's subjects navigating the same, inasmuch as it would not only narrow the water-way, but would also produce an eddy at each end of such embankment, and an increased deposit of mud in the parts adjacent, and would produce shoals in some parts of the river below the embankment, by excluding a quantity of tidal water essential to the scour or preservation of the depth of the said river.

The information set forth other grants (in consideration of fines) made by the Mayor and Corporation, particularly to one J. Park, at Battersea, and repeated the allegations of injury to the bed of the river and to its navigation by the making of the embankments in pursuance of such grants. It traversed the right of the grantees to make such [444] embankments, and denied that any charter granted by the Crown had given the Mayor and Citizens any title to the soil or bed of the river,

or had recognised any immemorial right as vested in them. It then specially referred to a charter of the 23 Hen. VI., and denied that it gave to, or recognised such a right as existing in, the Mayor and Citizens, and alleged that no evidence of the exercise of any such right was sufficient to establish such right by immemorial usage. The information traversed the right of the Mayor and Citizens to make or to authorize the making of any embankments on the river, and charged that it was the duty of the Mayor to prevent the same, that even if the bed and soil of the river were vested in the Mayor and Citizens, still the embankments at Battersea and Rotherhithe were common nuisances, and as such ought to be abated; and that the Mayor and Citizens, or their town clerk (the defendant Merewether) had documents in their possession relating to these matters, and ought to make discovery thereof. The information prayed that the rights of her Majesty and of the Mayor, etc., might be declared, that issues might be granted if necessary, that if the rights claimed by the Mayor and Citizens should be found to be null and void, an injunction might be granted, that the embankments already executed might be abated, that the Mayor, etc., might be ordered to be accountable, and that the right of the Crown to the bed and soil of the river might be for ever established.

The Mayor, and Citizens, and the other persons, defendants in the information, appeared, and to all the parts of the information, except those which charged that the embankments were nuisances, and were injurious to the bed and soil of the river, and to the navigation thereof, demurred, for want of equity; and as to these excepted parts, they answered, denying that the embankments had occasioned, or would occasion, any injury to the river, or to its naviga-[445]-tion; and they said, that in the case of the Rotherhithe embankment, the plan had been laid down by Mr. Walker, the civil engineer (who was perfectly acquainted with the river), together with the harbour masters and Captain Bullock, hydrographer to the Admiralty, and that such embankment had there improved the navigation of the river, by enlarging the tidal scour thereof. The defendants then denied that the embankment at Battersea would be injurious; they denied that either of the embankments was a nuisance; and denied that the mayor and citizens then claimed, or ever had claimed, to create a nuisance to or upon the said navigable river, or to the injury of the Queen's subjects navigating the same.

The case was argued before the Master of the Rolls, who, by an order of the 4th June, 1845, overruled the demurrer (8 Beav. 270; 14 Law Jour., Ch. 305). The appeal was against this order.

Mr. Bethell and Mr. Serjeant Channell (Mr. Randell and Mr. James Wilde were with them), for the appellants:

The Master of the Rolls laid down the broad proposition, that all the jurisdiction in these matters was, by the 5 Vict., c. 5, transferred to the Court of Chancery. Such a proposition cannot be supported. Since this decision has taken place, two cases have occurred in the Exchequer, in which that Court has held that it still retains its equitable jurisdiction in matters of revenue (the cases referred to are *The Attorney General v. Hallett*, 15 Law J. (Ex.) 155, and 15 Mee. and W. 97; and the *Attorney General v. Halling*, 16 Law J. (Ex.) 304, and 15 Mee. and W. 687). In the latter of those cases the question of jurisdiction was directly in issue, and the judgment, which was very elaborately considered, is therefore of very high authority. If they are right, the judgment of the Master of the Rolls in this case cannot be sustained. Those decisions and the present are inconsistent with [446] each other. It is submitted that they are right, and that the Master of the Rolls was wrong, and consequently that his order in this case must be reversed. That is the first objection. The next is as to the form of the information, which could not be maintained in any court of equity whatever.

The shores of the river appear to have been granted to the Corporation, yet the Attorney General says that that grant is without any effect. Usage is, however, in favor of the Corporation, but usage is treated as of no value; and it is charged that the ground and soil of the river are in the Crown, and that the Corporation has no power to permit building of any sort on the shores of the river, but that if there are embankments in any way obstructing the navigation of the river, it is the duty of the Corporation to prevent them. And this restriction as to the powers of the Corporation is extended to the soil between the high and low water marks.

Such being alleged to be the extent of the legal rights of the Corporation, the information then proceeds to charge that all the embankments authorized by the Corporation are in fact nuisances, for that they do obstruct the navigation and deprive the Queen's subjects of their rights thereon. But it is plain that nothing of that sort can affect the question of right to the soil, for if the embankments actually made, or in progress, are in fact nuisances (which is however positively denied), still the right to authorise embankments, which are not nuisances, cannot be thereby affected. The Attorney General may have a good right to come and demand that nuisances should be removed, but a judgment in his favor, on that point, will not determine the question as to the title to the soil or bed of the river, nor shew that the Corporation cannot grant to any one whatever a licence to embank any part of the river. The case here set up on the part of the Crown is not that of a *purpresture*, but of a nuisance. There is a great distinction [447] between *purprestures*, which are private encroachments on the property of the Crown, and nuisances, which are matters of public concern. The former may be proceeded against in equity, the latter must be proceeded against at law. The charge here is of a nuisance, and not of a *purpresture*, and the demurrer is therefore a general demurrer, on the ground that this is not a case in which the Crown can ask a court of equity for a discovery and general relief.

The real question in this case is, whether the point in dispute between the Crown and the Corporation shall be determined in a legal and constitutional manner, or by what is in effect an inquisitorial process. This question depends upon the construction to be given to the statute 5 Vic. c. 5. To decide what is the proper construction of that statute, it is necessary to consider what the Court of Exchequer was before the passing of that act. The Exchequer was a court of revenue, and, as such, exercised a jurisdiction in equity as well as at law; the *Attorney General v. Halling* (15 Mee. and W. 694. By Lord Chief Baron Pollock, in judgment). It cannot be denied that this court of revenue is a court of equity for the purposes of the revenue. By the 5 Vict., c. 5, the equity jurisdiction of the Court of Exchequer, as between subject and subject, was transferred to the Court of Chancery; but its jurisdiction as a court of revenue, and a court of equity incident to revenue, is not transferred. So far as the Crown is concerned, the powers of the Court of Exchequer are untouched by the statute. They would still be untouched to that extent, even if they were in all other respects taken away; for the statute does not name the Crown; and it is a universal rule of construction, that the Crown is not bound nor affected by the provisions of an act of Parliament, unless named therein. The two cases above cited (in [448] the latter of which especially it is to be regretted that the arguments are not given), shew, that for the purposes of the public service, it is desirable that the law officers of the Crown should preserve these rights of the Crown in the Court of Exchequer.

[The Lord Chancellor.—The statute effects a transfer of the jurisdiction from one court to another, or the extension of the jurisdiction of one court. In such a case the argument as to the naming of the Crown in an act of Parliament does not seem to apply.]

The first clause of the statute manifests the intention of the legislature to exempt some part of the revenue jurisdiction of the Crown from being affected by its provisions. The Barons of the Exchequer agree in saying that this exempted jurisdiction does not comprehend the ordinary equity jurisdiction between subject and subject, which is equivalent to saying that the other part of the equity jurisdiction is untouched by the statute. What are the exemptions in the statute? The first is of all the powers possessed by the Court, such as are exercised by the courts of law; the second is of all such as are exercised by it as a court of revenue, and not heretofore exercised by it as a court of equity. The equity jurisdiction in matters where the Crown is concerned, is within the second exception; for that jurisdiction was one of a peculiar nature, specially appropriated to itself, and did not belong to it in its ordinary capacity as a court of equity. Though some of the officers of the Court are taken away, the peculiar officers who belong to it as a court of revenue remain.

This case raises this important constitutional question, whether it is competent to the Crown to bring into a court of equity a case for adjudication, which is a pure case of legal title, and to have that case argued on and adjudged, with this peculiar advantage ensured to the Crown, that it shall have the power to compel discovery



and a disclosure of the title on the part of the defendants [449] who are sued. The course now taken is also subject to this objection, that it deprives the private party of the benefit intended by the 21 Jac. I., c. 14, to be conferred on all the subjects of the realm, namely, to plead the general issue, and thus throw on the party claiming the right of possession the necessity of recovering by the strength of his own title.

[The Lord Chancellor.—The consequence here would have been the same had this been an information in the Equity Exchequer.]

But it is contended on that very ground that an information there would not have been a proper mode of proceeding.

[The Lord Chancellor.—I do not understand what the Lord Chief Baron means, when he says (15 Mee. and W. 696), "The first exception is of all powers possessed by or incident to it as a court of common law. It has all the powers, legal and equitable, which, by statute or common law, belong to the other courts of common law." What are the equitable powers belonging to the courts of common law?]

Perhaps they are the powers under the statutes of interpleader. The subject is very involved, but the probable meaning of the Lord Chief Baron is, that there are two kinds of equitable jurisdiction attributable to the Court of Exchequer: its original equitable jurisdiction, as between the Crown and the subject, and its usurped equitable jurisdiction, as between subject and subject. The statute intended to transfer to the Court of Chancery the usurped jurisdiction.

[The Lord Chancellor.—Can you distinguish between them?]

No, for the jurisdiction is in all cases said to be exercised *jure coronae*, in virtue of a party being a debtor to the Crown.

[450] It is a recognized principle, that where legal rights are involved, a party has no occasion to go into a court of equity, if the courts of common law can give him full relief. *The Attorney General v. St. Aubyn* (1 Wightw. 180; see also *Walsingham v. The Attorney General*, Hard. 49-51), where Mr. Baron Wood says, that "if the Crown can come here, and by filing a bill, compel a person to disclose his title, there will be an end to the Statute of James, and the subject will be deprived of his trial by jury.

[Lord Campbell.—Do you mean to say that this information could not have been filed in Chancery before the statute?]

Certainly—For it does not contain any matter of Equity.

[The Lord Chancellor.—But do these questions of jurisdiction properly arise here? There is not, on the face of these proceedings, any adverse claim of the soil. The information states that the present appellants are conservators of the river under the Crown, but that they have no right to the soil thereof. That is admitted on the face of the pleadings, and the appellants are charged with having created a nuisance, by their violation of their powers and duties as conservators of the river.]

The information itself raises the question of title, for it expressly negatives that any charters or letters patent, granted by the Crown, "contain any grant of the soil, or bed of the river Thames, or of the shores thereof, between high and low water mark, to the mayor, commonalty and citizens of London." And then this question being thus raised in the information, the demurrer is addressed to the jurisdiction; because, admitting that to be a question raised, the demurrer alleges that the Court of Chancery is not the proper Court to try it. As to the question of nuisance, the appellants are not the parties to try that—

[451] [The Lord Chancellor.—Yes, they are; for the embankments alleged to be nuisances, are alleged to have been made under your license.]

That is not quite so. The appellants have granted licenses to embank; but it is not alleged that the embankments are made as authorised in the licenses, and a license to embank may be rightly granted, and yet the mode adopted for effecting the embankment may be a nuisance.

[The Lord Chancellor.—There is a part of the information which alleges that the appellants have of late assumed to exercise acts of ownership over the soil and shores of the river, such as are beyond the powers of bailiffs and conservators. That part is not demurred to. The Crown puts the matter in the alternative, and claims to be the owner of the soil; but also alleges that, if not owner, still the appellants are but bailiffs, and that they have exceeded their powers as such. This resembles a bill,

where it is charged that a man cuts down timber, he not being the owner of the field, but merely tenant for life. No demurrer would lie to such a bill.]

It would not; but the allegation that the mayor and commonalty have taken on themselves to grant licenses, does not say that they have done so as conservators, and therefore it must be taken that they have done so as owners. The question of title to the freehold, is, therefore, directly raised. Suppose a bill by a remainder-man, alleging that the tenant for life sets up a right as tenant in fee, and that he has granted leases as such, and praying the Court of Chancery to determine to whom the fee belongs; it is clear that no such bill could be sustained.—

[The Lord Chancellor.—But that is not the form adopted here.]

Yet all the prayer for the interposition of the Court is founded upon such a hypothesis. The purpose of the prayer of a bill is to explain and amend what might be ambiguous in the bill itself; and here, after an allegation in the information that the Crown has the right and title [452] to the bed and soil of the river, and that the mayor and commonalty have set up a claim thereto, the prayer is, “that the right to the freehold and inheritance of and in the ground and soil of the bed of the river, and of the shores thereof between high and low water-mark, may be deemed and established to be in her Majesty, to the end that multiplicity of suits may be avoided, and that the validity of such grants from the mayor and commonalty may be determined.” The Court is here not asked to annul these grants, except after an examination of title. In the *Attorney General v. Johnson and Earl Grosvenor* (2 John Wils. Rep. 87); upon an information of this kind, Lord Eldon held, that it was quite immaterial to whom the soil of the river belonged, it not being competent, either to the Crown or a subject, to use it for any purposes amounting to a nuisance. But it is in explaining that doctrine that his Lordship’s judgment becomes most material. He says (*id.* 101), “I consider it to be quite immaterial whether the title to the soil between high and low water-mark is in the Crown, or in the city of London, or whether the city of London has the right of conservancy, operating as a check upon the improper use of the soil, the title being in the Crown, or whether Mr. Johnson or Earl Grosvenor has any derivative title by grant from any one having the power to grant.” The case itself is not applicable as an authority here, for there the only prayer was for an injunction to abate the nuisance, and nothing was said as to declaring the right to the soil and bed of the river; but the observations in it are material.

[The Lord Chancellor.—This is the same as a bill by the remainder man, against the person whom the bill states to be only tenant for life, but who pretends to be the owner of the fee, and in such character to make deeds; and the bill prays that he may be declared not to be so, and that his deeds may be set aside. Can it be said, that if the whole statement of fact was admitted by [453] a general demurrer for want of equity, the admission would not shew the fee to be as alleged in the bill?]

Whatever may be the allegations in a bill, if they are introduced for the purpose of calling on the Court to try and to determine a claim which the court has no jurisdiction to try or to determine, they will not maintain the bill.

[The Lord Chancellor.—There is another view of the question. An information for a nuisance in a harbour may be maintained, though the soil is alleged to be in the Crown.]

There is no doubt of that: and if the Crown had thought fit to allege this to be a *purpresture*, this information might have been maintained; the *Attorney General v. Burbidge* (10 Price, 350). But that has not been done here. The title to the soil is the question raised.

But then it is said that this bill may be maintained, according to its prayer, to prevent multiplicity of suits. There is no ground for maintaining it. You cannot prevent an action of ejectment against each of one hundred tenants by filing a bill against one or other of them, asking for a determination of their rights in that suit. If you will take the whole of the information, and observe to what it is addressed, the issue it raises, the mode of trial it proposes, and the manner of making the subsequent relief depend on this subsequent enquiry, it is impossible to avoid seeing that the object of the information is the trial of the right of ownership over the soil and bed of the river. That question cannot be tried in a court of equity. The proper remedy here would have been by a proceeding as for an intrusion.

[Lord Campbell.—That is only where a party is in possession of that which the Crown claims.]

Intrusion is in the nature of an ejectment by the [454] Crown, and would bring this question of soil and freehold directly before the court. The information here raises no matter of equity, but purely a question of law.

[Lord Campbell.—Do you lay it down as a general rule, that where the Crown can proceed by information for an intrusion, it must do so, and cannot be allowed to proceed in any other way?]

Not quite so; but that where boundaries are in question, as they are here, the proceeding by way of intrusion is the proper remedy. And such is plainly the opinion of Mr. Baron Wood, in the *Attorney General v. Sir John St. Aubyn* (Wightw. 167). If the subject-matter of the information is sufficient, according to ordinary rules, to found the jurisdiction of the Court of Chancery, then that court cannot want a transferred jurisdiction; but if that subject-matter is not of that kind, and such the Master of the Rolls seems to consider it, then the jurisdiction properly belongs to the Court of Exchequer, and has not been transferred to the Court of Chancery. But it is further submitted that the matter is one which relates entirely to legal title, and therefore cannot be made the subject of an equitable suit in any court.

The Attorney General and Mr. Turner (Mr. Maule was with them) for the respondent.

The question here resolves itself into one of form, and there can be no doubt that the demurrer is defective in form, and was properly overruled. In the first place, there is ample ground to assert the jurisdiction of a court of equity; but if not, then it may be contended that there has been under the statute a transfer of all the equitable jurisdiction of the Court of Exchequer to the Court of Chancery, and that an information of this description would have been perfectly well maintainable in the Exchequer or Equity prior to the passing of the statute.

[455] What is the information here? It is one which charges an abuse of the powers confided to the mayor and commonalty, and complains that they have been guilty of that which is in substance a purpresture. All the allegations, with reference to the proposed embankments at any of the places mentioned in the information, set forth a case of breach of duty as bailiffs, as well as of injury to the public use of the river. Such being the state of the information, what is the demurrer? It is applied to every thing but those allegations which allege the injury to the public, and on them issue is joined. The defendants admit that there is an issue between them and the Attorney General on the question of nuisance. They admit the possession of the documents which will prove the facts alleged, and they demur to the discovery of those documents. According to this representation of the pleadings, if the case was one between subject and subject, there can be no doubt that it might be made matter of inquiry in a court of equity. The House is not dealing here simply with the *jus publicum* of the Crown: it is a case of *jus privatum* of the Crown, and the Crown cannot in such a case be placed in a worse situation than a subject would be under similar circumstances. This demurrer, therefore, cannot be maintained, more especially in the face of an admission of the possession of the documents which are to be used on the trial of an issue, of nuisance or no nuisance, between the Crown and the grantees of the Crown.

[Lord Campbell.—The Corporation may be indicted for a nuisance, if one has been committed.]

Not here; for the Mayor and Commonalty are not alleged to be in possession, or to have committed the nuisance. Suppose that this case had taken the course of a motion in Chancery for an injunction, surely the production of the documents, which are admitted to be in the possession of the defendant, would be most material in such a [456] motion; and if material, the production of them would be ordered. So that in point of form this demurrer goes a great deal too far in resisting the production of them.

Then, is it not clear, that on the face of this information, there is an equitable case stated; entitling the Crown to a decree? The general rule as to demurrer to a bill is this, that when the facts stated in the bill are admitted, the question is whether those facts do not establish a sufficient ground for interference? Here the facts admitted show that the Crown is entitled to the bed of the river, and that the defendants

held the office of conservators, and therefore were in a situation of confidence in relation to the Crown, being in fact the bailiffs of the Crown; then that the mayor did not in virtue of his office take any interest in the soil of the river; then that the mayor and commonalty had set up a claim not only to exercise the right of conservancy, but to be seised in fee of the ground, bed, and soil of the river; and, finally, that they took on themselves to make grants which were not in accordance with their rights or duties of conservators. The prayer is, that the grantees shall be restrained, and that the deeds of grant shall be given up, they being contrary to the fiduciary duty of those who made them. Is not such a case one for the interference of a court of equity? Can it be said that a land-lord cannot come into a court of equity and call on his bailiff to account for the rents and profits of the estate entrusted to his management? In this respect there is no distinction between the case of a private person and of a corporation as an agent of the Crown; nor can there be any difference on the ground that the defendants here are bailiffs by office, instead of being bailiffs by appointment, for a bailiff by office shall account, *Comyn's Digest* (Tit. Accompt (A 3) 2; citing 1 Rol. 118, l. 50). The declaration of right here prayed from the Crown, is for the purpose of preventing a multiplication of suits, and the [457] Crown has a right, as much as any individual, to come into a court of equity and ask a declaration of right for such a purpose. The Crown cannot be put to the necessity of proceeding by writ of intrusion against these grantees, when, the day after doing so, the appellants may grant a hundred other licences of the same sort. It is true that here they do not actually perform the acts complained of; but they grant licences to others to do them, and therefore a declaration of right is necessary. Proceedings may be taken in this way by a principal against an agent; the *Mayor of York v. Pilkington* (1 Atk. 282); that is an important case. A bill was there filed for a fishery; a demurrer was filed to the bill, on the ground that the bill was against several distinct parties, claiming different grounds of title. The court put the case that several defendants there claimed the same right, and after re-argument the demurrer was overruled. How does that case apply here? In this way, that all the licencees claim in a common right, and therefore this information, which is in the nature of a bill of peace, will lie. Then it is said that the mayor and commonalty did not do that which was here complained of, but that if done at all, it was done by those who had their lawful licence, but who neglected or violated that licence, and that this cannot make the act of granting the licence void. The answer is, that it is not necessary to file the information against those who actually do the act, nor perhaps could it be maintained against them without joining with them those under whose authority they acted. The mayor and commonalty here took fines for these licences, and therefore have a direct interest in the matter. The same equity is applicable here as in the cases of lords of manors, where questions arise as to reservations of privileges of particular mills, or as to rights of common, and where in a suit against the lord's grantee the lord himself must be joined.

The only doubt is on the question whether the Crown [458] was compellable to make the mayor and commonalty parties to the bill. On that point an important case was decided by Lord Eldon in 1819. That was a case of *Fairman v. King* (MS.), which related to the fishery at Milton. The bill was filed by the lessee of the Milton fishery against King and 130 other persons, calling themselves free fishermen, and the object was to prevent them entering on the fishery or disturbing the plaintiff's rights therein. An injunction was granted *ex parte*, and a motion afterwards made to dissolve it. Lord Eldon, in considering the question whether such an injunction could be granted, referred to the case of *Lord Tenham v. Herbert* (2 Atk. 483), and adopted the opinion there expressed by the Lord Chancellor, that there were cases in which a man might by a bill of this kind first go into equity, and others where he must first establish his right at law. That was a strong case, and is directly applicable to the present. The lessee there claimed title to the fishery under a grant from the lord; his rights were disputed by 130 persons, claiming to be free fishermen, or dredgers in the river. If the lessee's title was good, he might have maintained trespass against every one of them, and his legal rights must have been proved in order to show that he had a title to any damages. Without having tried his legal right, but asserting in equity a purely legal title, he asked the assistance of the court against these 130 persons, who claimed a right as free fishermen. The objection was

taken that this was a question of title, properly determinable in a court of law; but the Court, treating the suit as a bill of peace, said it was impossible to drive him to maintain actions of trespass against 130 persons, and therefore it interfered for the purpose of quieting the possession and putting the legal rights in a course of legal trial between a small number of the parties interested. The same course must be followed here.

[459] Then it is said that ejectment might be maintained here; but that is not so, for nothing that has occurred would enable the Crown to maintain ejectment against the corporation.

[The Lord Chancellor.—Ejectment might not be maintained against the corporation, because it is not in possession; but might not ejectment be maintained against its lessee or licensee?]

Perhaps so; but the corporation might grant a new lease immediately, and the suits might therefore be endless. To prevent such a course, the Crown may come into equity (Mitf. Trea. on Pleading, 117, 3rd Edit.). On this subject, that of permitting this information on the principle of a bill of peace, the case of *Ewelme Hospital v. The Corporation of Andover* (1 Vern. 266) is important; for there the bill was allowed, after full consideration of all the difficulties which might be raised, and while proceedings were in fact going on at law. The rule as to such bills is well laid down in Mitford on Equity Pleading, where it is said (3 edit. 119—4 edit. 145), "It is not necessary to establish the right at law before filing a bill, where the right appears on record, as under letters patent for a new invention; in which case a demurrer to a bill for an injunction to restrain an infringement of the patent right has been overruled. . . . Where a right, *prima facie*, and of common right, is vested in the Crown, it will receive the same protection; and this principle may be applied to some of the cases mentioned in a preceding page." The cases of *Lord Tenham v. Herbert*, and the *Mayor of York v. Pilkington*, are among those referred to.

So that, if it was admitted that in the case of a private individual there must be a proceeding at law, it would not follow that the same course must be adopted in the case of the Crown. But the admission as to the private indi- [460]-vidual is not made; and it is not necessary, therefore, to consider whether the Crown is or not exempted from a similar liability.

Then as to the prayer for an account. It is admitted that the corporation has received different sums of money in respect of these licenses. These sums have been received in consequence of a breach of duty. In a case of that kind, the rights of the Crown are well stated by Sir Anthony Hart in the *Attorney General v. The Corporation of Galway* (1 Molloy, 95). It was insisted that the information which had been filed in that case could not be supported, because the matter in dispute was properly the subject of a legal demand; but Sir A. Hart said (*id.* 103), "It cannot be an objection to an information that there is a remedy at law. The Attorney General, acting on behalf of the public, has the right to sue in this court, even for a legal demand. . . . The Crown may call on the subject to come into any of the courts. Of course, I do not mean to say that trusts may be enforced in the King's Bench, or ejectments maintained in Chancery."

[The Lord Chancellor.—That is just the line where the distinction is drawn.]

It is so. The general principle of the Crown to sue in any of its courts is clear; but that principle may be subject in its application to the necessity of proceeding in a particular manner.

[The Lord Chancellor.—Then would you say that the Crown might bring a case of law into a court of equity, but not a case of equity into a court of law?]

Certainly; except in the instance of a proceeding under a statute.

[The Lord Chancellor.—No statute has much to do with this case. If the matter is matter of law, it is as objectionable in the Exchequer as in Chancery, unless [461] you can show that there is a peculiar jurisdiction in the Exchequer which would make such a proceeding correct. If the Attorney General might have filed this information in the Court of Chancery before the statute of Victoria, then that statute has no application to the question now.]

If the principles already submitted to the House are correct, then it is undoubted that an information of this nature could have been filed in the Exchequer antecedently to the statute, and by the statute all the equity jurisdiction of that court was

transferred to Chancery. In the decisions of the Court of Exchequer, referred to on the other side, the judges must have confined their opinions to one clause of the statute.

[The Lord Chancellor.—If the Crown may still go to the Court of Exchequer as a court of equity, the statute requires amendment, for it has taken away all the machinery by which this sort of business was transacted in that court. There can be no doubt of the intention of the legislature to take away all jurisdiction from the Court of Exchequer in equity.]

Such seems to be the reasonable construction of the statute. The right to adjudicate in such matters is entirely transferred to the Court of Chancery; and this is a matter of a purely equitable nature, for it charges a duty on the defendants as bailiffs, and a breach of duty by them in that character, and asks for the interference of the Court in respect of that charge. That is clearly within the jurisdiction of equity, and the order of the Court below must be sustained.

Mr. Bethell, in reply.

The simple inquiry here is, whether, *de facto*, the embankments are nuisances! That is not a subject for relief in equity. It is said that an indictment for a nuisance would not lie against the Corporation, because the Corpo-[462]-ration is not a party to the nuisance. But, if not, then the Corporation ought not to have been subjected to this proceeding, which relates entirely to nuisance; the *Attorney General v. Johnston* (2 John Wilson's Rep. 87).

The information elaborately sets forth a question of title in the Crown, and an alleged usurpation by the Corporation by acts of ownership, and asks that the title of the Crown may be declared. The information is therefore distinctly addressed to the question of freehold, which is a legal, and not an equitable question.

There are two classes of bills of peace: one may be maintained before trial, where the same interest exists in different persons; the other is where one title has been tried at law, and the bill is brought to prevent further and useless litigation. But the principle of a bill of peace does not apply to the Crown, for the Crown may include as many persons as it pleases in one information for intrusion. This case therefore does not fall within that class in which, in order to prevent endless litigation upon the same legal rights, equity permits bills to be filed in respect of such rights. The distinction is perfectly laid down by the case of *Adair v. The New River Company* (11 Ves. 429). The case of *Fairman v. King and Others* (MS.) was an instance of a bill of peace after the legal title had been once tried. The case of *Ewelme v. The Corporation of Andover* (1 Vern. 266), was not a proceeding of this sort at all, but was a bill to quiet possession, where there was no dispute as to what had before been the rights of the parties, for there had been a trial at law.

This is not a case of *purpresture*, for that is a wrongful inclosure of a part of the freehold of the Crown; but this is a complaint of a nuisance, and, as such, must be sent to a court of law. The case of *The Attorney General v. The [463] Mayor of Galway*, is not in point here, for that related to the application of the borough funds, and was therefore in the nature of a public trust.

[Lord Campbell.—What are the allegations of this information? Referring to them, let me ask, whether, if a man is alleged to be the keeper of a royal forest, and is charged with cutting timber, or doing any other act of ownership, would not that be a breach of a fiduciary duty? and would not that entitle the Crown to maintain a suit in equity against him? Is it not the same thing here? If the Mayor of London is the conservator of the Thames, and he grants the soil of the river, is not that a breach of his fiduciary duty?]

Separate parts of the information may no doubt be selected, which will give an appearance of an equitable claim being raised by it; but, if the whole is properly taken together, it is clear that the question raised is one of title to freehold, and one therefore which gives good ground for demurrer to the jurisdiction. The facts stated in the information are not admitted, except so far as is necessary for the purpose of trying this question of jurisdiction. That question is fairly raised by this demurrer, and ought to be decided in favor of these appellants.

The Lord Chancellor (March 13).—My Lords, some important points have been raised in the arguments in this case, upon which, if it was at all necessary for your

Lordships to express any opinion, I should, undoubtedly, think it right to desire time for more mature consideration: but so far from thinking it right to give an opinion upon points, which, though important, do not necessarily arise for decision, I think that it is my duty to abstain from such a course, because any opinion given under such circumstances can only have the effect of an *obiter* opinion expressed by an individual, and does not constitute the opinion of the whole House. The pleadings here are such as not to [464] call for a decision upon the more important points raised in argument; and the more important the points raised are, the more I consider it the duty of the House to confine itself to that which is before it, and to decide on the minor points alone, if they alone are properly raised for its consideration.

This case comes before the House upon demurrer. The rules of a court of equity, and in fact also of a court of law, upon matters of demurrer, are generally free from all doubt; although particular cases may occur which may raise a difficulty about their application. The general principle is clear. The proposition raised by the demurrer amounts to this: admitting all your facts to be true, you do not state a case that any court of equity can give relief upon. If there is any part of the case which would entitle the parties to a decree upon the facts stated, the demurrer cannot be supported. A demurrer to a bill or information, therefore, challenges the plaintiff to show that he is entitled to some portion of the relief prayed according to the facts stated.

This bill, which is filed by the Attorney General, asserts in terms the right of the Crown to the soil of the river Thames, between high and low water-marks. It alleges, indeed, that the defendants set up a claim to the freehold of that soil; but it alleges and charges that they have no such right, that the right is in the Crown; that the corporators of London, exercising their duty through the means of the Lord Mayor, are merely conservators or bailiffs of the Crown to protect the navigation of the river, but have no right to the soil and freehold of it, and that what they have done is not authorized by the powers belonging to them as conservators or bailiffs of the Crown. It is against this part of the information that the demurrer is directed. The information then goes on to allege certain grants made by the appellants in exercise of their supposed right to the soil or bed of the river, and [465] charges that the embankments made under those grants are nuisances; and it prays, that the rights of the Crown and of the appellants respectively may be ascertained; that issues, if necessary, may be granted; and that perpetual injunctions may also be granted against the persons who are making the said embankments, so as to prevent them from making any such, except under license of the Crown, and that those already made may be ordered to be abated. The defendants put in an answer and demurrer to this information. The answer of the appellant alleges that the particular acts which are charged as nuisances are not nuisances, and the appellants then demur generally as for want of equity. The appellants have adopted this course; they have endeavoured to take out of the information all those allegations which relate to nuisance, to which they answer, and they demur to all the rest.

The portion of the prayer of the bill which the appellants answer, prays, that the embankments on the river, or so much of them as have been executed, may be abated, and the river restored to the situation in which it was before the embankments were made. Singularly enough, they leave standing and unnoticed the prayer that the licensees of the Corporation may be restrained, by perpetual injunction, from making such of the embankments in question as have only been partly begun without the license and permission of her Majesty.

Now, according to the information and the case stated, although the injunction is not prayed for as against the Corporation or the Lord Mayor, it is prayed that parties not claiming a title to the property, but acting under a licence from the corporation, may not be permitted to proceed with their works. The effect therefore of this demurrer, if it should be allowed, would be, that so much of the information as is the subject of the demurrer, so far as the parties demurring are concerned, may be struck out [466] of the cause, and they would then go on upon those parts only to which the answer has been applied, and therefore without any prayer for injunction so far as the appellants are concerned, but with the prayer standing upon the injunction so far as the other defendants are concerned. They would go to a hearing upon that part of the prayer

to which I have before alluded, namely, that the embankment made may be prevented from being made.

The information also alleges that the Corporation, as conservators and bailiffs, have violated their duty towards the Queen, as proprietor of the soil, in granting licenses for those embankments, and alleges that they have received fines and rents and other emoluments from the parties to whom these licenses have been granted, and prays an account of what they have so received.

If the rule is to prevail in the present case, which has prevailed in all other cases upon subjects of demurrer, that all the matters demurred to are true in fact, your Lordships are to assume, upon the matters demurred to, that the corporators of the city of London, acting through the Lord Mayor, in the exercise of their civil power, are only the conservators and bailiffs of the Thames, and have, in violation of their duty as such conservators, granted licenses which they were not authorised to grant, and have, in so doing, received profits, which, as bailiffs and conservators, they were not entitled to receive, but for which, being so received by them, they are answerable to the Crown for which they are acting.

It is said by the learned counsel for the appellants, that you must not pick out of the information a passage here and there, and put them together, but look to the main subjects of the information. Now, I conceive that a party is entitled to pick out particular parts of the information to make out his case; that, upon the information as it stands, admitting all the facts to be true as stated, when the party comes to a hearing of such allegation he may, [467] upon the face of the information, select such facts as are admitted, and as will entitle him to relief. It is quite immaterial in what part of the information you find this ground for relief, provided it is to be found there, the facts being so admitted, and the Court being called upon to give effect to the information.

If this information should be brought to a hearing, and all that which the demurrer admits should appear to be true, there cannot be a doubt as to the title of the Crown to the relief which the information prays. What does the information charge? That the Crown is proprietor of the soil; that the defendants are merely conservators, and have, in violation of their duty, granted licences, and have, by means of such violation of duty, taken fines and emoluments which they were not entitled to receive. It is perfectly true that the information shews a pretence of title, but the allegation of the pretence of title is no admission that such title really exists. If it was, the information alleging that the Crown is entitled, and that the defendants are not, those facts being taken to be true, the information would then present a case for relief, upon that admission of facts. I apprehend that to be so beyond all doubt.

The case has been argued, and necessarily argued, as if this was in substance an ejectment bill, a bill seeking to recover possession of land, and, so far, as an endeavour by a court of equity to assume a jurisdiction which properly belongs to a court of law. It is perfectly well known that very many ejectment bills, which, in point of fact, and in substance, are ejectment bills, are so framed as to be incapable of being met by demurrer, and in that way the jurisdiction of a court of equity has been sustained. Parties frequently, under the pretence of contesting the right to cut timber, have come into equity, and used title-deeds, which really raised the question of the title to the estate itself, and various other expedients have been resorted to for the purpose of endeavouring to bring such a matter [468] within the jurisdiction of a court of equity. If the bill be properly framed for that purpose, it precludes the opposing party from demurring, but it does not prevent the objection to the bill being raised when the case comes on for hearing, because then, when the facts are known, if it appears that the real question between the parties is the title to the freehold, the court of equity, notwithstanding the facts are true, as stated, may and does, and properly does, refuse to interfere, upon the ground of its being a matter of law only, and therefore not within the jurisdiction of a court of equity. That is not the case here. If the facts, as stated here, are true, there is no question of freehold raised; because, if the facts are true, the Crown is entitled to the freehold, the defendants hold under the Crown certain privileges only, and, having been guilty of an abuse of those privileges, are bound to answer to the Crown. How is it possible that the rule which applies to cases of this class can be so construed as to make the demurrer tenable? Is it possible, the facts being true, to say that a case has not been made out for the interposition of a court of equity? I take the whole general



scope of the statement of the information into my consideration when I put this question. Here is an allegation of title in the Crown, and there is an allegation also of abuse of privileges granted by the Crown to the appellants, and then comes the general charge of the possession of documents which are alleged to relate to matters herein before mentioned—"all the matters herein before mentioned,"—and you cannot take them otherwise. The language is clear and distinct, and therefore the demurrer admits that the papers and documents (the production of which is refused by the demurrer), do relate, or may relate—it is the same thing—to those matters amongst others; some of these matters being denied by the answer, and others being admitted by the demurrer.

Upon these grounds it appears to me that this House [469] would not be doing its duty, and would very much tend to relax the rules of pleading (which rules, if they are to be relaxed, are not to be relaxed by decision in a particular case), if it overruled the pleadings in this case, by expressing an opinion upon points which in my opinion do not arise in this case, upon matters of very high importance, which ought only to be decided where there is no doubt at all as to the mode and form in which they are brought forward for decision. I therefore move your Lordships to affirm the judgment of the Master of the Rolls.

Lord Campbell.—My Lords, I take exactly the same view of this case with my noble and learned friend who has just addressed the House. If it was necessary to decide that great question of the construction of the Act, 5 Vict., as to the transfer of the jurisdiction exercised by the Court of Exchequer in revenue causes, in what may be called the equity side of the Court of Exchequer, to the Court of Chancery, I should certainly wish to have time to consider it, and I should probably request that we might have the assistance of the judges in considering it; but I think that question is not at all necessary for us to decide, and therefore I give no opinion upon it.

I proceed upon the second reason given in the respondent's case, "because the facts stated by the information, and covered by the demurrer, furnish a proper and sufficient case to entitle the Crown to the relief prayed by the information, and demurred to, on some part thereof in the Court of Chancery in the ordinary exercise of its equitable jurisdiction, and independently of the jurisdiction transferred to that court by the above statute." It seems to me to be quite clear, that if this information had been filed in the Court of Chancery before the act of Parliament referred to had been passed, the demurrer could not have been sustained. Is there not a case for the equitable jurisdiction of the Court of Chancery that is not covered by the demurrer? Whatever other question there may be that [470] may be raised with respect to the soil of the river, is there not enough raised to show that this is a case for equitable relief? It is expressly averred that the bed and soil of the river Thames belong to the Crown. It is expressly alleged that the mayor and corporation of London are conservators of the river, and that they are, as such and for that purpose, the agents and bailiffs of the Crown. It is expressly alleged, that in violation of their duty as agents of the Crown, they have granted licences to embank the soil of the river, and that they have received money for so doing.

These are the facts, and I entertain no doubt that they establish a clear case for the interference of the Court of Chancery. It seems to me that the Crown has as good a right to relief in this case, as in the case, which I believe has occurred more than once, where the keeper of a royal forest has granted a power to depasture upon it, or to cut timber upon it, or has even made a grant of part of the soil of the forest. Can there be any doubt that, in such a case, he would be liable to an information in the Court of Chancery?—and would have been liable before this statute of the 5th of Victoria was passed, to account for what he had received through a breach of his duty as agent for the Crown. It seems to me that these conservators of the river Thames stand exactly in the same relation to the Crown? If these facts are alleged, which we must now take to be true, I think there is enough to support the jurisdiction in equity. The facts as alleged may be wholly unfounded; hereafter it may turn out that the Crown is not so entitled, for that the soil and freehold of the bed of the river Thames do belong to the Corporation and City of London; but at present, and on these pleadings, we must suppose that the Crown is seised of them, and that the Mayor and Corporation have held them only as

bailiffs, and have been guilty of a breach of duty by granting these licenses, and receiving money for the licenses. Under these circumstances it appears to me quite clear that this is a case in which the information [471] may be maintained by the Crown in the Court of Chancery without any transfer of any new power to the Court of Chancery from the Court of Exchequer, and, that therefore, this demurrer must be overruled.

Mr. Bethell.—In the Court below, the Master of the Rolls held, what I humbly submit to be the universal principle, that the Crown neither receives nor pays any costs. Therefore, after discussion there, the demurrer was overruled without costs.

Mr. Maule.—There is no such rule as that the Attorney General never pays costs. One of the last cases which was decided upon the subject was that of the *Attorney General v. Lord Ashburnham* (1 Si. and St. 394), where Sir John Leach, in a case where a charity information had been filed, without a relator, under the 59 Geo. 3, c. 91, held that the Court had jurisdiction to order the defendant to pay costs to the Attorney General. In the course of his judgment there he expressly stated that there was no such general principle in Equity, as that the Crown cannot receive costs.

The Lord Chancellor.—That case does not apply here, where the Attorney General sues as an officer of the Crown in right of the Crown. As such he does not pay costs. I do not mean to say that a case may not occur in which the Attorney General would be liable to pay costs, but then where private parties have no chance of getting costs, and they have none here, the Court is cautious how it makes them pay costs. I think the judgment must be affirmed, without costs.

Order affirmed, without costs.

[472] THOMAS BOURKE RICKETTS,—*Appellant*; WILLIAM TURQUAND, and Others,—*Respondents* [March 20, 21, 1848].

[*Mews' Dig.* xv. 671, 1174. Followed in *Jennings v. Jennings*, 1878, 1 L.R. Ir. 552. Distinguished in *King v. King*, 1884, 13 L.R. Ir. 531. See *Webb v. Byng*, 1855, 1 Kay and J. 580; and *Whitfield v. Langdale*, 1875, 1 Ch. D. 61.]

*Heir-at-law—Evidence—Issue—Will.*

It is the ordinary rule of a court of equity, in cases where an heir disputes the will, to grant an issue to try that question; but where he does not dispute it, but acts under it, merely denying that certain portions of the land pass under the description used in it, a court of equity has full jurisdiction to determine the question thus raised, without granting an issue, or may grant such issue at its discretion.

In such a case parol evidence of what was considered, in the lifetime of the testator, to be the extent of the lands constituting the estate, is receivable.

A testator, who describes himself as of "Ashford Hall, in the county of Salop," devised "all my estate in Shropshire, called Ashford Hall," to trustees, for sale:

Held, that this description was not confined to the mansion-house so called, and the lands immediately adjoining, but extended to such other lands in Shropshire as he possessed at the time of making his will:

Held also, that the court of equity, in a suit to enforce the trusts of the will, might receive parol evidence to shew what the testator had been accustomed to consider the Ashford Hall Estate.

This was an appeal against a decree of the Master of the Rolls in a suit brought by the assignees of one John B. Ricketts, under the following circumstances:—

In the year 1802, George Crawford Ricketts, Esquire, [473] purchased an estate in Shropshire. The conveyance of this estate, effected by deeds of lease and release, of the 1st and 2nd of October in that year, thus described the premises purchased:—"All that capital messuage or mansion house, with the gardens, shrubberies, stables, fish pools, coach-house, out-buildings, and appurtenances thereunto belonging, called Ashford Hall, heretofore the residence of Jonathan Green, deceased, and afterwards of Thomas Stokes, lately of Charles Edward Nugent, and now or late of William Henry Worthington; and also all that piece or parcel of meadow land, or ground

adjoining to the said mansion-house, called the Lawn, and all that meadow adjacent to the said lawn, and containing, with the said lawn, twenty-eight acres, two roods, fourteen perches, and occupied with the said mansion-house; and also all those three several pieces of meadow or pasture land, lying together, now called the Team-side Meadow, the Marl Brook, the Gravel-pit Piece, and the Gaul Meadow, and containing in the whole, by estimation, forty-one acres, and now or late in the possession of Richard Hodnet; and also all that newly-erected barn, with the fold-yards, sheds, and appurtenances, and all those several pieces or parcels of meadow ground, pasture land, orchard and arable land, all lying together, and containing in the whole, by admeasurements, eighty-one acres and twenty-one perches, and called by the names of Stoneybridge Meadow, the New Tending Orchard, the Barn-close Meadow, the Brick-kiln Field, the Shaw, the Fish-pool Field or Meadow, the Upper and Lower Hollyditch, Young Woodfield, and the Upper and Lower Lawrence Furlongs; and also all that messuage in the village of Ashford Bowdler, with the barn, out-buildings, and several pieces or parcels of meadow or pasture land and orcharding, containing five acres; and also all that piece called the Little Meadow, containing one acre; and also all that orchard, piece or parcel of land or ground, heretofore called Hollyditch Orchard, [474] and now or lately called Wheatal's Field, or Wheatal's Orchard, containing one acre and one rood, or thereabouts; and also all that croft or piece of meadow land formerly called Twist Oakfield, and heretofore lying open with the Gravel-pit Piece aforesaid, containing one acre or thereabouts: all which said hereditaments and premises (except the said piece called the Fish-pool Field or Meadow, containing four acres and two roods, which lies in the parish of Richard's Castle, in the said county of Salop), are situate, lying, and being in the parish of Ashford Bowdley, in the said county of Salop; and also all that piece or parcel of arable land, now or lately known by the name of the Church Land, formerly part of the estate of Henry Jordan, and situate at Overton, in the parish of Richard's Castle aforesaid, and also the tithes," etc.

The appellant, the eldest son of Mr. G. C. Ricketts, married in 1804, and on occasion of that marriage, a settlement to the amount of £4000 was made by Mr. G. C. Ricketts on his son and the intended wife, and this sum was charged on the purchased property, by deeds, dated on the 19th and 20th July, 1804, in which the estate was described in the same manner as before, omitting, however, the references to "Team-side Meadow, Marl-brook, Gravel-pit Piece, and Gaul Meadow," and also the references to the messuage in "Ashford Bowdler, and the Little Meadow," and also to the "Church Land in the parish of Richard's Castle."

In 1808 G. C. Ricketts made his will, in which he described himself as "of Ashford Hall, in the county of Salop," and by which, among other things, he devised as follows:—"As it is my wish and desire that all my estate in Shropshire, called Ashford Hall, should be sold, I do therefore give and devise the same unto my son, Thomas Bourke Ricketts, and my son-in-law, Rev. R. D. Hallifax, and the survivor of them, and the heirs of such survivor, in trust to sell and dispose of the same, for the most [475] money that can be got for the same. The proceeds of such sale, after deducting what may be due on the mortgage given on my eldest son's marriage, I give and bequeath unto my sons, John B. Ricketts, G. W. Ricketts, and my daughters, M. B. Anderson, E. B. Hallifax, and L. F. Ricketts, in equal proportions, share and share alike." The testator appointed Mr. Hallifax and T. B. Ricketts his executors.

The testator died in 1811, and the executors some time afterwards advertised for sale in five lots the estate comprised in the indentures of October 1802, and the printed particulars described it as consisting of "a substantial mansion called Ashford Hall, a walled garden, hothouse, pleasure grounds, lawn, and sundry rich inclosures, the whole including about 166 acres." As no sale was effected on this occasion, the two executors, in July 1812, employed Mr. Christie of London to sell the estate, and, with their knowledge, particulars were circulated, in which it was described as "a most desirable freehold estate, consisting of a substantial convenient mansion, called Ashford Hall, in excellent repair and neat condition, with stabling and offices of every description for the complete accommodation of a family, walled kitchen gardens, lawn, pleasure ground, and rich inclosures, altogether 121 acres and upwards." No sale took place on this occasion.

In September 1823, the appellant, on behalf of himself and the other executor

and trustee, contracted with Miss Harriet Buckley for the sale to her of the mansion-house and appurtenances, and thirty-three acres of land, for the sum of £3937 10s., and this purchase money was applied in part satisfaction of the mortgage of 1804.

In 1831 J. B. Ricketts, who on the death of his brother, G. W. Ricketts, had become entitled to that brother's share, became bankrupt, and the plaintiffs were appointed assignees of his estate. They then filed a bill, and afterwards an amended bill, against the trustees and children [476] of the testator, praying that the will might be declared well proved and established; that an account might be taken in respect of the monies received by the trustees from the sale of such part of the Shropshire estate as had been sold, and of the rents received by the same parties; that a rent might be fixed by the master, and paid by T. B. Ricketts in respect of his occupation of the mansion house and appurtenances previously to the sale thereof to H. Buckley; that the unsold part of the Shropshire estate might be sold, and two-sixth parts of the proceeds thereof paid to the plaintiffs, and a receiver appointed in the mean time.

The defendant, T. B. Ricketts, put in four consecutive answers to the original bill, and the like number of answers to the amended bill. By the former he alleged that the estate called Ashford Hall consisted of a capital messuage, with the garden, shrubberies, stables, fish pools, coach house, outbuildings, and appurtenances thereunto belonging, containing about ten acres; that the said capital messuages, without the said shrubberies and fish pools, was in common parlance called Ashford Hall, and was so called before part of the said shrubberies and fish pools conveyed therewith to the testator, under the same name, was purchased from an adjoining estate, and added thereto; that the testator was at the time of making his will, and thenceforward till the time of his death, seised in fee simple of the real estate in the county of Salop, containing altogether 154 acres or thereabouts, and which, according to the defendant's knowledge and belief, did not form any part of the testator's estate called Ashford Hall, but went and was known to the testator by the names and descriptions of "the Ashford Estate," "the Ashford Farm," "the Forty Acres," "the House in Village," and others mentioned in the mortgage security for £4000; and under such circumstances the defendant, as the heir at law of the testator, submitted that the words "all my estate in Shropshire, called [477] Ashford Hall," consisted of the premises comprised in the said ten acres, and did not include any other estate or property of the testator situate in Shropshire; that the estate called and distinguished as Ashford Hall, was, at the time when the testator made his will, of greater value than the amount of the mortgage debt of £4000; that to the best of the defendant's knowledge and belief, the testator never spoke of or called the other real estate of 154 acres, or any part thereof, "Ashford Hall," or his "Ashford Hall estate;" and the defendant, by the same answer, insisted that the hereditaments and premises containing 154 acres or thereabouts, descended to the defendant as the heir at law of the testator. The defendant, in his answers, likewise stated his belief that the estate and hereditaments, consisting of the particulars set forth in the bills, did not before the 28th of September 1798, belong to the same proprietor, and were not considered before that time as one estate, but that after that time they were called and known by the aggregate name of Ashford, or the Ashford estate, and continued to be so called and known to the testator up to the time of his death, and not called or known by the aggregate name or names of the Ashford Hall estate, or the estate of Ashford Hall.

The defendant admitted that he had principally acted in the execution of the trusts of the testator's will since the testator's death; that the estate and hereditaments in question, so purchased by and conveyed to the testator in the year 1802, were treated and considered by the defendant, up to the time of preparing his answers to the original bill, but not since, and by his co-trustee during his life, as one and the same devised estate and hereditaments; but he stated that they were not so devised, because the testator never did call the said estate and hereditaments Ashford Hall, but called them his Ashford estate; and that if the devise was not altogether invalid by reason of the uncertainty of the description of the property, still, nothing in law [478] passed under the words "all my estate in Shropshire called Ashford Hall," except that part of the purchased premises which was described and distinguished from the other parts of the estate and hereditaments, as being called Ashford Hall,

in the several conveyances to and from the testator, that is to say, "all that capital messuage or mansion house, with the garden, shrubberies, stables, fish pools, coach-house, outbuildings and appurtenances thereunto belonging, called Ashford Hall;" that the conveyance to Miss Buckley, containing the recital of the testator's desire as expressed in his will, to the effect that all his estate in Shropshire called Ashford Hall, including the hereditaments thereafter described, should be sold, was inadvertently executed by the defendant, and that the words "including the hereditaments thereafter described," were artfully inserted by the purchaser who prepared the conveyance, to give an appearance of title; and that the conveyances to and from the testator were in favour of the defendant's claim as heir at law, by showing that the testator had an estate which in title, viz., "the capital messuage, with the gardens, shrubberies, fish pools, coach-house, outbuilding, and appurtenances, called Ashford Hall," completely answered the description in the will of "all my estate in Shropshire called Ashford Hall."

Evidence was adduced on the part of the plaintiffs to the following effect:—that T. B. Ricketts had, in a correspondence, declared that he considered himself as a trustee of the property in question for the benefit of himself and the other legatees named in the testator's will, and treated the property, up to the time of a sale of a part thereof to Miss Buckley, as one entire and undivided estate. It was also proved that the estate and premises were purchased as one entire estate by a person named Stokes in 1797; that Green was the sole proprietor thereof during several years before Stokes became the owner, and that before Green became the owner, the estate and premises belonged to one Hall, who devised them to Green; and [479] by the conveyance to Stokes as well as by deeds of prior date, the *shrubberies and fish pools* were mentioned amongst the parcels thereby conveyed, and by the evidence of numerous witnesses, several of whom had lived in the vicinity of the estate for very many years past, the estate was represented by them to have been known as one entire and undivided estate, and called by them and the testator, and those living in its vicinity, as the Ashford Hall estate, or the Ashford estate. There was also evidence adduced of a map having been made of the estate in 1811, by a witness named Evans, by the direction of the solicitor of the trustees, and of a lease which had been granted to a witness named Carter of a considerable portion of the estate by the trustees, T. B. Ricketts and Hallifax. There was also evidence adduced of the letters written by T. B. Ricketts to Miss Buckley, pending the treaty for purchase by her of part of the property, showing that he considered himself a trustee of the whole of the property, and also of the proposed agreement with Miss Buckley in 1828, wherein he was described as a trustee.

No evidence was offered to the court on the part of the defendant.

The cause came on to be heard before the Master of the Rolls, on the 20th, 21st, and 22d days of February, 1844, and by a decree then made, his Lordship declared that the will of George Crawford Ricketts, the testator, was well proved and ought to be established, and the trusts thereof performed and carried into execution, and that the whole of the testator's estates in Shropshire passed by his will. And he decreed that it should be referred to the Master to take an account of all sums of money which had been produced by the sale of the mansion house and lands to Miss Buckley, and received by the defendant (the appellant), and how much of such sum was properly applied by the defendant in paying off the mortgage for £4000; and further directions were reserved.

[480] Mr. Serjeant Manning and Mr. Warren for the appellant.

The decree of the Master of the Rolls is erroneous; he has given a greater effect to the words than they can legally bear. The whole estate did not pass by the will. The Master of the Rolls has said that the whole of the estates in Shropshire passed by the will, yet part of what the respondents call the Ashford Hall estate is not within the county, and if ejectment should be brought to recover the lands in Shropshire, it must be confined to those which were within the county. The decree directs that all the estates (not estate, but estates), in Shropshire shall be sold. Under that decree the trustees would be bound to sell all the tithes of the lands, and to account to all the devisees in trust.

[Lord Campbell.—Did you make that point before the Master of the Rolls, or make any objection to the minutes of the decree?]

No objection of that kind was made. But though that particular point was not taken, this House will not affirm a judgment which on the face of it is erroneous. Now, it is clear that the land tax and the tithes would not pass under this devise, and therefore a decree, declaring that all the estates passed, is erroneous.

The rule to be applied in this case is that which is stated in Wigram's Treatise on Extrinsic Evidence, where it is said, "The question of expounding a will is not to discover what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words."

[The Lord Chancellor.—That merely intends that you are not to speculate on the meaning.]

It is clear, on the facts of this case, that the entirety of the property was not intended to be given, and it could not be so intended, for in 1799 three of the closes, which are [481] said to have passed, were exchanged for other closes. There is no ground for saying that this devise of "all my estate in Shropshire, called Ashford Hall," has any other application than to that particular property, which was originally conveyed to Mr. Ricketts by that name. This is clear, for several reasons. First, because there is property which never was held by the former proprietors of the estate; secondly, because the phrase will not cover the redeemed land tax, or the tithes, or the rent-charge created, in lieu thereof, by statute. In order to convey these, the party must have used very different language, and his not having done so must be taken as proof of what was his real intention.

It is curious enough that in no one part of the will does the testator use the phrase which alone would justify the argument on the other side. In no one part does he say "my Ashford Hall estate:" he invariably speaks of it as his estate called Ashford Hall, which plainly restricts his meaning to a particular portion of the property. In the settlement of July 1804 he so refers to it, and that mode of describing it he continued to the last. So that if evidence of his acts is to be given as evidence of his meaning, it is clear that he did not convey all the estates he was there possessed of, but only that part of them which had received the specific designation of Ashford Hall.

[The Lord Chancellor.—Your argument would go to shew that only the mansion-house and ten acres adjoining it would pass.]

That is so. The argument has a double aspect. The testator may not have said what he did intend to say, or he may have said what he did not intend to say, and in either case the heir-at-law would be entitled. There is no ground for any strained construction of the words of this will, in order to try to arrive at the intentions of the testator, for he knew well how to express himself; he was a lawyer; and when, as in another part of the [482] will, and with reference to another estate, he intended to pick out a particular portion of his estate, he knew how to do it.

[Lord Campbell.—Then you think that he intended to die intestate of the one hundred and fifty-four acres?]

He did. The rule which was laid down in the case of *Doe d. Oxenden v. Chichester* (4 Dow. 65, affirming the judgment of the Common Pleas, 3 Taunt. 147), must govern the present case, namely, that where there is a sufficient estate to satisfy a devise according to one meaning of the words employed, collateral evidence is not admissible to shew that the testator meant to use them in a more extensive sense. In this case the admission of such evidence is improper, because there exist a capital mansion-house and several acres of land exactly answering the description given in the will; besides which, there can be no doubt that the testator used the description in the sense in which it had been used when he purchased the estate four years before he made his will. He knew that he had other estates in Shropshire.

[Lord Campbell.—You must not forget that he uses the word "all" before "my estates."]

That does not affect the question. "All" would describe his interest in the property, and might not be employed with any other view. If he had said "all my Ashford Hall estate," that would have been sufficient; but he being a lawyer, and knowing the effect of restrictive words, has used them, and spoken only of all "my estate called Ashford Hall."

[Lord Campbell.—Does not that bring it to a question of evidence, namely, what was the estate which went by the name of the Ashford Hall Estate in 1808?]

It may do so.

[Lord Campbell.—Then, if it comes to the weight of evidence, is not that fatal to your argument?]

[483] It is not; for you must take the proof of what the testator called it, not what it was called by the tradesmen of any neighbouring village.

[The Lord Chancellor.—It must be the name by which it was generally known.]

Suppose he bought ten acres of bare ground without any name, and then disposed of it, calling it the Rookery; if what was meant by "the Rookery" should afterwards become a question, the best evidence of what the testator meant must be obtained, and the question then would, in fact, be parcel or no parcel. But here a specific estate, which had long had a specific name, was dealt with by that name, and no such question arises.

[The Lord Chancellor.—It is stated in the bill that all these lands "were treated by the testator as one individual estate, and called and known by the name of the Ashford Hall estate."]

That statement is utterly unsustained by the evidence.

[The Lord Chancellor.—That is another matter; but that statement strictly relates to the question which you now say is the question in the cause.]

The evidence of what other people called the estate is evidence of a dangerous class. It must indeed be assumed, that if all the world knows an estate by one particular name, the testator would use that name in the same way as all the rest of the world. But, in the first place, the evidence here is not conclusive to shew that all the world did know the whole of the testator's estates to be included in the term the estates of Ashford Hall; and, in the next place, there is not one scrap of paper to shew that he used the phrase in such a sense, while there are deeds in existence which shew the probability that he used the phrase in a much less extensive sense.

If this house should be satisfied that in fact the testator intended to dispose of only part of the estate in Shropshire, the decision of the case would be thereby affected. [484] Now there is a doubt upon this subject; and if there is a doubt upon it, then the legal proposition arises that the heir at law is entitled. In Jarman on Wills it is said (page 315), "Conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the rights of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness. The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication." The doctrine thus stated is supported by the cases of *Thomas v. Thomas* (3 Barn. and Cres. 825), *Doe d. Ashforth v. Bower* (3 Barn. and Ad. 453).

If the devisee has hitherto acted under an erroneous impression as to the extent of his rights, that will not affect them, or change the authority of the devise itself. Here the devisee was in the army and with his regiment, and the mortgage deeds, which might have informed him of the real nature of his rights, were with the mortgagee, so that he was without the means of forming a correct opinion; he cannot therefore be bound by anything that he has said or done under such circumstances.

Under the circumstances which exist in this case, the proper course of proceeding was not by bill. In a case of *Strickland v. Strickland*, which was recently before the Court of Chancery, the Lord Chancellor said that equity was not the proper place in which to try a question of partly legal title.

The Lord Chancellor.—We think that we need only trouble the respondent's counsel on the difficulty occasioned by the words of the decree, as to their effect on the tithes and the land tax. The testator devises "all my [485] estates in Shropshire called Ashford Hall." Now it appears by the conveyance that there are tithes there. The decree is peculiar; it declares that the whole of the "testator's estates in Shropshire" passed. That would include the rent charge and the land tax. Unless the respondents can make out that they are properly included, the decree would on the face of it appear to go beyond the words of the will. That would create some difficulty, though it would not affect the ultimate disposal of the appeal. If the words were altered in this way, that the whole of the "testator's lands in Shropshire"

passed, and it was referred to the master to inquire what were those lands, then it might be directed that such lands should be declared to pass by the will.

Mr. Turner (Mr. Parker, Mr. Hallett, and Mr. Heathfield, were with him) for the respondents.—The difficulty as to the land tax can be easily removed. When the testator purchased the land tax he was the owner of the fee, and consequently the land tax would pass under the term “land,” for the land tax is merged in the land. As to the tithes, it is clear, on the appellant’s own showing, that no claim to them has been set up by the respondent. [He was stopped.]

The Lord Chancellor.—My Lords, this appears to be a very clear case, and one which ought not to have been brought here for reconsideration. The Master of the Rolls was clearly of opinion, upon grounds which appear to be perfectly unshaken by any observations that have been made by the counsel who have addressed the House, that this was the proper decree to be made. In the first place, it has been argued as if a Court of Equity has no jurisdiction to adopt the course which the Master of the Rolls had adopted; but nothing can be more erroneous than that supposition. The bill is filed for the purpose of executing a trust. Reference has been made to some observations which I am supposed to have made in *Strickland v. [486] Strickland*, and an interpretation has been attempted to be put upon them, which those observations do not warrant. They were not then made for the first time, because it is the established doctrine of a court of equity, that the court will not entertain a suit for trying an adverse title to land; but here the party could not try the question at law. This is the case of a trust; the assignees are calling on the devisees under the will, the trustees, to account for property in which the bankrupt is interested under the will. Now, if the heir at law had disputed the will, as in the ordinary cases, if there had been no special circumstances, such as exist in this case, he might have said, “I do not admit the will, and there must be an issue to try it.” But his right to do that is gone by; he does not ask to have an issue *devisavit vel non* to try the validity of the will; but he says there are certain portions of the lands which do not pass by the description the testator has used in the will. The plaintiff says, “You are trustees for me of all the testator gave to you in trust;” and the question arises as to whether a particular description of the lands sought to be taken out of the devise did or did not pass by it; that is a question which a court of equity must try, unless there should appear to be a difficulty on the evidence, in which case the court, in order to ascertain what the fact may be, is in the habit of sending it for trial by issue. It is a question strictly within the jurisdiction of the court to ascertain to what extent the trust goes; and there are no means of ascertaining that, otherwise than by coming to a court of equity. The Master of the Rolls has so treated it, and beyond all doubt that is the rule of a court of equity.

Then how does the case stand? It stands thus: that the bill, in very distinct terms, twice over in the course of the statement, says, “That before and up to the time of the date and execution of the last-mentioned indenture of release, the hereditaments and premises thereby conveyed and therein comprised, had been, and the same were [487] considered as one estate, and were called and known by the name of the Ashford Hall estate, or the Estate of Ashford Hall, and that they continued to be called and known by such name or names, by the said George Crawford Ricketts, after he had become, in manner aforesaid, the purchaser thereof, and up to the time of his death;” and in a subsequent part it contains a passage, which, having before read, I will not again refer to, and in which the same proposition is repeated, and the same allegation made, that it was called by the testator his Ashford Hall estate. The plaintiff, therefore, put directly in issue the ground on which he considered the words of the will passed the whole of the property; of course, having put that in issue, and the defendant having put in the last of his eight answers, the cause went to issue in Chancery, and the proposition which the plaintiff contended for, being, that this property did pass by that description, he proceeded in the regular course to prove the proposition which he had stated, namely, that the estate was used as one estate, and acquired the name from the former proprietor of the Ashford Hall estate, or the Estate of Ashford Hall, and that the testator had himself occupied it as one estate, and had himself called it or described it as the Ashford Hall estate, and that he was in the habit of so doing. Various instances are brought to prove this



proposition, and, beyond all doubt they do prove it. Whether on cross-examination of the witnesses who supply this proof, it could have been shown that they had no sufficient means of knowledge, is a matter which does not appear on their depositions. Over and again they say the testator did so call it, and that is the appellation they give it, and they prove all that the allegations in the bill assert as the foundation of the plaintiff's claim. Now the party interested in meeting these allegations and contradicting what those witnesses were called to prove, enters into no evidence at all. Of all persons he was [488] the best able to know what the testator's views were with regard to his own property. He was the eldest son; his father was in possession, and nobody could be more capable of establishing the fact of his father's intention in not describing, or intending not to describe the property, as alleged in the bill; but no witnesses of any kind are called. It remains, therefore, on the evidence, such as it is, which is produced by the plaintiff, and not upon any other. There are various witnesses—very many in point of number—all of whom speak positively to the fact; and in that state of the evidence is a court of equity to say that there is a doubt? A doubt can only be raised on a conflict of evidence or by cross-examination, which will show that the parties who speak to facts have no means of knowing the facts they depose to. But to neither the one nor the other has the defendant had recourse: he has not attempted to shake the evidence produced by the plaintiff, nor has he, by bringing evidence on his own part, done that which was necessary to contradict the allegations in the bill. Therefore, whatever the real facts are, we can only judge of them by that which is put in issue and proved in the cause; and by those facts, so put in issue and so proved, it appears that the testator was in the occupation of this property as one estate, and that he did describe and call it the "Ashford Hall estate," or "the Estate of Ashford Hall," and I have been unable to discover the difference between the one and the other; they both mean to describe the same thing. Whether the word "estate" is put after or before "Hall," cannot, in my opinion, make any difference as to the meaning which the person who uttered those words, when he described the estates, meant to attach to the words so used.

It is very true that, in the deeds under which the testator derived title, part of the estate is described as the Ashford Hall estate, and then the deed goes on to describe other parts of the lands according to names or descriptions, not [489] necessarily including those other pieces of land in the description of Ashford Hall, describing Ashford Hall as the mansion-house. No doubt that must originally have been the name of the mansion-house, but how common is it for an estate to get the name of the mansion-house? First of all, it is such and such a Hall; then it is the Hall estate. It is by no means inconsistent with strong probability that the testator, even if he had obtained the lands from different quarters, was anxious to get them into one estate, and that he called the whole by one name; that is sufficient to shew what he meant by the terms used in his will. Here he procured it all from one source, except that one portion of land which he gained by exchange, and that part would well fall within the description of the original property. It is not unnatural that those parts so taken in exchange for other parts of the estate would fall within the same description, and be considered as a part of the estate to which they were added, and then the evidence is that such was the mode in which the testator dealt with the property, and such the appellation he gave to it; and that directly meets the allegation contained in the bill.

Then we have what I consider the most potent evidence of all; the heir being disinherited as far as this property goes, he being most interested in finding out that the property did not pass from him as heir; we have the extraordinary fact that from 1811, when the testator died, down to I do not know how long ago, he knew of this devise, acquiesced in it, dealt with the estate as trustee, conveyed part of it to another person, and then described all the lands as passing under this appellation contained in this recital:—"And whereas the said George Ricketts, by his last will, duly executed, and bearing date the 26th of April, 1808, expressed his wish and desire that his estate in Shropshire, called Ashford Hall, including hereditaments hereinafter described, should be sold." We have therefore this, which I use as evidence; it is not an estoppel if it [490] turns out that he was in error; but as matter of evidence, we have the heir-at-law acting in this way. This deed bears date in 1824, the death having been in 1811. Many years, therefore, after the testator's death, during the

whole of which time the appellant had ample opportunity for considering what his rights as heir-at-law were, we have him reciting the fact that the devise was intended to include all the lands, and that it was not confined to the mansion-house. Who could know better what the testator meant to describe by the terms that he used in the will than the heir-at-law himself? If, my Lords, we had had the heir-at-law himself personally examined, and he had said that his father had always called these lands "the Ashford Hall estate," and had so dealt with them that he intended by the terms used in his will to include all that property which, in his lifetime, he always considered as included in that appellation, would there have been any difference? All we are in search of are the terms by which the testator was in the habit of describing the property. It is proved, beyond all doubt as to the real history of the facts of the case, that the testator did so consider it, and that the terms which are used in his will are the correct terms, and, therefore, that the property is described in a manner so as to pass the whole by that description.

We have nothing whatever to do with the case that has been referred to, where there was clearly a contradiction, and where you could go into evidence to show what the testator meant, without contradicting the terms of the will. If he describes lands in a particular parish by a particular name, or in a particular locality, you cannot go into evidence to show he meant by the general appellation to include something out of it; you cannot do that without contradicting the express terms used. Here is a term which included more or less land according to what was meant by the term used, and all we are in search of is the [491] particular meaning of the expression which is used. It does appear to me that we have found that upon this will, and that there is not the least doubt that the Master of the Rolls has come to a right conclusion.

I therefore move your Lordships to affirm the decree of the Master of the Rolls, with costs, because, although as a matter of precaution, there is to be the inquiry which I have mentioned and shall propose to direct, the absence of direction that there shall be such an inquiry is not the ground of the appeal. After all it may turn out that the inquiry may be nugatory, and there seems reason to believe it will be so at least as to the land tax, but that is a matter which will be evident on the report, and it certainly is not an objection to the decree, which ought to protect the party appealing from paying the costs of the appeal.

Lord Campbell.—My Lords, I think the Master of the Rolls did quite right in stopping the reply when the case was heard before him, for it would have been a great waste of the public time further to hear the case debated at the bar. I believe it would likewise have been a waste of the public time if we had called upon the respondent's counsel to argue the questions which have been submitted to us by the appellants. I regret that such a case should have been so debated in the court below, and I deeply regret that it should have been brought by appeal before your Lordships.

The first question, my Lords, which we are called upon to determine, is this, whether the bill should be dismissed? for I find the reasons conclude with this, "For the above reasons the appellant humbly submits that he is entitled to a reversal of the said decree, and to a dismissal of the plaintiff's bill." The plaintiff's bill is to be dismissed for these reasons, that it is uncertain whether, under the will, a house and twelve acres of land, or a house and 166 acres of land, passed, and on account of [492] this uncertainty, we are gravely told that the will is void, that there is no question to be determined, and that, therefore, the bill should be dismissed. That is an argument which the learned Serjeant who argued it must have been, by great importunity and against his own better judgment, induced to offer to your Lordships.

The question is, whether in this case the appellant, as heir-at-law, is *ex debito justitiæ*, entitled to an issue. Now there is nothing more certain than that it is the rule of a court of equity, where the *factum* of a will is disputed, where the heir-at-law says that the testator was *non compos*, or that he was imposed upon; or that the formalities requisite for executing a valid will have not been observed, and without the assistance of a jury, to require the heir-at-law to renounce all his property, or to declare the will established, so as to disinherit him; but no authority has been cited to show that that applies to a case where the question is, as to the boundaries or the parcels of the property. There cannot be any such rule in such a case; because in many cases where, in a valid will, the question is as to the extent of the property

which is enjoyed under it, that may be made as clear as the sun at noon-day, and it would be very inconvenient if there was a rule that, under such circumstances, the heir-at-law, admitting the competency of the testator—admitting that the will was well made according to the Statute of Frauds, or the Statute of Wills, which has since been passed, that in all cases with such testimony, there must be the delay and expense of a trial at law. There has been no authority cited to prove such a position, and in my opinion the Master of the Rolls, in this case, was fully justified in refusing the application for a trial.

Then we come to the question as to the merits, and it is difficult, upon this record, to insist that the 154 acres did not pass under the will; and the question is, whether, upon the evidence before the Master of the Rolls, as Mr. [493] Warren most legitimately argued, these lands did or did not pass.

It is quite clear that the case of *Doe d. Oxenden v. Chichester* (3 Taunt. 147; 4 Dow. 65), does not at all apply here; for there the question arose as to the admissibility of parol evidence with regard to the construction of a will, but here parol evidence must inevitably have been admitted. The words of the devise are these, "As it is my wish and desire that all my estate in Shropshire, called Ashford Hall, should be sold, I do therefore give and devise the same unto my son Thomas Bourke Ricketts, and my son-in-law, the Rev. R. F. Hallifax, and the survivor of them, and the heirs of such survivor, in trust, to sell or dispose of the same." What is there devised, is, all the testator's estate in Shropshire, called Ashford Hall, and evidence must be admitted to show what the estate in Shropshire is, which the testator called "Ashford Hall." This then is not a case in which the question arises whether evidence shall be admitted to show the natural meaning of words which are in the will. We have here to consider what was the estate which the testator had in Shropshire, called Ashford Hall, and on that question evidence must be given. The question was, did the 153 acres or not belong to, and were they to be considered a parcel of the estate called Ashford Hall, or not? The evidence on that subject is so clear and satisfactory, that it would have been much to be regretted if the Master of the Rolls had granted an issue to try it. He had jurisdiction himself to decide it on the depositions before him, without granting an issue. If there had been any reasonable doubt about it, he would have done well to grant an issue, but as there was none, he did much better to take it on himself to decide on the evidence before him, which is all on one side; for there is not a particle of evidence on the other side to show that [494] the whole of this estate was not called Ashford Hall, except the description in the conveyance some years before. But the question is, what was called the estate of Ashford Hall at the time the will was made? What was called the estate of Ashford Hall one hundred years before, or any number of years before, is not the question. On that point, however, I must say, notwithstanding the observations made upon the evidence, that I cannot see that there is any discrepancy among the witnesses, because, whether the estate was sometimes called "Ashford Hall," or "the Estate of Ashford Hall," or the "Ashford Hall estate," they were all terms used without discrimination, for describing the thing, by those in the neighbourhood, and by those who knew the property.

Then, my Lords, the question of what passed by the description of "the estate called Ashford Hall" being expressly put in issue, there is no evidence at all given by the appellant to contradict the evidence which is brought forward on the part of the respondents. The best evidence that could have been given was that of the appellant himself: he had been, for a course of years, conversant with the property; he knew what it was his father possessed; he knew what name it went by when the will was made; and we find him, by the usage of a course of years, giving evidence that the whole of this was what was to be considered as the Ashford Hall estate. It is true that that is not an estoppel; it is nothing which, in point of law, estops him from setting up his claim, but it is evidence: he is an important witness against himself; and he, giving evidence in this manner for a long series of years, joining in the solemn act of conveying the estate, as well as advertizing it in the terms which the Lord Chancellor has read from the documents in evidence, it appears to me, must be taken to have proved what the estate was. It is much too late for him now to deny that which he has himself so strongly admitted to be the case.

[495] Under these circumstances, I think that the Master of the Rolls was fully

justified in coming to the opinion he pronounced, and in decreeing that all the lands of the testator, in the county of Salop, passed to the trustees under the will.

I agree, my Lords, that it is much better, *ex abundanti cautela*, to introduce the words into the decree which have been suggested. I should be exceedingly sorry if such a variation had at all affected the right of the respondents to costs; and I entirely concur in the motion which has been made, that the decree should be affirmed, and with costs.

The Lord Chancellor then put the motion, and declared the appeal to be dismissed, with costs.

On the application of Mr. Turner, and by the consent of Mr. Serjeant Manning, the words "mansion-house and lands" were substituted for the word "lands," in the declaration.

Mr. Serjeant Manning applied that the order for costs should be restricted to the costs of one set of appellants; but the House directed that the order should be general.

Mr. Serjeant Manning.—The appellant was bound to come here, my Lords, on account of these tithes.

Lord Campbell.—No; if that had been pointed out when the minutes were settled, it would have been immediately corrected.

Decree affirmed, with a variation, and with costs.

[496]

## HENEAGE'S DIVORCE BILL [March 28, 1848].

The enforcement of the Standing Order of the House (No. 142), requiring the petitioner in a divorce bill to present himself for examination at the bar, may be dispensed with on account of the state of his health.

The acceptance, by the petitioner in a divorce bill, of an offer of a certain sum upon a writ of inquiry to assess the damages, after judgment by default, in an action of *crim. con.* against the wife's paramour: Held, under the circumstances, not to be a bar to the bill.

[Mews' Dig. vii. 952.]

*Damages by Consent.*

Two points only, worth noticing, occurred in this case.

1st. The petitioner's personal attendance on the second reading of his bill, in compliance of the standing order of the House, No. 142, was dispensed with, upon proof that his domestic affliction affected his health so much that he was obliged to go to a warm climate, and he was then in the south of Europe.

2nd. In the action brought by the petitioner against his wife's paramour for criminal conversation, the defendant having suffered judgment by default, his counsel, upon the opening of the writ of inquiry before the sheriff, to assess the damages, offered a sum of £500, which offer was accepted by the petitioner's law agent, and the jury then gave a verdict for that sum and costs.

The agent, being particularly examined by some of the Lords of the Committee on that matter, said he had previously ascertained the circumstances of the defendant; that he had sold his commission (of Captain) in the army; was the younger son of a baronet, and possessed of no property; that there were several witnesses ready to be [497] examined before the sheriff, on behalf of the petitioner, as to the manner in which he and his wife lived together, up to the time of her elopement; that when his counsel rose to state his case to the jury, the defendant's counsel, without previous negotiation or intimation, addressed him, and offered £500 and costs, which offer witness accepted, after conferring with the counsel and friends of petitioner; that said sum had not been paid, but, the defendant having gone out of the jurisdiction, the necessary steps to outlaw him were promptly taken.

The bill was read a second time, and afterwards passed.\*

\* In the course of the evidence in support of Chippendall's Divorce Bill (8th of

[498]. ROBERT LAPSLEY and Others,—*Appellants*; JAMES GRIERSON,—*Respondent* [April 3, 4, 6, 1848].

[*Mews' Dig.* vi. 576, 580; vii. 648. As to presumption of life, see *Nepean v. Doe*, 1837, 2 M. and W. 894; 2 Sm. L.C. 10th Ed. 542, and notes thereto. On point as to marriage by habit and repute, considered in *The Breadalbane Case, Campbell v. Campbell*, 1867, L.R. 1 Sc. and Div. 182; and see *Dysart Peerage Case*, 1881, 6 A.C. 489.]

*Evidence—Presumptions—Legitimacy.*

There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offence against the law. In every instance the circumstances of the case must be considered. (*The King v. Twynning*, 2 B. and A. 386, explained.)

A., a Scotchman, married in Scotland and went abroad; his wife cohabited with C., and had children by him. To make such children legitimate it was held necessary for those who asserted their legitimacy, to prove either a legal origin of the cohabitation, or a change in the nature of it after the death of A. had become known to all the parties. The mere fact that C. and the woman continued to live together was not sufficient for that purpose. Under such circumstances the children were held legitimate, though born after the date of A.'s death.

*Quære*: C. and B. live together as man and wife, in the *bona fide* belief that A., to whom B. had been lawfully married, was dead; in fact he was alive: will his subsequent death, during the continuance of their cohabitation, confer on B., according to the law of Scotland, the character of a legal marriage?

William Lapsley, sen., of Glasgow, in the month of December, 1792, made his will, by which among other things, he disposed of certain heritable property belonging to him in Glasgow, to trustees, for the benefit of his four children, William, Robert, James, and John Lapsley, for life, with benefit of survivorship, and to their children, or the children of the survivors in fee. The testator died in 1798, leaving these four sons him surviving. Robert and [499] James died unmarried, and their shares survived to their brothers, William and John. William Lapsley went to Canada, married, and died leaving two children, Sarah and William. The appellants are the two children of John Lapsley, the youngest of the four brothers, and the question in the case was whether they were or were not his legitimate children.

Robert, the survivor of the four sons of the testator, died in Anderston, in 1817, and Sarah and William, the two children of William Lapsley, were, in 1819, served heirs of all their grandfather's (the testator's) property. They held undisputed possession of this property until the year 1826, when they sold it to the father of the respondent for a sum of £1400. The purchaser continued in possession as undisputed

February 1848), a witness said, the petitioner's action at law against the wife's paramour "was settled by a judge's order, the defendant confessing damages to the amount of £50, and the plaintiff's attorney taking the judgment for that sum."

The Lord Chancellor asked the petitioner's counsel (Mr. Terrell and Mr. Joyce) whether they could refer to any precedent of a divorce bill passing, when the judgment at law had been taken by consent?

The Counsel said they were not aware of any, but submitted that in this case the judgment could not be said exactly to have been taken by consent, it being only the amount of damages that was so taken, and that, no doubt, with a view to save the delay and expense of a writ of inquiry.

The bill was afterwards withdrawn, but whether on this or on other objections, did not appear, as the House pronounced no opinion. It appeared that the petitioner had left his wife before her adultery, to seek employment in Belgium, and that he did not take proceedings promptly to get rid of her, after the adultery, both which objections were met by evidence of the petitioner's poverty,—for which he was admitted, upon petition to the House, to prosecute his bill in *forma pauperis*.

owner under this sale until the year 1834, when Robert Lapsley, weaver in Kirkintilloch, and Joanna Margaret, his sister, the wife of John M'Ewan, of Glasgow, claimed a right to one half of the property as lawful children and heirs of John Lapsley, who died in Glasgow in 1810. These two persons, the children of John Lapsley and of Janet M'Kinley, whom they alleged to have been his wife, were born between 1807 and 1810.

The claim was resisted, and in 1836 the appellants instituted a suit to reduce or annul the title of the respondent to the property in question, and likewise to have themselves declared the lawful children of John Lapsley, the youngest son of the testator. They alleged that Janet M'Kinley, their mother, had been thrice married, first to James Kidd, who died about the end of the year 1796; secondly to William Paul, who left this country for America in 1801, and was lost on his passage from New York to St. Kitts, in 1804 or 1805; and thirdly to John Lapsley in 1807. The first two marriages were admitted, but the respondent denied the third, and alleged that John Lapsley and Janet M'Kinley cohabited unlawfully soon after Paul's departure from Scotland, and that the cohabitation thus unlawfully commenced, was continued till the death of John Lapsley, but had never changed its character during his life. The legitimacy of the claimants was therefore directly put in issue.

The case came on before Lord Cunninghame, as Lord Ordinary, who heard evidence on the subject, and on the 20th of May, 1845, his Lordship pronounced an interlocutor, finding that the parents of the pursuers "were cohabiting, and generally held by habit and repute to be married persons, for three years at least prior to the death of John Lapsley in 1810, and consequently that the pursuers were entitled to, and did possess from their birth, the status and repute of his lawful children." The case was taken before the judges of the second division of the court of session, and by them the interlocutor of the Lord Ordinary was reversed. This was an appeal against that reversal.

Mr. Wortley and Mr. Anderson, for the appellants.

The *onus* of proof lies in this case upon the party impeaching the marriage. The law will not presume illegality of this serious kind—it must be shewn to exist: *Cunningham v. Cunningham* (2 Dow. 482), and *Williams v. The East India Company* (3 East, 192).

[Lord Campbell.—Do you mean to contend that the party impeaching a marriage, on account of its having been contracted when a former husband was alive, must shew that he was alive within a short time, a fortnight for instance, before it took place?]

Certainly—for the law presumes innocence, not guilt. *The King v. Twynning* (2 Barn. and Ald. 386). There, a woman twelve months after her first husband was last heard of, contracted a second marriage, and it was held on appeal that the sessions did right in presuming, *prima facie*, that the first husband was dead at the time of the second marriage, [501] and that it was incumbent on the party objecting to the second marriage, to give some proof that the first husband was then alive. The doctrine in that case was agreed to in the subsequent case of *The King v. Harborne* (2 Ad. and El. 540; 1 Har. 2 Wol. 36), though the particular circumstances there were held sufficiently strong to rebut the presumption of innocence. But this second case does not in the least degree shake the authority of the former, in which Mr. Justice Bayley, lays down in strong terms, that the "law presumes against the commission of crimes," and that presumption he there considers to overrule the ordinary presumption of the law in favor of the continuance of life. He adopted the ruling in the case of *Williams v. The East India Company* (3 East, 192), in which it was held, that where an act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty—the law presumes that such act has been done, and throws the burden of proving the negative on the party who insists upon it. That case was well considered, and Lord Ellenborough then distinctly laid down the rule which Mr. Justice Bayley afterwards, in *The King v. Twynning*, as distinctly adopted.

Mr. Turner and Mr. Rolt for the respondent.—The question of fact here is, whether there was a marriage between John Lapsley and Janet Paul, in 1807. On that question the evidence merely shews a continuance of a cohabitation previously commenced. Now if that cohabitation was in its origin unlawful, from the fact that W. Paul was alive at the time it began, it could not become lawful by mere continuance, but required some decisive act, such as a regular marriage, to give it a new character.

There is no evidence in this case of such an act having been performed. The marriage set up here is at best an irregular marriage, and all the circumstances [502] connected with it must therefore be considered; *Jolly's Case* (3 Wils. and S., 189).

Those circumstances disprove the pretence of an actual marriage. There is no evidence here of consent after the death of Paul, except that which is afforded by the fact of the parties continuing to live together. That alone is not sufficient. It is said that they cohabited in good faith, in the sincere belief that Paul was dead. That good faith might, perhaps, be an answer to an indictment for bigamy, or an excuse after conviction, but it will not legitimatise children born from such a connection.

Marriage is a contract. There must be both the will and the ability to consent at the time the contract is made. Habit and repute are only evidence of consent. But when the evidence of habit and repute commences at a period when the spouse of one of the parties is actually living, it amounts to nothing, and though it should continue till and after the death of that spouse, it will still amount to nothing; for there must be a legal origin of a marriage, evidenced by habit and repute. There cannot be a conditional contract of marriage. No two people can agree to live together, treating each other as man and wife, if a third person, spouse of one of them, should prove to be dead, but not to be man and wife, should that person prove to be living. Where such a connection has once existed, there must be a distinct change in its nature, after the impediment to the marriage has been removed, or the parties can never become husband and wife. Lord Eldon laid down that proposition broadly, in *Cunningham v. Cunningham* (2 Dow. 505), and he afterwards said (2 Dow. 506-7), "When the cohabitation of man and woman was not known to have been in its origin illicit, the presumption was that it was lawful. But where it was at first notoriously illicit, a change in the character of the connection must be operated. He could not admit that mere cohabitation as [503] man and woman was cohabitation as man and wife." These observations answer the arguments on the other side, as to presumption of legality and illegality. In *The King v. Twynning* (2 Barn. and Ald. 386), the second marriage was in form a perfectly valid marriage, and the only question was, as to the time at which, under such circumstances as existed in that case, the death of the first husband could be presumed. But here no marriage took place, and the presumption of the law, if it made any presumption, would be, that the parties had not married; for a marriage, under the circumstances of their first cohabitation, would certainly have subjected them to the penalties of bigamy.

Mr. Wortley, in reply.

The law will always presume against illicit intercourse; but even supposing that the connection here was illicit in its origin, a time arrived when it no longer bore an equivocal character; and that time preceded the birth of either of these appellants. The woman wore mourning for Paul, and when her children were born, christened them by the name of Lapsley, with whom she was then living.

[Lord Campbell.—Do you admit that it would not be a valid marriage, if the parties merely said to each other, "We are married, if it should turn out that Paul is dead?"]

That may be admitted; but, in fact, they believed that he was dead. They acted *bona fide*, and the presumption of the law must be in their favour.

The Lord Chancellor.—This case appears to me to depend on the evidence as to the facts. That evidence establishes the fact, that cohabitation had commenced when William Paul was living. The nature of that cohabitation was not altered by any undoubted and open act of the parties; there was no change in their demeanour after the period at which it is now believed he died. The [504] cohabitation continued as at first, and the first cohabitation appears to have taken place at a time when William Paul was, in fact, alive, and when there was no reason to believe that he was dead. The rule, therefore, applies, that the cohabitation was illegal from the commencement, and consequently there is no proof of a marriage between these parties, because at a subsequent period the disability to contract marriage between them had ceased. Every thing turns, in this case, upon matter of fact. I have no doubt about the case; and, in my opinion, the illegitimacy of the children is conclusively established.

Lord Campbell.—The law upon this subject is well settled, but particular circum-

stances were said to exist in this case. We may deplore the loose state of the law of Scotland upon the subject of marriage, and, in our legislative capacity, we may afford a remedy to that evil; but, sitting here as judges, we are bound to administer the law as it now exists. There is not, in this case, any controversy as to the law of Scotland. The pursuers rely on the marriage of the parents to be established by habit and repute, which may establish a marriage by affording evidence of consent. On the other hand, the defender relies on the rule of the law of Scotland, which is not disputed, that if the connection was in the beginning illicit, it must continue to bear that character, unless it is clearly changed by the parties. That rule was established by this House, in the case of *Cunningham v. Cunningham* (2 Dow. 482), and has ever since been the settled law of Scotland. In this instance, there is clear evidence of habit and repute, for a part of the time during which the parties were living together. There is no doubt that, at a certain period of their lives, they lived together as man and wife; but then the objection is made that this connection was illicit in its origin, and its original character was never changed by any direct and open act of theirs. Was this connection [505] illicit in its origin?—and if so, was its nature ever changed? Now, the first of these matters does not seem to me to admit of any doubt; the connection was illicit in its origin, and there does not seem to be any reason for saying that its nature was afterwards changed. It is said that the woman must have married Lapsley in 1806, as she had a child in 1807: and none till then. But that argument involves a presumption, on which it is impossible for us to found a judicial decision. Besides, we cannot disbelieve the evidence, that the connection between these parties originated in 1803; and, if so, William Paul was undoubtedly alive at that time; for a letter, written by him in 1804, has been produced in evidence. It was at first said, that at that period he was dead; but the *onus* of proving him to have been dead lay on the pursuer. Then it was argued, that the law would not presume the commission of a crime, and consequently would not presume the connection to have been illegal; but that it must be positively shewn to have been so. But the main question is, was there, or was there not, a valid marriage; and we cannot presume that there was. The marriage must be proved to us.

We have been much pressed with the case of *The King v. Twynning* (2 Barn. and Ald. 386), but what is said there by Mr. Justice Bayley has been much misunderstood. He who was one of the most learned, accurate, and conscientious of judges, never laid down what in this argument has been attributed to him. All that he said was, that there were presumptions of law on both sides, and that as the quarter sessions had come to a conclusion on the facts, the Court of King's Bench would not say, that in fact they had come to a wrong conclusion. In the subsequent case of *The King v. Harborne* (2 Ad. and El. 540), Lord Denman intimated a strong opinion, that the *onus* of proof lay on the party setting up the [506] marriage. Now beyond all controversy, the connection here was illegal in its origin.

An important question was purposed to be agitated in this case, namely, whether supposing the first husband to have been alive when the children were born, they were still to be considered illegitimate, both their parents believing that he was dead. That, no doubt, is a very important question, but it does not arise here, for it is clear to me, that here neither of the parents did entertain that belief. There was *mala fides* from the beginning to the end of the proceeding. I concur with the Lord Chancellor in the opinion, that the interlocutor of the court below should be affirmed.

Lord Brougham.—I have been requested by my noble and learned friend (Lord Campbell) to look into the case, and into the elaborate opinions pronounced by the learned judges in the court below. I have done so, and have no difficulty whatever in stating, that the conclusion to which I have come is, that the interlocutor pronounced in the court below should be affirmed. I was first a little hampered by the arguments of the Lord Advocate and of Lord Cunningham. If the death of William Paul was believed *bona fide* before the cohabitation, then the fact being contrary to their belief, the belief being groundless, but the cohabitation proceeding on that belief, if afterwards William Paul died, and the cohabitation continued, I might have had some difficulty in saying that this cohabitation, which was in fact illegal, but was founded on the *bona fide* belief of the death of the first husband, and of the character of man and wife being lawfully assumed by these parties, did not become licit by the death of Paul. But when I come to look into the facts of the case, I do not think that I am



at all called on to consider that question. This is a case entirely of fact, and the evidence satisfies me, that in fact these parties did not live together as man and wife.

Judgment of the court below affirmed with costs.

[507]

## IN COMMITTEE FOR PRIVILEGES.

## THE BARONY OF SAYE AND SELE [1848].

*Illegitimacy by non-access—Evidence.*

The illegitimacy of a child, born of a married woman, is established, beyond all dispute, by evidence of her living in adultery at the time when the child was begotten, and of her husband then residing in another part of the kingdom, so as to make access impossible.

Where a Patent of Peerage cannot be found, entries on the Journals of the House of Lords, shewing the limitations of the patent, may be referred to for that purpose; or an examined copy of the record of the patent will be received.

King James I., by letters patent, dated the first year of his reign,—after reciting that James Fenys, knt., was summoned to Parliament, by writ, in the twenty-fifth of Henry VI., and was, in the same Parliament, created a baron of England, by the title of Lord Saye and Sele; that his son and heir William Lord Saye and Sele, was summoned to and sat in several Parliaments in the reigns of Henry VI. and Edward IV.; and that Richard Fenys, knt., was then (1603) the lineal heir male of the said William and James—"not only recognised, allowed, and confirmed to the said Sir Richard, and the heirs of his body, the said title and dignity, but also constituted and created him, Baron of Saye and Sele, to hold to him and the *heirs of his body*." He sat in Parliament as Lord Saye and Sele, and, upon his death, the honor descended to his son William, who was created a viscount by patent, dated the 22nd of James I., to hold to him and the *heirs male* of his body. The son sat in Parliament under both patents, and died in 1662, leaving four sons, the eldest of whom, James, succeeded to the honors, and died in 1673, leaving only two [508] daughters, Elizabeth and Frances, whereupon the barony fell into abeyance, but the viscounty passed to the next brother of James, and to the issue male of him and of another brother, successively, until, on failure of such issue, it became extinct in 1784.

The said Elizabeth Fenys (or Fiennes, as the name was then spelt), elder daughter of James, Baron and Viscount Saye and Sele, married John Twisleton, and left issue by him one daughter only, who married George Twistleton, of Woodhall, Yorkshire, and died in 1723, leaving Fiennes Twisleton, her eldest son and heir, who married, and had issue one son, John, and three daughters, and died in 1730. John married, and having issue three sons, died in 1763.

In 1781, Thomas Twisleton, the then eldest surviving son of John, presented a petition to the king, claiming the barony, the abeyance of which had been terminated in 1715 by the failure of issue of Frances, second daughter and co-heiress of James, the last baron. That petition being referred to the House of Lords, a report was made to his Majesty that the claim was made out, and the petitioner received his writ of summons to Parliament, and took his seat, according to the letters patent of the first of James I. (see the Lords' Jour. for June 21 and July 2, 1781). He died in 1788, leaving two sons, Gregory William and Thomas James; the former succeeded to the title, and died in 1844, leaving one son, William Thomas Eardley Twisleton Fiennes, Baron Saye and Sele, who died in 1847, without issue. He had an only sister, who had previously died without issue.

In 1847 the Rev. Frederick Benjamin Twisleton, rector of Adlersop, in Gloucestershire presented his petition to the Queen, claiming the barony, as the only legitimate son of the said Thomas James, uncle of the last Lord Saye [509] and Sele. He stated, among other things, that Thomas James, his father, married his first wife in 1788, by whom he had issue several children, who all died without issue; that in 1794 he and his wife agreed, by deed, to live separate, and they never afterwards cohabited to-

gether; that his father went to the university of Oxford in 1796, took priest's orders the 22d of May, and in October of that year was appointed chaplain to the *Monmouth* ship of war, and served in that ship till October, 1797; that the wife, after the separation, went upon the stage, and in March 1796, and afterwards, lived in Edinburgh and elsewhere with Mr. John Stein, as his mistress, and was delivered of a male child in London, on the 5th of January 1797; that such child was the fruit of her adulterous intercourse with Stein, and was supported and educated by him as his own, and never acknowledged by the petitioner's father, who, after discovering his wife's infidelity, took proceedings against her for a divorce in the Ecclesiastical Court, and obtained a decree there, and afterwards an Act of Parliament, dissolving the marriage, on the ground of the said adultery, but brought no action against Stein, being advised that, on account of the separation, he could not maintain an action; that, after the passing of the act of divorce, he married his second wife in June 1798, and died in Ceylon, in August 1824, leaving by her the claimant, his eldest son and heir.

The petition being referred to the Attorney General, he reported to her Majesty that the evidence laid before him was sufficient to establish the claim, "provided it should be proved that the said male child was illegitimate by reason of the non-access of the husband;" and he advised her Majesty to refer the petition to the House of Lords, and added, that "as the case depended entirely on the evidence of Mr. Stein, who was of great age, it was important to the claimant that his examination should be taken at the earliest possible opportunity."

[510] The petition, with this report annexed, being referred by her Majesty to the House of Lords, towards the end of the Session of 1847, the Lords Committees for Privileges, considering that the claimant had not time to prepare and lay his case before the House in that Session, appointed an early day for Mr. Stein's examination, *de bene esse*, and he was examined accordingly; and his evidence, which was ordered to be printed, sustained the allegations of the petitioner relating to his intercourse with Mrs. Twisleton in 1796 and 1797, and to the birth and education of the child.

The claimant presented his printed case to the House early in the present session, and Stein again attended as a witness, but the committee having his former evidence before them, dispensed with his examination *de novo*. It was shewn by other witnesses, and by a correspondence, that the claimant's father was in Devonshire or Oxford during the time when the child, born of his wife in January 1797, must have been begotten, and that she was in Edinburgh from the 20th of January 1796, to the end of the month of April the same year. For further proof, the libel, depositions, and decree of divorce in the Ecclesiastical Court, were referred to, and also the evidence on the divorce bill in this House, and the act of Parliament.

The claimant's agents having proved that they searched, unsuccessfully, for the letters patent of the first of James I., entries shewing the limitations of the barony were read from the Journals of the House, containing the proceedings on the claim of Thomas Twisleton, in 1781;\* and [511] the resolution of the House, affirming that claim, was received as sufficient evidence of the present claimant's pedigree down to that period.

No question was raised on any other part of the evidence.

Sir Frederick Thesiger and Mr. Unthank were counsel for the claimant.

The Attorney General for the Crown,† said, I have carefully examined the evidence which has been given at the bar in support of the claim in this case, and I see no ground upon which I can, in any part of the case, properly offer to your Lord-

\* On the claim of the Earl of Lanesborough (April 11, 1848) to vote at elections of Irish Peers, an examined copy of the record of the patent, produced from the proper office, was admitted for the same purpose, after proof of an unsuccessful search for the patent. And after like proof, in the same case, the copy of an entry, in the Prerogative Office, in Ireland, of the grant of a dispensation licence to solemnize a marriage, was admitted to supply the place of the undiscovered register of the marriage.

† The Attorney General attends, in Peerage cases, as assistant to the Lords Committees for Privileges, and it is said that he is entitled to sit (on a chair) inside the bar.

ships any objection or suggestion in respect to the facts as they appear before your Lordships. There is no question upon the evidence that the claim is clearly established, provided your Lordships do not desire the question of law to be argued, I mean the question of illegitimacy by non-access, upon which there has been a recent decision of your Lordships' House, varying from the old law, as it was laid down in former cases (see *Morris v. Davies*, 5 Clark and F. 163). Upon the fact of the claim of the petitioner being established, there can be no question whatever. Upon the fact of illegitimacy, also, the evidence leaves no doubt; and I have only to appear here to request your Lordships' directions whether you desire the point to be argued as to the legal effect of the proof of non-access upon the question of illegitimacy; if your Lordships should think that matter capable of discussion, and should call on my learned friends to argue it—

Lord Lyndhurst.—We do not require the general question to be argued, because we have, in the case referred to, acted upon illegitimacy, as proved by non-[512]-access; but the question is as to the fact of non-access. If that is proved, it is sufficient.

The Attorney General.—I think the fact is already proved, and it would not be right to occupy your Lordships' time in bringing the question of law before your notice, unless any doubt has occurred to your Lordships' minds.

Lord Lyndhurst.—You are perfectly satisfied upon the fact?

The Attorney General.—I am perfectly satisfied upon that.

Lord Lyndhurst.—I believe all the noble Lords who heard the evidence are also satisfied.

The Attorney General.—After the case of *Morris v. Davies*, I apprehend that there can be no question raised on the law of the case.

The Lord Chancellor.—There is an extraordinary concurrence of circumstances in this case, shewing the impossibility of access of the husband during the period of the child begotten. The facts are quite consistent, and the evidence brings the case within the rule of law established by the recent authorities.

Lord Lyndhurst.—The rule of law as to non-access in a claim of Peerage is precisely the same as the rule of law as to non-access with respect to property.

It was then resolved that the Rev. Frederick Benjamin Twisleton had made out his claim to be Baron Saye and Sele.

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[513] JOHN FLEMING and Others,—*Appellants*; ARCHIBALD SMITH and Others,—*Respondents* [April 17, 18, 1848].

[*Mow's* Dig. xiii. 69, 1225, 1236, 1285. S.C. 6 Bell 278. Adopted on point as to election in *Rankin v. Potter*, 1873, L.R. 6 H.L. 123. On question whether notice of abandonment necessary, see *Rankin v. Potter*, *ubi sup.* at p. 83; and *Trinder, Anderson and Co. v. Thames and Mersey Marine Insurance Co.* [1898], 2 Q.B. 114, 119.]

*Insurance—Abandonment—Constructive and actual total loss.*

A vessel insured under a time policy from August 1841 to August 1842, encountered very severe weather in the Indian seas, and was compelled, in May 1842, to put into the Mauritius. The master wrote to the owners, telling them of the injuries which the vessel had received, of the necessity to make extensive repairs, of his intention to borrow money on bottomry for that purpose, of the sum required, and of the impossibility of getting the money except on the undertaking to return direct to England, instead of proceeding to Bombay, as originally intended. He further stated, that on account of the very low state of freights in India, this would be better for their interests, which he said he consulted in everything he did. The agents for Lloyd's at the Mauritius, who were employed by the Captain to act for him, wrote letters to the same effect. These letters were received at intervals between September and December 1842, and in the latter month the owners wrote

to the agents expressing their surprise at the amount required, but saying, at the same time, that they supposed what was done was the best that could be done under the unfortunate circumstances in which the ship was placed. The owners wrote to agents in London, apprizing them of the expected arrival of the vessel, and directing them to do what was needful. The vessel did arrive on the 27th of March, and was at first taken possession of by the agents for the owners. On the 30th of March the owners abandoned to the underwriters:—

Held, that under these circumstances they were not entitled to recover as for a total loss; for, first, assuming notice of abandonment to be necessary in a case of constructive total loss, the notice here had not been given in time; and secondly, the conduct of the owners on the receipt of the letters amounted to an election to treat this as a partial loss, and they could not afterwards, on the arrival of the vessel, when they found that the cost of repairs much exceeded the market value of the vessel itself, convert this partial into a total loss.

Though the master may, by an ordinary rule of law, be considered, [514] whenever the vessel is, by capture or other detentions and casualties, prevented from continuing the voyage, as the agent for all parties concerned, yet the owners, even under such circumstances, may by their conduct make him their sole agent, so as to be bound by his acts.

*Per* Lord Campbell. Notice of abandonment is necessary in order to convert a constructive into an absolute total loss.

The cases of *Cambridge v. Anderton*, and *Roux v. Salvador*, show that where a ship, in consequence of the inability of the master to get it off the rocks where it has struck, has been actually sold, or where a cargo of a perishable nature has been so damaged by the sea that its substance is gone, and it can never reach the destined port in specie, the loss, in each instance, is actual, and not constructive total loss.

Where a prudent owner uninsured would have sold, the case amounts to one of actual total loss.

This was an appeal against a decree of the Court of Session. The appellants, as the owners of the ship *William Nicol*, had effected an insurance on that vessel for the period of twelve months from the 18th of August, 1841, valued at £6000, and they claimed as for a total loss occurring in the month of May or June, 1842. The respondents, who were the underwriters on the policy, insisted that they were only liable for a partial loss.

On the 12th of April, 1842, the vessel sailed from Port Adelaide to Bombay, and on the 18th of May encountered very tempestuous weather, and was driven into the Mauritius, where it arrived on the 31st of May. The summons set forth the facts very fully, and alleged that by these occurrences the vessel sustained serious damage in the hull, and "was not in a reparable state, or in a state to be beneficially repaired, considering the means of repair and the expenses, but was totally lost by the perils of the sea." The summons then went on to allege, that attempts were made to repair the ship, that money was advanced on bottomry, and the ship was repaired, took in a cargo of [515] sugars, and arrived in England on the 27th of March, 1843, when it was found that the vessel and the freight were not equal in value to the amount secured by the bottomry bond, which was given for £4536, and that the ship was abandoned by letter to the underwriters on the 30th of March, 1843.

The cause was sent to the Jury Court for trial on an issue directed to determine whether the vessel was totally lost in the month of May or June, 1842, or whether the loss was only an average loss. The cause was tried before the Lord President; when evidence was given to show that on the arrival of the vessel at the Mauritius, Captain Elder put himself into communication with the house of Hunter and Co., the agents there for Lloyd's, in order to have the injuries sustained by the vessel ascertained. On the 5th of June he wrote (the letter was received on September 5) to his owners, "It is but right to inform you that the copper in the ship was entirely gone, nearly one-third being washed off; it must have been very bad. The ship must be hove down to see if there is anything wrong; and if it should be for your interest

to condemn the ship, if the repair should amount to so much as to make your one-third part of the insurance, which you will have to pay, very heavy, I shall certainly do so, as the £6000 she is insured for, is, I believe, more than the value; but before I can do this, we must have tenders in, to see that the underwriters will save by selling the ship as she is, than laying out so much money on her. There is one thing I must state, the rigging was entirely done, fore and aft. Eight years was a long time for it to be over mast heads." He then gave his reasons for thinking that the ship ought to be repaired, and added, "whatever I may do, I shall act according to the best for your interest." On the 9th of June he wrote another letter, in which he said, "we could not have made money at any rate with the present rate of freight from Bombay." On the 5th of July he wrote a [516] third letter, giving an account of his proceedings, estimating the expense of repairs at about £3000, and saying, "Now the ship being insured for £6000, the loss to the insurers would have been too great for abandonment, and on that account it could not have been effected for any consideration. For your interest I must raise money on bottomry . . . . The accounts from India are very disheartening; freight is not to be had but at a very low figure, which would occasion a loss to the shipowners. If I can make from here £2500 to £3000 freight, direct home, it will, I think, be certainly best for your interest." Messrs. Hunter, Arbuthnot, and Co., wrote to the owners in nearly the same terms. One of their letters, dated on the 16th of July, said, "Captain Elder is naturally anxious to follow his instructions, and proceed, when repaired, to Bombay. For this purpose he has advertised for a loan of about 20,000 dollars, to be secured by a bottomry bond on the ship, which would proceed to Bombay in prosecution of her voyage. No offers however were made on those terms, but parties are ready to advance the money provided the ship proceeds to England direct. Captain Elder will therefore be obliged to deviate from his instructions, and we have offered him a cargo of sugar at the first of the season for England, at the current rate of freight, which, we think, is better for all parties than to go on to Bombay in search of a cargo at the miserably low rate of freight ruling in India. We shall keep you informed from time to time of what is going on, and when the repairs are completed, we shall forward to you all the documents necessary for a settlement with the underwriters." By a letter of the 3d of December, 1842, the owners acknowledged these communications, said that they "hoped the measures might turn out to have been the best in the unfortunate circumstances," declared themselves to have been startled by the necessity for a bottomry bond to so large an amount, thanked Messrs. Hunter and [517] Co. for their offer of a cargo for England direct, and said, "Should it have been decided to follow this course, we hope the rate of freight will prove such as to compensate in some measure for the loss which must necessarily accrue from the heavy expense connected with the repairs." Other letters of a similar kind were written, and in December 1842 the *William Nicol* sailed from the Mauritius for London, where it arrived on the 27th of March, 1843. On the 7th of that month the owners wrote to the Messrs. Henderson to act as their agents with regard to this vessel, and those gentlemen accordingly cleared the vessel at the custom house. On the 30th of March the owners wrote to the underwriters a formal abandonment of the vessel. The amount secured on the ship by bottomry bond was about £4536, and the vessel being seized by the bottomry creditor, was sold by him for a sum of £2780. The owners instituted in the Court of Session a suit on the policy to recover as for a total loss. They stated in a letter, that they dated their claim as from the time the vessel reached the Mauritius. The underwriters insisted that in point of law there could be no claim as for total loss in a case where the vessel still existed in specie, without a notice of abandonment being duly given; that the owners here, not having given such notice in due time, they had lost the right to abandon; that this was in fact only a case of a partial loss; and, that the owners having repaired the vessel, and applied it to the purposes of trade on their own behalf, had elected to treat the case as one of partial loss.

The jury found "for the pursuers, with leave for the defenders to move the court to enter a verdict in their favour if the court should think fit upon the following points: whether the pursuers were barred from recovering as for a total loss in consequence of abandonment having been necessary, and not having been made in due time, or of the pursuers having elected to treat the case as one of

[518] partial loss." The court adjudged that the pursuers were "barred from recovering as for a total loss, in respect that they were bound and failed to abandon the vessel in due time to the defenders, and also that they elected to treat the loss as partial." Against that judgment the pursuers brought the present appeal.

The Attorney General and Sir F. Thesiger (Mr. Ivory was with them) for the appellant:

The questions are, first, whether in the case of a constructive total loss, any notice of abandonment is necessary; secondly, whether, assuming a notice of abandonment to be necessary, the notice here was given in due time; and, thirdly, whether the owners here have not elected to treat the loss as a partial and not as a total loss. The second and third questions depend on the facts of the case. As to the first question, it is submitted that no notice of abandonment is necessary where the vessel is either lost by being at the bottom of the sea, or by being so seriously injured that it has lost the character of a ship, and is unable to prosecute its intended voyage. The latter was the case with this vessel in May 1842. It had then ceased to be an effective ship, and no person acting with prudence or judgment would have expended any money upon it. Can abandonment be required under such circumstances?

Abandonment is not necessary in the case of an actual total loss; *Mellish v. Andrews* (15 East, 13), and *Cologan v. The London Assurance Company* (5 M. and S. 447); in the latter of which Lord Ellenborough says it is required, as excluding the presumption that the owner still adheres to the risk as his own. In a case of constructive total loss, there must, it is true, be a relinquishment of salvage, because the contract of insurance is a contract of indemnity. But even [519] there notice of abandonment is not necessary; *Boyd v. The Royal Exchange Assurance Company* (not yet reported); and the two things are essentially different from each other. In *Irving v. Manning* (*ante*, 287) it was not doubted that a party might recover as for a constructive total loss where a ship was damaged beyond repair, except at an expense such as no prudent owner would incur.

[Lord Campbell.—A constructive total loss is so, not only with reference to the physical state of the ship, but to the rate of labour where the ship is found, to the value of money there, the price of materials, and the freights to be carried after repair.]

The jury here having found that there was a total loss, the respondents are bound by that finding, and the question of total or partial loss cannot be discussed.

[Lord Campbell.—But the verdict here expressly reserves the questions, whether in such a case abandonment was necessary, and whether the notice was given in time. It may be treated as settled that in this case there has been a total loss, but, such as we call in this country, a constructive total loss.]

Then as to such a case, it is contended that notice of abandonment is not necessary. A constructive total loss is still a total loss; and the true distinction is not between an actual and a constructive, but between an actual and a contingent total loss.

If the case is clearly one of constructive total loss, it is the same as that of actual total loss, and notice of abandonment is not necessary. Now what is constructive total loss? The case of *Cambridge v. Anderton* (2 Barn. and Cr. 691), adopting in substance the rule as laid down in *Park on Insurance* (vol. I., p. 159, 7th ed.) shews that there may be a total loss, though the vessel is in fact recovered; and Mr. Justice Holroyd [520] there expressly said that the damage sustained may make the loss a total loss; and he added that in such a case it is unnecessary to give notice of abandonment. Such too was the opinion of the whole court.

It is true that in that judgment the Chief Justice used the expression as to the ship being "reduced to a mere congeries of planks;" and that expression is relied on by the other side to show that, in the case of a constructive total loss, the ship must not only have lost the character, but the very form of a ship—must not only be unfit for navigation, but must actually be a mere wreck; but that was not the meaning intended by the Lord Chief Justice himself to be given to the phrase, nor was it meant to be said that in order to constitute a constructive total loss, the ship should be reduced to the condition of a mere wreck.

[The Lord Chancellor.—Assuming that the expression only meant where the ship

is so damaged that the repair of it will cost more than the value, and is therefore a case of constructive total loss, still the question is whether notice of abandonment is necessary?]

It is not: for the ship does not remain a perfect ship, with the mere temporary loss of its use, as in the case of capture or embargo, so that when restored it can at once be employed in the ordinary manner. In such a case, and in such a case only, must the owner give notice of abandonment to the underwriter. *Roux v. Salvador* (1 Bing. N. C. 526) is not an authority contradicting this position, for there the relinquishment of salvage is confounded with abandonment; and the observations which appear opposed to the plaintiff's right to recover, do not refer to abandonment. The Lord Chief Justice says, "The necessity of abandoning to the insurer all the right of the assured to what may be saved or recovered from the peril insured against, arises [521] out of the very nature of the contract of insurance, which is a contract of indemnity only." It is plain that these words do not apply to what is ordinarily termed abandonment, but to relinquishment of salvage; and the subsequent expression that "the underwriter is to be put into the owner's place as to all the benefit that may be derived from what has been actually saved or recovered from the loss," justifies that view of the judgment. The additional statement there made, that in such a case the owner "must first relinquish to the underwriters all his interest in what remains," is however erroneous, for that is not necessarily a preliminary proceeding.

[Lord Campbell.—When is the relinquishment of salvage to be made?]

On the adjustment of the policy.

[Lord Campbell.—Then nothing is to be done before the bringing of the action?]

It is not necessary to do anything. If there is a total loss, the property remaining becomes *ipso facto* the property of the assured.

[Lord Campbell.—Then is there not a difficulty in saying at what moment the right of the underwriter accrues?]

It accrues at the moment the ship receives its death wound. Such is the doctrine adopted in the United States, *Ruggles v. The General Interest Insurance Company* (12 Wheaton's Rep. 408, 414), and that doctrine is in full conformity with every principle of insurance law.

It must be admitted that the first case of *Roux v. Salvador*, shakes the authority of *Cambridge v. Anderton*, but the decision thus pronounced was afterwards denied in the Exchequer Chamber, where the reasons given in support of the judgment were reviewed, and the judgment itself was reversed (3 Bing. N. C. 266).

[522] [Lord Campbell. —The decision in the Exchequer Chamber proceeded on the ground that the subject matter of the insurance was totally lost. Here the vessel brought home a cargo of sugars.]

But in *Cambridge v. Anderton*, which is set up again as an authority by the Exchequer Chamber in *Roux v. Salvador* (3 Bing. N. C. 266), and which is exactly the same case, so far as principle is concerned, as the present, the vessel was got off the rock by the purchaser, repaired, and freighted with a cargo for England. In *Allen v. Sugrue* (8 Barn. and Cres. 561; 3 Man. and Ryl. 9), the materials of the ship were not lost, but bad.

As to the other questions they are more matters of fact than law. The first is whether, assuming abandonment to be necessary in such a case, it was here given in due time? If the assured was in full possession of all the circumstances, it is a rule of law that he shall communicate them in due time, but whether he was in possession of them or not is a question of fact.

[Lord Campbell.—If notice was necessary it lies on you to shew that it was given in due time.]

What is due time is a mixed question of law and fact; but here there is no finding of the fact which raises the question of law. There ought to be a remit on this point.

Then as to the question of election. Every thing had been done before the owners received the letters, and every thing done was the act of the master and not of the owners. In such a case the master is not the agent of the owners alone, so as to bind them, but becomes, by the happening of the peril insured against, the agent for all concerned. The moment the vessel ceases to be an effective sailing

vessel, he assumes that character: the case of the ship *Alexander* (1 Rob. N. S. 346), and *Douglas v. Moody* (9 Massachusetts' Rep. 518). [523] If a prudent owner, being present, would not have incurred the expense, these owners are not bound, because the master incurred it. There cannot, in such a case as the present, be a ratification by mere delay, for ratification can only be made with full knowledge of all the facts. Story on Agency (page 205, s. 243), citing *Horsfall v. Fauntleroy* (10 Barn. and Cr. 755), and *Owens v. Hulme* (9 Peter's Rep. 607, 629). The opinion of Mr. Justice Ashhurst in *Mitchell v. Edie* (1 Term. Rep. 612), is to the same effect, and *Gernon v. The Royal Exchange Assurance* (6 Taunt., 383), adopts the same principle. Where a ship ceases to be a navigable ship, the master ceases to be the agent for the owners, and becomes agent for all concerned, and the owners are not bound by his acts, unless they were present. Here the owners knew nothing of the facts till after the repairs had been executed, and could no more have prevented them than could the underwriters themselves.

The Lord Advocate and Mr. J. Leycester Adolphus (Mr. Peacock was with them) for the respondents.—The first two questions here are, whether notice of abandonment was necessary, and whether the notice here given was given in due time; and it is not pretended that the appellants can answer the second question in the affirmative. The notice of abandonment was too late, much to the injury of the respondents. The facts shew that the finding of the jury on what constituted the third question is correct, and that the appellants did really treat this as a case of mere average loss.

As to the first question; The other side is not warranted by any authority in confining the necessity of abandonment to cases of barratry and capture. The question whether a vessel is lost if it is not actually sunk, must depend on various circumstances. But if the owners take [524] these circumstances into consideration, and incur the expense of repair, they are not at liberty afterwards to abandon the ship. To say that they are so would be to allow them great advantages, such as, in fairness, they ought not to enjoy. At all events they cannot be entitled to abandon and treat the case as one of total loss, after having made the experiment of treating it as a case of average loss. They cannot, when in fact the ship still exists, make voyages with a view to profit, and then, finding that the vessel will not sell for the amount they have expended upon it, abandon it to the underwriters, as if actually and totally lost. If they intend to abandon, they must give notice of that intention, and give it at the earliest possible period after the injury which they allege to be the cause of the loss. Such is the effect of the various decisions on this subject. The case of *Mitchell v. Edie* (1 Term. Rep. 608) is an instance; Mr. Justice Buller there directed the jury that the capture of the vessel gave the owners an option to abandon or not; but if they chose to abandon they must do it immediately upon receiving intelligence of the loss, and not having so given notice, they had waived their right, and could only recover for an average loss. The Court adopted this view of the law, and declared that the master could not be considered the agent of the underwriters till notice had been given to them, and they had had an opportunity of exercising a discretion as to his acts. The case of *Cambridge v. Anderton* (2 Barn. and Cr. 691) does not impeach that doctrine, for there the master being unable to get the vessel off the rocks, and to repair it, sold it to some people residing on the spot, and they having at their command means which he could not procure, released the ship, repaired it, and sent it on a voyage. No notice of abandonment was required there, because the ship was in fact, as the jury found, totally lost. The master could not there be said to have [525] had the opportunity of exercising any choice as to the course he would pursue. In the first place, it was supposed to be impossible to recover the ship; in the next, it was clear that the cost of any attempt to recover and repair it would far exceed its value.

[Lord Campbell.—There, and in *Roux v. Salvador*, there has been an actual sale of the ship. Here, no sale has taken place. Those cases are, therefore, different from the present.]

The question here is, whether the act of the master is, or not, to bind the owners. It is clear that in this case they were bound by his acts. He was acting, as his letters shew, exclusively for them. They had insured the freight of the vessel on this very voyage on which he took the vessel, after making the repairs. In such a case



there can be no doubt that notice of abandonment is necessary. Till this case arose, no text writer would have expressed any doubt upon it. In Smith's Compendium of Mercantile Law, it is said (page 348): "Total loss is of two sorts: it is either total *per se*, or that which may be rendered so by abandonment." Hughes on Insurance says the same thing (page 381). A total loss occurs either when the property insured is totally lost to the owner, or when, though not in fact wholly lost, the damage sustained is of such a nature that the owner is entitled to recover to the amount of the insurance, on making an abandonment. The use of an abandonment, in such cases, is to enable the underwriters to take measures for the preservation of the property, and to exclude any inference that the insured still intend to adhere to it as their own."

The law clearly recognises a distinction between the cases of an actual and a constructive total loss: the distinction is not confined to instances in which the ship exists in such a shape that it may be restored to the owner, and at once employed in continuing the voyage. The [526] cases of *Irving v. Manning* (*ante*, 287), and *Allen v. Sugrue* (8 Barn. and Cr. 561; 3 Man. and Ryl. 9), have no bearing upon the present as to this point. The first merely decided that actual and constructive loss were the same things with respect to a valued and an open policy. In the other the question of abandonment was never raised. In *Cambridge v. Anderton* (2 B. and Cres. 691), it was held that no notice of abandonment was necessary, but then the description of the circumstances which dispensed with such a notice was given by Lord Tenterden, when he spoke of the vessel as "a congeries of planks."

[Lord Campbell.—That expression is very perplexing. What does it mean?—It cannot mean to confine the right to recover as for a total loss to cases where the very form of the ship is destroyed, for it is plain that the price of labor, the means of getting money, and various other circumstances, may give the right so to recover, even in cases where the ship has been repaired and has arrived at the port of destination.]

It confines the right so to recover, without first giving notice of abandonment, to cases where the ship has been destroyed as a ship, and is a mere congeries of planks. The cases of *Dyson v. Rowcroft* (3 Bos. and P. 474), *Roux v. Salvador* (1 Bing. N. C. 526; 3 Bing. N. C. 266), and *Cologan v. The London Assurance Company* (5 M. and S. 447), are all to the same effect, the reason being that where the very form of the ship is destroyed, the underwriter cannot be better or worse for the abandonment; but that shews that where it is not so destroyed, he is entitled to notice of abandonment. *Hamilton v. Mendes* (1 Wm. Bl. 276; 2 Burr. 1198), *Martin v. Crockatt* (14 East, 465), *Irving v. Manning* in the Court of Common Pleas (1 Com. Bench, 168), *Bell v. Nixon* (1 Holt, 423), *Young v. Tu-[527]-ring* (2 Man. and Gr. 593; 2 Scott, N. R. 752), all tend to the same point, and shew the marked distinction which exists between an actual and a constructive total loss, and that notice of abandonment is necessarily incident to the latter class of cases.

There is a considerable difference between abandonment and voluntary relinquishment.

[Lord Campbell.—That is a new term in the law of insurance. Lord Brougham.—It is used for cession.]

Abandonment has the effect of election. In *Cologan v. The London Assurance Company* (5 M. and S. 456), Mr. Justice Abbott says, "Abandonment excludes any presumption which might have arisen from the silence of the assured, that they still meant to adhere to the adventure as their own." That gives it a character quite different from that of relinquishment. The choice of electing to abandon may depend on many circumstances with which the underwriter is not acquainted. It is necessary to vest in the underwriters a title to the thing which is abandoned. If not required to be made at a particular time, and if treated as a mere consequence of the existence of particular circumstances, innumerable disputes would arise as to the time when the property was divested from its original owners, and vested in the underwriters. The cases which show abandonment to be necessary are numerous: *Tunno v. Edwards* (12 East, 488) laid down the doctrine distinctly, that wherever the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment. And wherever this doctrine has been held, no distinction has been made between the case of capture and sea damage. It is true that the judgment of the Court of Common Pleas in the case of *Roux v. Salvador* was overruled by the

Exchequer Chamber; but it was not upon the point as to the abandonment, but upon the facts as to which alone the two courts differed in opinion. The [528] expressions used by Lord Abinger in that case (3 Bing. N. C. 286, 287), as to what the assured is to do while the thing insured exists in specie, and there is a chance that it may be recovered, probably gave rise to the present litigation. But Lord Abinger certainly misapprehended the intention of Lord Ellenborough in the observations made by the latter in *Mellish v. Andrews* (15 East, 13); for they were confined to the particular case then before the court, in which there had been a total loss in fact. His Lordship intended to lay down the doctrine that where the thing existed in specie, there must be an abandonment; for otherwise the owner would be taking the chance of recovering it, and then he could only sue as for a partial loss. Nothing that was said in *Roux v. Salvador* really controverts this position, for there the Court of Error was of opinion that the hides were totally lost in fact. Nor do the text-books published since the case of *Roux v. Salvador* in error, adopt the rule, supposed to be established in that case, that abandonment is equally unnecessary in the case of a constructive and of an actual total loss.

It has been said that the property vested in the underwriter on the ship receiving its death wound, but Lord Mansfield, in *Hamilton v. Mendes* (2 Burr. 1211), expressly repudiated such a doctrine, and declared that no rights vested in the owner to claim as for a total loss, until he had made his election by abandonment. Of course, therefore, no right to the property could vest in the underwriter until the owner had made that election. Here it is clear that the ship did exist in specie, and that the doctrine of Lord Mansfield directly applies to this case.

Then supposing the owner bound to give notice, has he done it in due time? And supposing him bound to make his election, has he not made it by his mode of dealing with the ship, so as to prevent him from recovering as for [529] a total loss? The argument that the underwriters would not have been bettered by receiving an earlier notice, cannot be admitted. The parties bound to give notice have no right to consider what may be the value of such a notice, at one time or another. They must give the notice as soon as possible after the event which they intend to make the groundwork of their claim.

The Attorney General in reply.—It is clear that for all purposes a constructive and an actual total loss are identical. *Manning v. Irving* must be taken to have decided that principle. “Constructive total loss” is in truth an inaccurate expression.

[Lord Campbell.—An action on a policy may be brought at any time within the period fixed by the Statute of Limitations. Now suppose this vessel had met with an accident in the Thames, the owners and the insurers living in London; suppose it to be a question whether the vessel could be advantageously repaired or not, and the underwriters to receive no intimation for three years; at the end of that time might the assured come on them for a total loss?]

The question proceeds on the mistake of confounding abandonment itself with notice of abandonment. Notice of abandonment is not necessary in all cases; *Cambridge v. Anderton*, *Roux v. Salvador*. In the case supposed, if it turned out that the vessel was not worth repair, notice would not be necessary. In the cases of capture and embargo, notice may be necessary; but these cases differ from those of injury occasioned by perils of the sea. In the case of *The General Insurance Company v. Ruggles* (12 Wheaton's Rep. 408), the court talked of abandonment, though there the vessel was in fact at the bottom of the sea, and no question about notice of abandonment could possibly arise.

[530] The case of *Chapman v. Benson*\* is in principle an authority for the appellants, and the acts of the master being considered to be acts done either for the underwriters, because he became their agent by the injury happening to the ship, and by the voyage being thereby retarded, or for all parties concerned, cannot be brought forward in answer to the claim of the owners. The case of *Douglas v. Moody* (9 Massachusetts's Rep. 518) shows that wherever the voyage is interrupted “by capture or prize, or by other detentions and casualties,” the master becomes the agent of all concerned; and nobody in particular is bound by his acts, but the value of them

\* 7 Scott's N. R. 625; 6 Man. and Gr. 792. In this case a writ of error is pending in this House.

is to be ascertained by circumstances. That principle is deducible from all the English authorities, and must be applied here.

Supposing then that notice of abandonment was necessary, it was here given in due time, and nothing that the master did can be construed as done by an agent of the owners, so as to bar them from their right to recover.

The Lord Chancellor.—It appears to me that in this case there are special grounds shown upon the correspondence, which are sufficient to dispose of the questions, without entering into any discussion as to many of the points which have been raised at the bar, particularly as to that question which has arisen with respect to the formal notice of abandonment, about which there is a confusion existing, arising, as I believe, more from the misuse of terms than from any real difference in the cases. But at all events, in this case it is admitted on all hands, whether the parties were bound to give a formal notice of abandonment or not, that when the facts came to their knowledge in this country, they were sufficiently informed of [531] what had taken place to enable them, if they thought proper, to take upon themselves the chance of the benefit of retaining the ownership of the property, instead of taking the sum which was secured to them by the policy effected with the underwriters upon the vessel; and if they acted upon that opportunity of election, they surely cannot afterwards turn round and go against the underwriters as for a total loss. If there was any necessity for a formal abandonment, and with a full knowledge of the facts they did not make that formal abandonment, but took the property instead, they could not afterwards take the benefit of the policy, as if there had been a formal abandonment. If, on the other hand, there was no necessity for a formal abandonment, still, if they chose to lie by and allow things to go on as they did, they could not afterwards, upon a change of circumstances, or in consequence of a better calculation, turn round and say to the underwriters, "Now we will give you up this property, because we find we cannot turn it to the advantage which we expected." The question really turns upon what the information was which was sent to them, as to the occurrences that had taken place abroad, and what their conduct was upon that information coming to them. Now the first communication they had, may perhaps not have been sufficient to enable them to come to any conclusion; they knew that misfortune had occurred to the vessel, and they knew that expenses had been incurred in respect of repairing the vessel; but they did not know to what extent. But there is a letter which they received afterwards, which seems to me to decide the question. That letter is written by Hunter, Arbuthnot, and Company, at the Mauritius, and it is dated the 16th of July, 1842, and was received in this country on the 13th November. In that letter it is stated that "Captain Elder is naturally anxious to follow his instructions, and proceed, when the ship is repaired, to Bombay; for this purpose he has advertised for the loan of about 20,000 [532] dollars, to be secured by a bottomry bond on the ship, which would proceed to Bombay in the prosecution of the voyage. No offers, however, were made on these terms, but parties are ready to advance the money required, provided the ship proceeds to England direct from this. Captain Elder will therefore be obliged to deviate from his instructions, and we have offered him a cargo of sugar at the first season for England, at the current rate of freight, which we think better for all parties than to go to Bombay at the miserably low rate of freight ruling in India." That letter therefore shows that the parties were under the necessity of borrowing upon the ship a sum equal to 20,000 dollars. That letter they received on the 13th of November; and by a letter of their own, dated the 3rd of December, 1842, they acknowledge the receipt of the various letters containing the information as to what extent the expenses at the Mauritius would be carried. Knowing therefore the extent to which the expenses were likely to be carried, they write acknowledging the receipt of these letters, and then they express themselves in these terms:—"We observe the general measures adopted for the representatives of the ship *William Nicol*, which we hope may turn out to have been the best in the unfortunate circumstances in which she was placed; but in the absence of any past experience on our part of the usages of your port in such cases, we were rather startled at the apparent necessity of a bottomry bond being had recourse to; but this may be a misapprehension on our part which the communication of particulars hereafter may clear up."

There is no doubt that they were in possession of all the information necessary to enable them to decide as to the course they would take. In point of fact the answer

to that particular letter shews that they were in possession of the information, stating that 20,000 dollars had been borrowed on a bottomry bond for the expence of the repairs, and were well aware that the continuance of the [533] voyage, for any purposes of profit, must be a doubtful speculation.

When we consider that these parties on the 13th of November had possession of this information, and we find them answering in the terms I have already noticed, and afterwards, on the 7th of March, writing to Messrs. R. and J. Anderson, London, in the terms I am about to read, there can be no doubt that they possessed all the knowledge necessary for them to determine whether they would or would not abandon the vessel. They write thus:—"From the advices last received by us from the agents of the ship *William Nicoll*, at Mauritius, it was expected that she would be ready to leave that place with a cargo of sugar for London, about the 20th December; and as she may, therefore, be looked for shortly, we enclose a few lines for Captain Elder, requesting him to follow your directions as to the dock of his discharge, to which please attend, after fixing with Mr. J. D. Nicol what dock it will be most advisable to send him to for that purpose."

Whether the fact of a total loss, as it is called, or such damage as would exceed the value of the ship to repair, was incurred, would, or would not, make the captain the agent of the underwriters, or the agent for all the parties, is a matter which I do not think it necessary at present to advert to, because it is quite clear, even if it was so, that it was quite competent for the owners to continue the employment of the captain. If they thought proper to say, "we do not treat this as a total loss; we do not treat you as the general agent in this matter, but we treat you as the person having our authority over this property:" and if the facts had sufficiently come to their knowledge of what he was doing, and notwithstanding that, they think proper to take the property under their own direction, and to recognize his acts, can they afterwards, when a considerable time has elapsed, and the vessel has made a different voyage, and obtained different freight from what they expected, [534] turn round and say,— "We no longer consider this property as ours, but we will go against the underwriters as for a total loss?" It appears to me to be not only contrary to the common principles of justice, but also contrary to all the authorities which have been referred to, that they should do so. Nothing has been cited at the bar which can alter that view of the case, because when it is said that they had not the necessary information to enable them to come to the conclusion of whether they would treat it as a total loss or not, and when it is said that they were not aware of what species of vessel it would become in consequence of the repairs to be done, so as to enable them to elect, still, if they thought proper to employ the captain as their agent in causing the repairs to be done, whether he acted judiciously or not, it is for them to suffer the loss, and any want of judgment in their agent, they must take the consequence of, and it is not to be visited upon the underwriters. Upon these grounds, my Lords, it appears to me that the judgment of the Court below must be affirmed.

Lord Brougham fully concurred, and thought that the judgment should be affirmed with costs.

Lord Campbell.—I think that the judgment of the Court below should be affirmed on both the grounds on which that Court proceeded, namely, "in respect that the pursuers were bound and failed to abandon in due time," and also that "they treated the loss as partial."

A constructive total loss is a good ground for abandoning, but in deciding on the circumstances which constitute a constructive total loss, which is as good a term as a contingent total loss, the reasons which govern the conduct of prudent uninsured owners must be considered. If a prudent person, uninsured, would not have repaired the vessel, but would have sold it to be broken up, that [535] amounts to a total loss. Then the question arises what the assured is bound to do under such circumstances, in order to entitle himself to claim as for a total loss. The ship was not submerged or destroyed; it remained in the form of a ship, capable of being repaired, and it was for the captain to determine whether it should be repaired or not. Whether it should be repaired or not depended on the price of labor, the cost of materials, the rate at which money could be borrowed, and on the probable profits to be obtained from the employment of the ship after such repairs should have been executed. Under these circumstances the question arises, whether, when the owners of a ship so insured

receive intelligence that the ship is capable of being repaired, and that it is lying in port, they can claim as for a total loss, without giving notice of abandonment? My opinion is that they cannot do so. According to all the old authorities, a constructive total loss can only entitle the owners to recover as for an actual total loss, by a notice of abandonment, for though, in the judgment of the assured, it may be better not to repair the vessel, the underwriters may, with different means, give directions to repair, or may direct, and are entitled to direct, how the wreck is to be disposed of. It would be an extreme hardship for them to be called on to pay as for a total loss, without having the opportunity of making the most of the ship in its disabled state. The law, therefore, requires that notice shall be given in order to convert a constructive into an absolute total loss.

Then we come to the cases of *Cambridge v. Anderton*, and *Roux v. Salvador*. The Court of King's Bench held, in *Cambridge v. Anderton*, without overturning the old authorities, that in the peculiar circumstances of that case, a notice of abandonment was not necessary. But why? Because, coming down the St. Lawrence, the ship met with a serious misfortune, and the captain, after having taken the best advice, thinking it not worth repairing, sold [536] it at once, and conveyed a good title to the purchaser. The owners received intelligence of that sale at the same moment that they learned the injury which had happened to the vessel. In such circumstances there was nothing to abandon. The ship was gone; the underwriters could not have taken possession of it, for it was lawfully transferred to the purchasers.

Then comes the case of *Roux v. Salvador*, in which Lord Chief Justice Tindal held that notice of abandonment was necessary. There the hides were so injured that they ceased to exist as hides before reaching the port of destination; so that though the substance of something remained, the substance of what had been insured was destroyed. But here the ship existed, was repaired, and brought home a cargo to England. When the assured heard, in November, the facts of the case, it was imperative on them, if they meant to turn a partial into a total loss, to give notice of abandonment, so that the underwriters should have the opportunity of dealing as they pleased with the property.

Was there any notice of abandonment? There was; but not till the 30th March, 1843. The ship had returned on the 27th of March, and, at that time, the assured were fully aware of all the facts of the case.

• Under all these circumstances, I think that the first ground alone would have been sufficient for the judgment.

As to the second ground, that here the assured had elected, I think that equally conclusive against them. Not only had they not given notice to abandon, but they had taken steps by which they chose to appear as treating this property as still belonging to them. They did that which amounted to an intimation of their intention of coming upon the underwriters for a partial loss, and taking all the advantage which might arise from the employment of the ship.

It is not necessary to give any opinion as to the general [537] power of the master under such circumstances as exist in this case; but I must hear a great deal of argument before I determine that where he acts *bona fide* for the advantage of the owners, he has not authority, by so doing, to bind them. In this case he thought he was doing the best for the interests of those who employed him: he thought he was doing the best for all parties concerned; but he was still the agent of the owners, and it would be dangerous to say that his authority, as their agent, might be questioned, and contradicted, by afterwards shewing that in fact what he did would not be for their interests.

In this case his authority was adopted in this country; for in the month of November 1842, the owners knew that he was repairing the ship, and on their account, and was to freight it from the Mauritius home, and that they were to have the profits arising from such freight. Are they to be allowed, after this, to revoke his authority?—No; they have acquiesced in all that he has done as conformable to his authority, or if he did not already possess that authority, they created it by their adoption of his acts. They treated this loss as a partial loss till the 30th of March, 1843, and after that they cannot be allowed, for the first time, to adopt another line of conduct, and to treat it as a total loss.

Interlocutor of the Court below affirmed with costs.

[538] JOHN WRIGHT HENNIKER WILSON, Esq.,—*Appellant*; MARY WRIGHT HENNIKER WILSON (the Appellant's Wife) and Others,—*Respondents* [June 16, 1846; Feb. 9, 11, 15, 16, 1847; May 23, 1848].

[*Mews'* Dig. vii. 981, 1009, 1010, 1011. S.C. 12 Jur. 467; and see 5 H.L.C. 40; 1 Wh. and T.L.C., 7th ed. 577, and notes *ad loc. cit.* Considered and adopted in *Hunt v. Hunt*, 1861-62, 4 De G. F. and J. 221; *Gibbs v. Harding*, 1870, L.R. 5 Ch. 338; *Burchell v. Clark*, 1876, 2 C.P.D. 98; *Marshall v. Marshall*, 1879, 5 P.D. 23; *Besant v. Wood*, 1881, 12 Ch.D. 623; *Cahill v. Cahill*, 1883, 8 A.C. 430; *Aldridge v. Aldridge*, 1888, 13 P.D. 214.]

*Husband and Wife—Articles of Separation—Specific Performance—Jurisdiction.*

The Court of Chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife, so far as they regard an arrangement of property agreed upon.

The Court, in decreeing specific performance of such articles, does not inquire into the cause of the separation.

The stopping of a suit in the Ecclesiastical Court for nullity of marriage, on the ground of impotency of the husband, is a sufficient consideration to him for articles of separation; and so, it seems, is a covenant by a third party to pay his debts.

*Semble*, that the Court, after decreeing specific performance of the articles, may restrain the wife, as well as the husband, from proceeding in the suit for nullity. (*Infra*, pp. 556, 575.)

This was an appeal against a decree for specific performance of articles of separation between the appellant and his wife, the respondent. They were married in April 1839. Differences arose between them soon after the marriage, and continued until May 1843, when Mrs. Wilson, by advice of her friends, went to reside at the house of Mr. Foster, her solicitor. On the 8th of that month the appellant was served with a citation from the Consistory Court of London, in a suit for nullity of marriage by reason of impotency. The appellant called next day on Mr. Foster, expressed his anxiety to stop the suit, and to enter into an amicable arrangement for a separation; and proposed to execute a proper deed for that purpose, and to give up the interests which he took in his wife's property under their marriage settlement, and in virtue of his marital rights, in consideration of an annuity of £1500.

By the settlement executed previous to the marriage, [539] a freehold estate in the county of Southampton, called Drayton Lodge, of the value of £2000 a-year, to which Mrs. Wilson was entitled for her life, for her separate use, with remainder to her issue, under the will of Lady Frances Wilson, was secured to the same use, together with £3000 consols, part of her own funds; and a leasehold house and premises, called the Chelsea Park estate, which, with the land tax charged thereon, she had purchased some time before the marriage, were settled to the use of the appellant during their joint lives, and to her, for her life, if she survived him, with remainder of the term absolutely to the appellant, his executors and assigns. The rest of the respondent's property—consisting of freehold estates in the counties of York and Essex, worth together about £3000 a-year, devised to her by Sir Henry Wilson, for her life, with remainder to her issue, with other remainders over; of a leasehold house in Grosvenor Place, in the county of Middlesex, bequeathed to her by the same will, and also of considerable sums of money in the public funds, in Bank and on mortgage, and other personal estate of large amount,—was not included in the settlement, and therefore, after the solemnization of the marriage, belonged, as the settlement recited, to the appellant in his marital right (see 14 Simons, 405).

The appellant was informed, on the 13th of May, that the terms of separation which he proposed to Mr. Foster would not be accepted, and that it was determined by Mrs. Wilson and her advisers to proceed with the suit in the Consistory Court. A notice to that effect was sent on the 25th of May to the appellant, who, on the next day, called again on Mr. Foster, and was informed that the libel in that suit would be filed on the 2d of June then next ensuing, unless an arrangement was completed

in the mean time. The appellant on the 26th of May again called on Mr. Foster, and with a view of preventing the suit, and the consequent publicity of the charge therein made, proposed [540] (without prejudice) "to bind himself to enter into a deed of separation to be executed immediately, whereby Mrs. Wilson should be secured in the undisturbed enjoyment of Chelsea Park, with the furniture there, and at Drayton also; Mrs. W. to receive the rents of the adjacent property at Chelsea, paying the ground rents; the rents of the property in Yorkshire and Essex to be placed under the control of Mrs. W., there being reserved to Mr. Wilson a certain sum annually, which he would prefer hearing suggested by Mrs. Wilson or her advisers. In considering this amount, it should be recollected that Mr. W. had, in pursuance of the agreement made before marriage, effected policies of insurance requiring annual payments to the amount of £600." This memorandum was dated May 26, 1843, and signed by Mr. W. H. Wilson.

Mr. Foster having submitted this proposal to Mrs. Wilson and her advisers, by their direction offered the appellant £1000 a-year out of the property, on his entering into a deed to carry the proposal into effect. The appellant required £1200 a-year, but finding after several discussions with Mr. Foster, on the 30th and 31st of May, that unless he accepted the annuity of £1000, the suit in the Consistory Court should proceed, he submitted to the terms proposed, and wrote and signed this memorandum: "The annual sum agreed upon on the part of Mrs. W. H. Wilson, to be paid to Mr. W. H. Wilson under the deed of separation, to be executed immediately, is £1000. The deed made to carry into effect the terms proposed in a memorandum dated the 26th of May, 1843, signed by Mr. H. Wilson, and to be a bar to suits; suit now pending to be withdrawn on the mutual execution of the agreement."

Articles of agreement for separation were immediately prepared, and the appellant—having before refused to appoint a solicitor, as being himself a barrister, and competent to conduct the negotiation—perused the draft and suggested alterations in it, and perused it again after it was finally settled on behalf of the respondent, and he assisted also in examining the engrossment.

The articles so prepared, dated the 1st of June, 1843, and made between the appellant of the first part, the respondent, his wife, of the second part, and Nathan Wetherell, Esq., of Lincoln's Inn, and the said Mr. Foster, of the third part—after reciting that, unhappy differences having arisen between the appellant and his wife, they had agreed to live separate, and to enter into the arrangements after mentioned—witnessed that the appellant on the one part, and the said N. Wetherell and W. C. Foster on the other part, with the privity and approbation of Mrs. Wilson, mutually covenanted and agreed to the effect following:—

*First*, That the appellant should at all times thereafter permit Mrs. Wilson to live separate and apart from him, etc.

*Secondly*, That the Chelsea Park estate, and the land tax thereon, comprised in the marriage settlement of Mr. and Mrs. Wilson, and thereby settled as before stated, and all such other estates (if any) as might be purchased or taken in exchange under the provisions thereof, should, from and after the 24th of June, 1843, be held by the trustees of the said settlement, in trust for Mrs. Wilson, for her separate use during the joint lives of herself and the appellant, to the intent that his life interest in the premises during the life of Mrs. Wilson might be superseded; but nevertheless without prejudice to his ultimate interests in the said premises expectant upon her decease.

*Thirdly*, That the estate in the county of Southampton, devised by Lady F. Wilson, and also the sum of £3000 consols, comprised in the marriage settlement, should remain subject to the trusts thereof.

*Fourthly*, That all other freehold, copyhold, and leasehold estates, to which Mrs. Wilson was, at the time of her marriage, or since become, entitled under the wills of [542] Sir Henry and Lady Wilson, should after the said 24th of June, subject, as to such of these estates as were situate in the county of York, to the annuity of £1000 after mentioned, be conveyed by the appellant to the trustees of the settlement, for the separate use of Mrs. Wilson, for the joint lives of her and the appellant.

*Fifthly*, That all the furniture in the mansion at Chelsea Park, should be held and enjoyed by Mrs. Wilson during her life, for her separate use, and after her

decease should belong to the appellant, his executors, etc.; and that all other goods and effects in the said mansion (except books belonging to the appellant) and all additions to be made thereto, and to the furniture, and all furniture, goods, and effects, in the mansion at Drayton Lodge, and all jewels, ornaments, wearing apparel, etc., belonging to Mrs. Wilson, and also all real and personal estate afterwards acquired by her, should belong absolutely to her for her separate use, with power to dispose of the same by deed, or will, etc.

*Sixthly*, That all rents, taxes, and other outgoings in respect of the Chelsea Park estate, and all expences of repairs upon the same, should be paid by the appellant up to the same 24th of June.

*Seventhly*, That, if and so long as the appellant should duly observe and perform the said covenants and agreements, all the rents, taxes, and other outgoings in respect of the said several estates, and all expences of repairs upon the same, should, after the 24th of June, be paid by Mrs. Wilson during her life, and "that he, the said John Wright Henniker Wilson, his heirs, executors, and administrators, and his and their estates and effects, should be indemnified therefrom, and from all the present debts and liabilities of the said John Wright Henniker Wilson, by the joint and several covenant of the said N. Wetherell and W. C. Foster."

*Eighthly*, That, if and so long as the appellant should [543] duly observe and perform the covenants and agreements herein contained, a clear annuity of £1000, commencing from the 24th of June, should be paid to him by equal half-yearly portions, during the joint lives of himself and Mrs. Wilson, the said annuity to be charged on the freehold estates in the county of York, which belonged to Mrs. Wilson before her marriage.

*Ninthly*, That a proper deed or deeds for effectuating the objects of the articles should, with all convenient speed, be executed by all the parties to these presents, "such deed or deeds containing all such covenants and provisions as should be deemed expedient," to be settled on behalf of all parties by counsel; and that in case of any unnecessary delay in the execution of such deed or deeds by any of the parties, the other of them should be at liberty to make void these presents.

And *lastly*, that, upon the execution of these presents by the appellant, the proceedings instituted against him in the Ecclesiastical Court by Mrs. Wilson, should be suspended, and upon the execution of the deed or deeds to be so prepared as aforesaid, should be put an end to and withdrawn, but nevertheless without prejudice to Mrs. Wilson's right to institute any other proceedings against him, in case he should make default in the performance of any of these covenants and agreements.

These articles were executed by all the parties to them, and the proceedings in the suit, in the Consistory Court, were suspended.

The appellant having, at first, interposed some delay in quitting Chelsea Park, in compliance with the articles, soon afterwards, in the course of a correspondence with Mr. Foster, objected to them altogether, on various grounds hereinafter mentioned.

In August 1843, Mrs. Wilson, by her next friend, and Messrs. Wetherell and Foster, filed their bill against the appellant, stating, among other things, that they, with the view [544] of carrying the said articles into effect, had caused a proper deed to be prepared as thereby provided; that a clerical error occurred in the copying of the original draft of the 7th article, which mentioned that the appellant should be indemnified against his own debts instead of his wife's, as was intended, and that they caused to be substituted in the said deed the usual covenant for indemnifying the appellant against the debts and liabilities of his wife. The bill prayed that, subject to the correction of the said error, the appellant might be decreed to execute the deed so prepared for carrying the articles into effect, according to their true intent and meaning.

The appellant, in his answer, stated the various grounds on which he objected to perform the articles: that they were procured from him by intimidation, duress, and surprise; that he agreed to them from an apprehension of degradation and ridicule, by the exhibition against him of a charge of impotency, which was false, as Mrs. Wilson well knew; that in making the proposals of the 26th and 31st of May, and in executing the articles, he acted not only without due advice, but also under mental incapacity to contract, arising from apprehension of publicity being given to



the said calumnious charge, and that Mrs. Wilson and her advisers instituted the suit in the Ecclesiastical Court, and took advantage of his alarm and apprehension, to coerce him into the arrangement; that her sole object was to obtain from him some concessions of property which he acquired under the marriage articles, or his marital rights, for which purpose she had previously threatened him with a divorce upon equally false charges of adultery and cruelty; and the suit for nullity of the marriage by reason of impotency, was another contrivance and device resorted to by her for the same purpose, without any belief in the imputation. He also insisted that the articles differed materially, to his prejudice, from his said proposals, and the draft deed prepared for his execution by the respondent[s], was itself a deviation from the articles, which did not contain any such clerical error as they alleged; that the suit instituted in the Consistory Court, although suspended, might still be prosecuted by Mrs. Wilson, notwithstanding the articles, so that he had no benefit or protection from the articles in that respect: but he repudiated such benefit, and stated that he would compel her to proceed in that suit, so as to give him an opportunity of refuting the false charge of impotency. He submitted that the articles, not being deliberately entered into by him, nor fairly, but fraudulently, obtained from him, were not binding on him; and as the respondents, Messrs. Wetherell and Foster, did not offer to perform their covenant, to pay his debts, exceeding £6000, the articles were without any consideration to him, inasmuch as the covenant which they proposed to insert in the deed to indemnify him against Mrs. Wilson's debts, was never desired or contemplated by him, knowing, from her habits, and possessed as she was of large property, that she would not incur debts.

The appellant's proctor took a proceeding in the Consistory Court, to compel Mrs. Wilson to file her libel there. Her proctor obtained time to do so, and then she and the other respondents filed a supplemental bill in Chancery for an injunction to restrain the appellant from taking further proceedings to compel her to continue the said suit, or to dismiss it; and such injunction was issued, but was discharged upon the appellant's answer being put in.

In May 1844, the appellant filed a cross bill, stating the contents of his answers to the original and supplemental bills, and that he had consummated the marriage, and charging that Mrs. Wilson admitted his competency, and that her imputation of his impotency would appear to be unfounded if she would proceed to proofs in the suit in the Consistory Court, to [546] which he endeavoured to compel her; but she avoided the prosecution thereof, well knowing that she could not succeed therein. The cross bill prayed that the articles might be declared void, and be delivered up to be cancelled.

Mrs. Wilson in her answer repeated her denial that the marriage was ever consummated, and added that, to the best of her belief, it was not consummated by reason of the impotency or physical inability of the appellant owing to some mal-conformation, etc. And she denied that the suit in the Consistory Court was instituted for such purposes as were alleged in the cross bill, but *bona fide* to obtain a sentence of nullity of marriage, to which she and her legal advisers, including eminent counsel and civilians, conceived her to be entitled; and she denied that she ever admitted to any person the appellant's competency.

Witnesses were examined in both causes, in the original cause by the respondents only, in the cross cause by both parties, and orders were made that the evidence taken in either cause might be read in the other.

The causes were heard by the Vice Chancellor of England, in January and February 1845, when his Honour rejected certain evidence proposed to be read on behalf of the appellant, to prove the admissions charged in his bill to have been made by Mrs. Wilson, to the effect that he was not impotent, and that he had consummated the marriage. His Honour also declared, that, although the covenant, contained in the seventh article, to indemnify the appellant against his own debts, instead of his wife's, was an error committed by the conveyancer's clerk in copying the original draft of the articles, it could not be considered an error as between the appellant and the other parties; and as they had offered to covenant to indemnify him against his wife's debts, his Honour decreed that it be referred to the Master to settle a proper deed of conveyance for carrying into effect the articles of separation, and [547] that he should insert therein a joint and several covenant by the respondents, Messrs. Wetherell and Foster, with the appellant, to indemnify him against all debts and

liabilities of Mrs. Wilson which existed on the 1st of June 1843, and all her subsequent and future debts and liabilities. And it was ordered that the appellant should, forthwith, deliver up to Mrs. Wilson, for her separate use, possession of the mansion at Chelsea Park, and the premises occupied therewith, and also the household furniture and all other goods and effects which were therein, on the 1st of June 1843: and it was ordered, that he should set an occupation rent thereon, and charge the appellant with the amount thereof up to the day on which possession thereof should be delivered up. And the master was to inquire by whom the rents of the several estates in the counties of York and Essex, which had accrued due since June 1843, had been received, and to take an account of all such parts thereof as had been received by the appellant, or for his use, and charge him with the amount thereof, after all just allowances; and it was ordered that the master should inquire and ascertain what had become due to the appellant in respect of the annuity of £1000 under the said articles, and that he should set off what he should find due to the appellant on account of the said annuity against what he should find due from him on the other accounts. And it was ordered that an injunction should be awarded to restrain the appellant from receiving any of the rents of the said estates, and also to restrain him, until after execution of the said deed, from taking any proceedings in the suit instituted by Mrs. Wilson in the Consistory Court, for the purpose of compelling her to proceed therein, and from applying for any order of the said court for the purpose of dismissing such suit, or otherwise putting an end to it, or whereby the respondents might be made liable for the costs thereof. And it was ordered, that the bill, in the cross cause, be dismissed with costs, and that it be [548] referred to the master to tax the costs of the respondents in that and in the original cause up to the hearing; and that the appellant should pay all such costs when ascertained.

The appeal was against the whole decree.

Sir Fitzroy Kelly and Mr. G. Turner (Mr. Busk and Mr. Henniker being with them) for the appellant:

This case presents several points of great importance, never yet decided. The principle question is, whether a Court of Equity, considering the nature and contents of the articles, and the circumstances under which their execution was obtained from the appellant, has jurisdiction, and ought to exercise it, to compel specific performance of them. The appellant states, that soon after the marriage, differences of a trivial nature occurred occasionally between him and Mrs. Wilson, chiefly about a natural child he had, and about the apportionment of their household expences. She, conceiving that he had obtained too much of her property by his marital rights, was anxious to re-possess herself of part of it; and, with that view, she sometimes held out threats of a divorce for adultery and ill usage, charges which were wholly unfounded; but she never imputed impotency, nor had he ever the slightest intimation of any such charge, until on the 8th of May 1843, to his utter astonishment and consternation, he received a citation in a suit for nullity of marriage on that ground. Thrown into a state of alarm and sorrow by so odious a charge, and anxious by any means to avert the threatened calamity, he put himself in communication with his wife's solicitor the next day. The result was, that overpowered by the threat of proceeding immediately with the impending suit, and by the fear and shame of publicity of so disgraceful an imputation, he was induced to enter into the articles of separation.

The articles thus executed, under surprise and misrepresentation, purport to be made between the appellant and wife, and Messrs. Wetherell and Foster, as trustees for her; they recite that Mr. and Mrs. Wilson had agreed to live separate; and the first article stipulates for such separation—which is contrary to the policy of the law and to moral duty: they contain no allegation of adultery or cruelty—which are the only justifiable grounds of separation, being those on which alone the spiritual courts grant divorces, and on which the temporal courts recognize articles of separation as beneficial private arrangements, resorted to for the purpose of avoiding public exposure; they contain no covenant, on the part of the trustees, to protect the husband against the wife's debts,—without which courts of equity have no jurisdiction to enforce the articles. The principal covenants are those by which Mr. Wilson gives up the property which he acquired by his marriage. And what is the consideration? Messrs. Wetherell and Foster covenant to indemnify him against his own debts; but their bill alleges that that is a clerical error, and prays it may be

corrected by substituting a covenant to protect him against Mrs. Wilson's debts. The appellant never required or contemplated any such protection, knowing that she, with so large a property, and parsimonious habits, would not incur debts. The only consideration, therefore, for the appellant's resigning the enjoyment of at least £3000 a year, for a life annuity of £1000, was the suspension of the suit in the Ecclesiastical Court, which is no consideration at all, because Mrs. Wilson may, at any time, proceed with that suit, or institute another, notwithstanding the covenant of her trustees to stop it.

The appellant, finding upon deliberation, after executing the articles, that the only benefit he derived from the sacrifice made by him was a mere temporary rescue from the terror and disgrace of the suit for nullity of the marriage, repented of what he had done in a state of distraction, caused by the horrible imputation—

[550] [Lord Brougham.—Not horrible; all men become impotent with the infirmities of age.]

[The Lord Chancellor.\*—The odium of the imputation would be, that he contracted marriage knowing that he was impotent.]

It is an imputation so horrible as to drive men mad, of which Dr. Burrowes has given several instances in his book, and it had the effect on the appellant of rendering him, at the time, incapable of transacting business.

The most eminent Equity Judges disapproved of separation deeds, and expressed their surprise how they came to be recognised by any court. Lord Rosslyn, in *Legard v. Johnson* (3 Ves. 359), says, "The common law will not entertain a suit upon contract by a wife against her husband. The Ecclesiastical Court has exclusive cognizance of the rights and duties arising from the state of marriage. I am completely at a loss to discover an equity to control the common law, and admit a suit between husband and wife on a personal contract, and supersede the jurisdiction of the Ecclesiastical Court, by entering into the consideration of it." He mentions several cases, in which, he says, "Lord Nottingham would not entertain any jurisdiction upon a contract between husband and wife:" And he adds that Lord Hardwicke, in *Head v. Head* (3 Atk. 547), held the same opinion of the defect of jurisdiction in Chancery; and that the only cases in which that court interfered were those in which a third party bound himself to indemnify the husband against the wife's debts, as in *Seeling v. Crawley* (2 Vern. 386), and *Angier v. Angier* (Prec. Chan. 496; S.C., Gilb. Eq. Rep. 152). Lord Eldon frequently declared [551] his repugnance to such deeds. In *Lord St. John v. Lady St. John* (11 Ves. 529), he expresses strongly his dissent from the *dicta* that fell from judges in cases at law in favor of deeds of separation, which he considers to be contrary to the sacred nature of the contract of marriage, and to the policy of the law, that marriage should be indissoluble, except by the legislature: He further says that there could not be even a separation *à mensâ et thoro* except *propter sævitiam aut adulterium*, and that even where the parties, after such separation, came together again, there would be a complete end of it: And—after referring to deeds of separation, containing covenants by third persons to indemnify the husband against the wife's debts, on which the jurisdiction in equity was said to be founded, and which was exercised, for the first time, in *Guth v. Guth* (3 Bro. C.C. 614), of which he disapproves, as Lord Rosslyn did in *Legard v. Johnson* (3 Ves. 361)—he says "Lord Thurlow doubted whether covenants with such objects ought to be the foundation either of action or specific performance. That doubt has long since had place in my mind. If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this court. But if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject. It is better that the case should go to the House of Lords than that the law should remain in this state upon a point connected with the very well-being of society." His Lordship, in the subsequent case of *The Earl of Westmeath v. The Countess of Westmeath* says (Jacob, 135), "If the question,

\* The case was partly heard in 1846, by Lord Lyndhurst, (then Chancellor) Lord Brougham, and Lord Cottenham. It was fully heard in 1847, by Lord Cottenham (then Chancellor) without any law lord.

whether the Courts would, or would not, act [552] upon articles of this sort, were not prejudiced by any decisions, I should say that I think no Court ought to act on them;” and after referring to his opinion in *St. John v. St. John*, he says, “it is quite inexplicable how courts of equity got any jurisdiction with respect to these articles.” As to the covenant by the trustees to indemnify the husband against the wife’s debts, his Lordships says (Jacob, p. 138)—“It is impossible to deny that a covenant of this sort is made by parties who are capable of contracting, and it is considered to be sufficient to support the deed against creditors; but if I am asked how it is possible that objections on ground of public policy can be removed by these covenants, the only answer is that, if not bound by decisions, I should say that it was impossible to shew that it originally ought to have made any difference whether there was or was not such a covenant.” Then saying that he must yield to the judgments of his predecessors, he adds that, from conversations he recollected with Lords Keynon and Thurlow, and Lord C. B. Eyre, they thought such covenants material, and would not without them enforce articles of separation. In giving his final judgment in the case, he says (*id.* 141), “There is not in this case that which in some cases has been held to support these instruments, namely, the valuable consideration of such a covenant” (to indemnify the husband against the wife’s debts). “The deed having been prepared without it, the defect cannot be supplied by a Court of Equity; for I think that a Court of Equity could not correct such a deed.”

Sir William Grant says, in *Worrall v. Jacob* (3 Meriv. 268), “It is now settled that this court will not carry into execution articles of separation between husband and wife. It recognises no power in them to vary the rights and duties growing out of the marriage, or to affect at their pleasure [553] a partial dissolution of it. It should seem to follow that the Court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenants between the husband and the trustee, is to give efficacy to the agreement between the husband and the wife; and it does seem strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law.” And after observing that the covenants between the husband and trustee had however been held valid, he repeats and concurs in what Lord Eldon said in *St. John v. St. John*:—“If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action at law, or a suit in Chancery.”

Now, as that covenant by a third party for indemnifying the husband against the wife’s debts, which was in some of the preceding decisions held sufficient, and in all held to be indispensable, to support separation deeds, does not find a place at all in these articles; and the want of it cannot, as Lord Eldon said, be supplied by a Court of Equity; they contain no foundation for an action or suit in equity, and they are all directly within the principles laid down by Lords Thurlow and Rosalyn and Eldon, and by Sir W. Grant. The appellant, it is admitted, never desired any such covenant, and now resists the insertion of it in the articles; but he is not therefore precluded from insisting that without it the articles are void.

Reliance may perhaps be placed on the covenant to stop the suit in the Ecclesiastical Court—for which the appellant most anxiously stipulated—as a sufficient consideration for the articles. Can that covenant be enforced? Can the trustees or the Court of Chancery prevent Mrs. Wilson from proceeding in that suit? “That,” says Lord Eldon, in *Westmeath v. Westmeath*, “leads to a most important question, whether deeds of this kind raise [554] such an equity between husband and wife as to authorize the Court of Chancery to prevent them from proceeding in the Ecclesiastical Court; for unless it could be carried to that length, I cannot see how they can be supported” (Jacob, 139). His Lordship having before said (p. 136), “it was a question whether such a covenant would be binding,” and that “none of the cases touched it in decision or in principle.”

Courts of equity, and of law also, most anxiously avoid interference with the Ecclesiastical Courts, whose exclusive province it is to entertain causes matrimonial, and grant separations. All that the temporal courts can do towards upholding separation deeds is, whether the parties, in order to avoid the publicity in court of their unhappy differences, come to a private arrangement, to give effect to the arrangement while the separation actually continues. The spiritual courts dis-

regard deeds of separation altogether, as bars to either party's application for divorce, or for restitution of conjugal rights; *Durant v. Durant* (1 Hagg. Ecc. Rep. 760), *Beeby v. Beeby* (1 Hagg. Cons. Rep. 142 n), *Westmeath v. Westmeath* (2 Hagg. Ecc. (Supp.) 115), *Smith v. Smith* (2 Hagg. Ecc. (Supp.) 44 n), *Mortimer v. Mortimer* (2 Hagg. Cons. 318), *Warrender v. Warrender* (2 Clark and F. 527 and 61). But neither they, no more than the temporal Courts, sanction any act that would have the effect of preventing a return to cohabitation; on the contrary, they promote and enjoin it, where there does not appear to be adultery or cruelty enough to warrant a separation. And when the husband and wife do return to cohabitation, whether by voluntary reconciliation or by decree for restitution of conjugal rights, there is an end to the separation, and to all the covenants in the deed, and all things are restored to the state in which they were before the separation; *Fletcher v. Fletcher* (2 Cox, 107), *St. John v. St. [555] John* (11 Ves. 532 and 537), *Bateman v. The Countess of Ross* (1 Dow, 245), *Westmeath v. Westmeath* (2 Hagg. Ecc. (Supp.) 52). But how can things be restored in the present case, if this decree, compelling the husband to convey property worth from £2000 to £3000 a-year, for the benefit of the wife, be affirmed? Can reconciliation, putting an end to the separation, re-vest in the appellant that property, after it is conveyed away absolutely by force of this decree? The trustees may, by the wife's direction, have conveyed it away to strangers, before the reconciliation; and if not, the retention of it will operate as a premium to the wife to reject all overtures towards reconciliation.

[Lord Chancellor (Lord Lyndhurst).—It was the wife's property before marriage, and still belongs to her if the marriage is void.]

The wife's allegations in that respect are unfounded, and the greatest injustice is done to the appellant by the injunction, restraining him from putting her to the proof of them.

[Lord Brougham.—Does he say in his answer to her bill that the marriage was consummated?]

He has contradicted her allegations by the testimony of four medical gentlemen, whose evidence the Vice Chancellor rejected. The Ecclesiastical Court is the proper tribunal to disprove them, but the injunction prevents him from going there, and if it be continued, that will be, in effect, to decree a perpetual separation.

[The Lord Chancellor.—The injunction has a more limited object; it merely restrains Mr. Wilson from moving in the pending suit.]

In effect, it enjoins perpetual separation of the parties; because it prevents the husband from putting his wife to the proof of her charges, and from proceeding to negative them; after which he might graft on her libel [556] his suit for restitution of conjugal rights, *Clowes v. Clowes* (1 Curteis, 145).

If, independently of the injunction, Mrs. Wilson cannot be prevented from proceeding in the pending suit, or instituting any other in the Ecclesiastical Court, the articles, for which the trustees' covenant to put an end to the suit was the sole consideration, are void. The House will, therefore, have to decide the question, whether she can be prevented.

[Lord Cottenham.—Is there not jurisdiction in Equity to prevent her, as Mr. Wilson has been prevented, by injunction, as consequential on the decree for specific performance? Courts of Equity constantly restrain proceedings in the law courts, without any conflict of jurisdiction, because the injunction affects the parties, and not the Courts.]

In such cases the Equity Courts have a concurrent, or the sole, jurisdiction over the subject-matter, but in causes matrimonial, they have none, and no instance of their interference by injunction can be produced. There are strong observations applicable to this point—and to articles of separation generally—in the case of *Warrender v. Warrender* (2 Cl. and Fin. 527), in this House. Lord Brougham there says, "What is the legal value of this agreement (of separation) in our law? Absolutely none whatever—in any court whatever—for any purpose whatever, save and except one only, the obligation contracted by the husband with trustees to pay certain sums to the wife. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract; no damages can be recovered for its breach; no specific performance of its articles can be decreed; no court, civil or consistory, can take notice of its existence. It is admitted on all

hands that the *consistorial courts never regard a separation, how formal so ever, as of any avail* [557] *at all against either party.*" And Lord Lyndhurst says (2 Clark and F. 561)—"The strongest articles of separation may be drawn and signed with the acquiescence of the husband and wife, *yet he may sue her, and she may sue him, notwithstanding. One may pledge himself not to claim or institute a suit for conjugal rights, but he cannot be bound by such pledge, for it is against the inherent condition of the married state, as well as against public policy.*" These observations only confirm the opinion of Mr. Justice Buller, sitting for the Lord Chancellor, in *Fletcher v. Fletcher* (2 Cox, 107), where he says—"I know of no instance of this court interfering, by way of injunction, to prevent a proceeding of this nature in the ecclesiastical court, and I certainly do not feel myself prepared to make such an instance. When this court has interfered, it has been in aid of the Ecclesiastical Court, and not to restrain its jurisdiction."

If Courts of Equity will not interfere to stay a suit for divorce, or restitution of conjugal rights, will they stay a suit for nullity of marriage? Assuming Mrs. Wilson's allegations, that she was defrauded into the state of marriage by an impotent person, to be true, will they compel her to forego the proper legal process to get rid of the false marriage? But, be the allegations true, or be they false, no Court can prevent her from trying to establish them. Then, "what a strange state of circumstances," says Lord Eldon, in *St John v. St. John* (11 Ves. 533), "if the husband suing in the Ecclesiastical Courts, the trustees could come to this court to compel him to give up his rights; but if the wife sues, the same equity fails, for it is impossible to say the wife is bound in any degree by a deed of this sort." That very state of circumstances is brought about by the Vice Chancellor's decree, restraining the husband from proceeding in the Ecclesiastical Court, while the wife's express [558] covenant not to proceed there, cannot be enforced. There is no reciprocity in that exercise of equity jurisdiction, and it is at variance with the well known principle not to interfere by injunction when it cannot compel mutual and complete performance of a contract; *Gervais v. Edwards* (2 Dru. and War. 80), *Kemble v. Kean* (6 Sim. 333), *Baldwin v. The Society for Diffusing Useful Knowledge* (9 Sim. 393), *Hooper v. Brodrick* (11 Sim. 47), *Armiger v. Clarke* (Bunbury, 111), *Howell v. George* (1 Madd. 1), *Diestrichsen v. Cabburn* (2 Phil. 52), *Harnett v. Fielding* (2 Sch. and Lef. 549).

[The learned counsel then proceeded to examine the Vice Chancellor's judgment (14 Sim. 414), and the cases there referred to, some of which they had already cited; and as to others, they said that *Hyde v. Price* (3 Ves. 437), and *Cooke v. Wiggins* (10 Ves. 191), had no application to the present case; that *Guth v. Guth* (3 Bro. C.C. 614), in which specific performance of articles was decreed, was disapproved of by Lords Rosslyn and Eldon (as before-mentioned) (*supra*, p. 551); that *Rodney v. Chambers* (2 East, 283; see 6 East, 252-3, and 2 B. and Cr., 551-2), disapproved of by Lord Eldon in *St. John v. St. John*, was overruled in *Durant v. Tilley* (7 Price, 577), and that in *Seeling v. Crawley* (2 Vern. 386), *Angier v. Angier* (2 Pre. Ch. 469), *Stephens v. Olive* (2 Bro. C.C. 90), *Hobbs v. Hull* (1 Cox., 445), *More v. Freeman* (Bunb. 205), *Bateman v. The Countess of Ross* (1 Dow, 235), *Ross v. Willoughby* (10 Price, 2), *Nunn v. Wilmore* (8 T. Rep. 521), *Elworthy v. Bird* (2 Sim. and Stu. 372), *Logan v. Birkett* (1 Myl. and K. 220), [559] *Clough v. Lambert* (10 Sim. 174), *Wellesley v. Wellesley* (*id.* 256; and 4 Myl. and Cr. 561), *Frampton v. Frampton* (4 Beav. 987), and *Jones v. Waite* (5 Bing. N.C. 351; 9 Clark and F. 101), the deeds of separation were supported, because either they were founded on compromises of adultery or cruelty, which would warrant a divorce in the Ecclesiastical Court; or they contained covenants by third persons for maintenance of the wife, and indemnity to the husband against her debts, on which covenants the courts acted; or they were deeds executed and complete, and not articles executory—in all which essentials the present case is deficient.]

The third and last ground of objection to the decree is the dismissal of the cross-bill, and rejection of evidence material to the appellant's case. His bill put the fact of consummation of the marriage in issue, and prayed that the articles might be delivered up to be cancelled on the ground of the appellant's assent to them having been procured by duress and intimidation, and the fear of publicity of a degrading though false charge. Mrs. Wilson, in her answer, re-asserted the truth of the charge.

Captain Wilson, her friend, and entitled next in remainder to the estates left to her by his elder brother, Sir Henry Wilson, was examined on behalf of the appellant; and he deposed to conversations she had with him after her marriage respecting the character and constitution of the appellant, and in which she spoke of his ardour in the performance of those conjugal duties for which she now swears he was incompetent. She also spoke of a natural child which she knew he was maintaining, and spoke of proceeding against him for adultery and cruelty, but she never, he says, "hinted at or insinuated, in the slightest degree, anything in the nature of or approaching to the charge of incompetency for sexual intercourse." And he says he believed [560] "that if any serious ground for complaint existed," he should have been told of it by her.

His evidence, which was clearly admissible upon the issue raised in the cross-suit, and most important to the appellant's case, was rejected by the Vice Chancellor. His Honour also rejected some documentary evidence, consisting of letters that passed between Mrs. Wilson and a Mr. Smithson, and made exhibits in this suit—

Mr. Bethell for the respondents, objected to any argument on this evidence, as it was not mentioned at all in the decree appealed from; and he referred to the cases of *Cairns v. Raine* (12 Cl. and Fin. 835-6) in this House, and *M'Mahon v. Burchell* (2 Phill. 137, *et seq.*) before the Lord Chancellor, in both which a similar objection was admitted.

The Appellant's Counsel.—It is not clear that the decree does not refer to the rejection of the evidence: the petition of appeal certainly complains of it. The appellant ought not to be precluded by a technical objection from showing a material error in the decree.

[The Lord Chancellor (Lord Cottenham).—The objection was sustained in the case in this House, because the evidence was said to have been given *de bene esse*; and in the other case, because it was stated to be entered by consent of the parties, and without prejudice. But suppose a case in which evidence is properly tendered and rejected, or admitted, and the officer in drawing up the decree omits to notice it?]

Mr. Bethell.—The mistake may be rectified by application to the registrar before the decree is made up, or to the court. But he would not press the objection.

The Appellant's Counsel (continued).—The letters written by Mrs. Wilson to Mr. Smithson, a solicitor, and her confidential adviser, and one of the trustees in Sir Henry Wilson's will, contained repinings in respect of the [561] large share of her property acquired by the appellant by the marriage settlement, and in these letters she put questions to him as to whether a Court of Equity would not restore part of it, and hinted at consultations with him and others about proceedings for a divorce for adultery and ill-usage, but never made any allusion to impotency. These letters, as well as Captain Wilson's depositions, were applicable evidence to maintain the statement in the appellant's bill, that Mrs. Wilson, at and before the issuing the citation in the nullity suit, well knew that he was not impotent, and that she "admitted to several persons the competency of your orator; and although the said Mrs. W. H. Wilson, has several times given way to violent feelings, and expressed herself with great anger as to your orator, as well to the said Mr. Smithson as to the said Captain Wilson, she never made the least insinuation, or the most remote allusion to either of them, of any such complaint against your orator, but has used to each of them expressions implying the contrary." The charge of impotency was this lady's last resource to coerce the appellant into a concession of property, which she was so anxious to obtain that it is hardly credible that she would ever enter into any arrangement if she knew the charge to be true.

Mr. Bethell and Mr. Lloyd for the respondents:

The arguments for the appellant have stirred up questions of law which have been long considered as settled. Upon all general principles now established and recognized in numerous decisions, not only of the Courts of law and equity, but also of this House, these articles are not open to any of the objections raised against them. The agreement was not, as alleged, for a future or prospective separation; these parties had lived in a manner separate for a considerable time, though the actual separation is to be dated only from the day on which Mrs. Wilson took up her residence at the house of her solicitor, which, how-[562]-ever, was prior to the execution of the articles. One can easily understand the feelings of delicacy which prevented her from making

an earlier disclosure of the appellant's impotency. That charge was the ground of the suit in the Consistory Court, and the articles were founded on a compromise of that suit. The appellant alleges in all his pleadings that the charge is false, but he does not swear that he consummated the marriage; he says in the cross-bill that it was consummated, but Mrs. Wilson, in her answer, denies it, in the most solemn and circumstantial manner, and re-asserts the charge of his inability to consummate it.

The appellant sets up various pretences against the validity of the articles, alleging that they were obtained from him by "conspiracy and intimidation;" by "fraud and falsehood" as to the grounds of the suit; by the "influence of fear, and apprehension of publicity, and consequent ridicule and degradation;" by "surprise" and "under mental incapacity to contract, and want of professional advice." All these pretences are groundless, and are mere after-thoughts and fictions, resorted to after execution of the articles, in order to evade the performance of them.

As to the pretence of pressure through surprise and want of advice, Mr. Foster wrote to him twice before the citation from the Ecclesiastical Court was served, and afterwards recommended to him to appoint a solicitor, and his answers were that he did not require any, as being himself a barrister fully competent to transact the business. And so it appeared, for he wrote or dictated minutes for the agreement: he perused and reperused the articles, first in draft, afterwards when engrossed, and he suggested several alterations in the draft, some of which were approved of and adopted. He had frequent interviews with Mr. Foster, the negotiation having continued for three weeks, during which he showed no signs of alarm or intimidation. At the first interview, he said the case "must [563] ultimately come to a separation," and he proposed an amicable arrangement by an annuity of £1500, but finding a determination on the part of Mrs. Wilson not to yield to that demand, he, after consulting a proctor, as he said, reduced it to £1200, and finally assented to the annuity of £1000, as first proposed by her advisers. The proposal to come to a private arrangement, instead of proceeding in the suit, originated with himself, and he had abundant time and opportunity to confer with solicitors and counsel, and negotiate the compromise of the suit through them; he sometimes used expressions implying that he was in consultation with friends and advisers. That he acted with deliberation and in the free exercise of his judgment throughout the negotiation, and with full and perfect knowledge of the provisions of the articles, appears clearly and conclusively from his letters and other documents contained in the evidence, as well as from Mr. Foster's depositions. If any one had cause to complain of intimidation, it was Mrs. Wilson, to whom the appellant sent letters and other writings respecting her age and parentage, of the most offensive character, with a view to coerce and terrify her into a modification of the terms of the articles of separation. All his pretences and imputations against the *bona fides* of the whole transaction are contradicted, not only by her oath, solemnly pledged and repeated, in the most distinct manner, in various parts of her answer to his cross-bill, but also by the testimony of the witnesses examined in her behalf; by letters and documents; by acts and interviews which preceded and followed the execution of the articles. His allegations of fraud and conspiracy in instituting the suit for nullity of marriage, as a contrivance to compel him, through fear of exposure and degradation, are negatived, not only by Mrs. Wilson's answer, but also by the fact that, before that suit was commenced, she, at the suggestion of her advisers, submitted to medical examination, [564] the certificate of which satisfied the eminent Civilians before whom it was laid, that she was fully entitled to a decree of nullity.

The appellant's objections to the constitution of the articles of agreement being thus removed by mere reference to the evidence in the cause, it becomes necessary to answer his objections to their legal validity. The first was that all agreements for separation of husband and wife are contrary to public policy, to the policy of marriage, and to moral duty; and that to enforce them in equity or at law is an invasion of the jurisdiction of the Ecclesiastical Courts; but the Judges, whose doubts and *dicta* were cited in support of this objection, gave effect to such agreements in some of the cases that were referred to. Lord Rosslyn, in *Legard v. Johnson* (3 Ves. 352), while he disclaimed jurisdiction of a Court of Equity upon a contract between husband and wife to live separate, still recognized the jurisdiction to enforce the executory covenants between the husband and third parties in such a contract, and referred to cases



in which the jurisdiction was exercised. Mr. Justice Buller, in refusing specific performance of the articles in *Fletcher v. Fletcher* (2 Cox, 99), because there was a suit for restitution of conjugal rights, said, there was no doubt of the general jurisdiction of the court to compel specific performance of articles of separation. Sir W. Grant also, in *Worrall v. Jacob* (3 Meriv. 268), although he held it to be then settled that a Court of Equity would not execute an agreement for separation between husband and wife, and thought it strange that the auxiliary agreement between the husband and third party should be enforced, yet held such agreement to be valid, and in that very case enforced it, being obliged—as he said, repeating the words of Lord Eldon in *St. John v. St. John* (11 Ves. 537)—to submit to what was “the settled law on the subject.” And notwithstanding Lord [565] Eldon’s complaints in that case of the former decisions, and his recommendation that “the case should be taken to the House of Lords, rather than that the law should remain in that state,” yet when soon afterwards he had the case of *Bateman v. The Countess of Ross* (1 Dow, 135) before him in this House, he upheld the jurisdiction in equity to enforce an award providing for a separation of husband and wife; and in *Tovey v. Lindsay* (*Id.* 117), another case in this House, his lordship held that a deed of separation had the effect of changing the wife’s domicile. So that Lord Eldon’s decisions in those cases may be set off against his doubts and regrets in the former cases of *Beard v. Webb* (1 Bos. and Pull. 93), and *St. John v. St. John* (11 Ves. 526). There is no case in which it has been said that a court of equity is decreeing a separation of husband and wife, when it decrees performance of the husband’s covenants in such deeds, over which it only exercises the same jurisdiction that it does on other executory agreements. There are, however, some classes of cases in which neither Courts of law nor equity will interfere in enforcing articles, as where they are made in contemplation of a future separation: *Durand v. Durand* (2 Cox, 207), *Durant v. Titley* (1 Price, 557), *Westmeath v. Westmeath* (Jacob, 125), *Hindley v. Westmeath* (6 Barn. and Cr. 200); or in fraud of creditors; *Hobbs v. Hull* (1 Cox, 445), *Legard v. Johnson* (3 Ves. 352); or where an end is put to the separation by voluntary reconciliation, or decree of restitution of conjugal rights; *Head v. Head* (3 Atk. 547), *Fletcher v. Fletcher* (2 Cox, 99). The present case does not fall within any of these classes.

The next objection to these articles is, that as they contain no covenant to indemnify the husband against the [566] wife’s debts, they are void, for want of consideration. The omission of that covenant has been shewn to be a clerical error; and the respondents offered to supply it in the deed intended to carry the articles into execution, which it is quite competent for them to do under the 9th article. *Stephens v. Olive* (2 Bro. C. C. 90) was the first case in which any reliance was placed on such a covenant to support a deed of separation, but it does not follow that the absence of it would affect the validity of the articles; *Guth v. Guth* (3 Bro. C. C. 614), *Fitzer v. Fitzer* (2 Atk. 512), *Cook v. Wiggins* (10 Ves. 191), *Innell v. Newman* (4 Barn. and Ald. 419), *Ross v. Willoughby* (10 Price, 22), *Wilson v. Mussett* (3 Barn. and Ad. 743), *Frampton v. Frampton* (4 Beav. 287), *Hindley v. Westmeath* (6 Barn. and Cr. 200). The objection ill becomes the appellant, who admits that he sets no value on such a covenant, and never contemplated it. He has, besides, by the clerical error, obtained a better consideration in the trustees’ covenant to pay his own debts, which the decree upholds. He has also the consideration of £1000 a-year, whereas, if the suit compromised by the articles had proceeded to a decree of nullity, he must give up, without any annuity, all the property which he acquired by the marriage. The stopping that suit was of itself a valuable and sufficient consideration: it was the only consideration, beyond the annuity, for which the appellant stipulated. Lord Hardwicke says, in *Fitzer v. Fitzer* (2 Atk. 514), “considerations are not to be weighed in too nice scales.” Where, however, there is a consideration for the husband’s covenants, they will be enforced against him, even where there is no covenant, by a third party or trustee, to indemnify him, as appears in many cases from *Angier v. Angier* (Prec. Chan. 296), down to *Clough v. Lambert* (10 Sim. 174).

[567] Next comes the question whether a suit for nullity of marriage, on the ground of impotency, may be compromised by an agreement for separation. The objection attempted to be raised against such a compromise, upon the supposition that there is some principle of public policy to prevent it, is wholly untenable. No principle is stated in support of the fancied distinction drawn between a suit of that

sort and suits for divorce in the ordinary cases of adultery and cruelty, which are constantly compromised by private agreements for separation. The temporal Courts, in enforcing the agreement, do not inquire into the cause of separation, nor whether the spiritual courts would grant a divorce. They have no jurisdiction or machinery for conducting such an inquiry; all they inquire into is whether the deed or articles of separation be a valid agreement, and shew sufficient consideration for the covenants between the husband and third parties. The arguments for the appellant on this point are hardly intelligible; if his counsel would adhere to their first broad principle, that every deed of separation which does not appear to be a compromise of a suit for a divorce is illegal, that is a proposition with which one could grapple, and shew that it is contradicted by most, if not all, of the cases, from *Seeling v. Crawley* (2 Vern. 386), in the year 1700, to *Jones v. Waite* (9 Clark and F. 101), in 1842. Deeds or articles of separation generally recite that the husband and wife, in consequence of unhappy differences, have agreed to separate, but they seldom disclose the nature or causes of those differences. Adultery and cruelty may be, and often are, the causes; but they are not essential to the validity of the agreement, and the supposition of their existence is excluded in many decided cases, in which other causes are expressly assigned. In *Sanky v. Golding* (Carey, 124), the cause was "discord," and in *Seeling v. Crawley*, it was "a quarrel." In *Head v. Head* (3 Atk. 547) the wife's "infirmities" were the cause; [568] in *Fletcher v. Fletcher* (2 Cox, 99), her "expensiveness." The cause is not mentioned in the reports of *Guth v. Guth* (3 Bro. C. C. 614), *Stevens v. Olive* (2 Bro. C. C. 90), *Compton v. Collinson* (id. 377), *Jee v. Thurlow* (2 Barn. and Cr. 547), *Fitzer v. Fitzer* (2 Atk. 511), *Cooke v. Wiggins* (10 Ves. 191), or *Frampton v. Frampton* (4 Beav. 287), but that it was not for adultery or cruelty appears clear enough. Whenever these or other justifiable causes of separation exist, and the articles show a valuable consideration for the husband's covenants, they will be enforced, even though there is no third party or trustee; *Angier v. Angier* (Pre. Ch. 497), *Clough v. Lambert* (10 Sim. 174).

The injunction restraining the appellant from proceeding in his wife's suit, in the Ecclesiastical Court, is consequential on the decree for specific performance of the articles, one of which provided for the termination of that suit. It is contended that it has the effect of a sentence of perpetual separation, inasmuch as it prevents the appellant from suing for restitution of conjugal rights, which, it is said in *Fletcher v. Fletcher* (2 Cox, 99), *St. John v. St. John* (11 Ves. 527), and *Westmeath v. Westmeath* (Jac. 125; 1 Dow and C. 547), a court of equity has no power to do. The injunction does not go to that extent, although, if it did, there appears to be no reason for saying that the Court may not, on the application of the trustees, prevent the appellant from a breach of his contract, after a decree for specific performance. The injunction was not an invasion of the jurisdiction of the Ecclesiastical Court, but was intended to preserve the jurisdiction of the Court of Chancery over its own decree, and to prevent the appellant from defeating it, by resorting to another court. In *Hill v. Turner* (1 Atk. 515), Lord Hardwicke restrained a woman, who [569] married a ward of court clandestinely, from proceeding in the Ecclesiastical Court against the infant for restitution of conjugal rights, or against his guardian for alimony. In *The Bishop of Winchester v. Paine* (11 Ves. 199, *sed quaere*, as to the point), a party was restrained by injunction from obtaining probate of a will by fraud. This injunction had for its object to compel obedience to the decree; if that is not sustained, the injunction falls with it; but if it is sustained, the appellant has no reason for complaining of the injunction.

The evidence of the medical gentlemen, rejected at the hearing, and of the rejection of which the appellant complains, might be received in answer to the allegations in the suit in the Ecclesiastical Court, but was immaterial to the issue in this cause, and was therefore rejected on the established doctrines and rules of Courts of Equity; *Attwood v. Small* (6 Clark and Fin. 350, 516); and so also were Captain Wilson's depositions, the appellant not having put in issue the points to which they were applicable; *Watkins v. Watkins* (2 Atk. 96).

Sir F. Kelly in reply.

The appellant and his wife lived together in apparent amity until May 1843; if they had differences, they arose about the management of their property or servants. There is no charge of adultery or cruelty indicated in the articles, but even the

supposition of the existence of these causes of separation is excluded in the compromise of a suit for nullity. The question is whether a Court of Equity will support that compromise under the circumstances of this case. The appellant's argument is not, as alleged on the other side, that the Court will not execute articles of separation except where they are a private arrangement and compromise of a suit for divorce, on the ground of adultery or cruelty. The principle for which he contends is, that a Court of Equity confines its interference to cases [570] in which one of the parties might have proceeded in the Ecclesiastical Court for divorce; and then, if both parties and their friends, to prevent publicity, will arrange among themselves to do what the spiritual court would decree, Equity will support the arrangement. The possibility of the existence of any grounds for a divorce is excluded from this case. The cause of separation is not immaterial; the Courts of law as well as equity regard it; *Angier v. Angier* (Pre. Cha. 496), *Nunn v. Willsmore* (8 T. Rep. 521), (per J. J. Lawrence and Le Blanc). On that point it was that there was a difference of opinion among the judges, in *Jones v. Waite* (5 Bing. N. C. 341), Lords Denman and Abinger thinking that the record ought to have stated the cause of separation, all of them admitting that there must be sufficient cause, though not stated. The contract of marriage is not to be affected by every arrangement to which the husband and wife may agree. The observations of Lord Eldon in *Beard v. Webb* (1 Bos. and Pull. 99), *St. John v. St. John* (11 Ves. 527), and *Westmeath v. Westmeath* (Jacob, 125), on this point, are entitled to the greatest respect. To give effect to all voluntary agreements between husband and wife in derogation of marriage, is contrary to public policy and morality, and this House will be cautious not to extend the principle.

There is no mutuality in this agreement; the wife agrees to put an end to her suit for nullity for £2000 a-year, and after the property is conveyed by her husband, she is at liberty to proceed in the suit; she cannot be prevented, but he cannot recover back his property. That consideration alone vitiates the articles. The injunction against the appellant brings the decree in conflict with the jurisdiction of the Ecclesiastical Court. It is impossible to escape from this conclusion, that if it be right to restrain the husband from seeking restitution of his conjugal rights [571] for a time, it cannot be wrong to separate him from his wife permanently. It is the husband's duty to seek and to exercise his conjugal rights, and any decree of court preventing him, is opposed to the policy of marriage. If there are articles which cannot be enforced against both parties, why enforce them at all?

With respect to the cross bill, the competency of the appellant is thereby put in issue; he examined witnesses, who say there is no malconformation, as the wife alleged, and he says he consummated the marriage. She swore he did not. The evidence tendered by the appellant, applicable to that issue, was improperly rejected.

The Lord Chancellor (May 23, 1848).—In this case the articles of separation are between the husband, of the first part, the wife of the second part, and two trustees of the third part, reciting that the husband and wife had agreed to live separate and apart. The agreement is between the husband on the one part, and the two trustees, with the privity and approbation of the wife, on the other part; and it provides, *First*, that the wife may live separate; *Secondly*, that the husband shall give up, for the use of the wife, certain property belonging to her, but in which he had a life estate under the marriage settlement; *Thirdly*, that certain other estates, not included in the marriage settlement, should be enjoyed by the wife for her separate use during their joint lives, subject to an annuity of £1000 a-year to the husband; *Fourthly*, it provides for securing to the wife certain jewels, furniture, and other articles, and securing to the husband £1000 per annum; then it provides for executing a proper deed to effect these objects; and, *lastly*, it provides for putting an end to a suit instituted by the wife for nullity of marriage, conditioned if the husband should keep this contract.

[572] The decree against which the appeal has been presented, directed a specific performance of these articles, and the execution of a proper deed for that purpose, with the necessary inquiries and directions; and it restrained the husband from any proceeding to compel the wife to proceed in the suit in the Ecclesiastical Court, or

to pay the costs; and it dismissed the husband's cross cause, and ordered him to pay the costs of both suits.

The appeal was attempted to be supported upon two grounds; *first*, on the ground that the articles had been obtained by intimidation and duress—this, I think, wholly failed, and the cross bill was properly dismissed, with costs;—and, *secondly*, because Courts of Equity ought not to entertain jurisdiction for performance of articles of separation.

The second head gave rise to a very protracted and learned argument, in which very many cases were cited, but of which very few, of the later date, seem to me necessary to be adverted to; for if those later cases, particularly some which have been decided in this House, have settled the law, all those which preceded them may be thrown aside.

It must be observed that the decree appealed from does not touch the question of separation, but only makes provision for a previous contract for that purpose; and enforces a contract respecting property growing out of such separation. If an agreement for the separation and living apart of a husband and wife be so contrary to public policy, and therefore illegal, as to make void all arrangements of property arising from it, then, in all cases, the only question would be, whether the arrangement of property was in consideration of or dependent on such illegal agreement. But what has this House decided upon the subject? In the very recent case of *Jones* [573] v. *Waite* (9 Clark and F. 101) the question was whether the execution of a deed of separation was a sufficient consideration for the agreement in question there, or whether it was illegal and void. Chief Justice Tindal said, "My brothers and myself are of opinion that there is no illegality disclosed by this agreement; one part of the consideration for it is the execution of the deed of separation, which, as clearly appears from the declaration, was previously agreed upon and drawn up.

A case of *Bateman v. The Countess of Ross* (1 Dow, 235) had previously (in 1813) occurred in this House, in which Lord Eldon and Lord Redesdale held an award good, which confirmed an arrangement of property "provided the husband and wife shall continue to live separate and apart;" Lord Eldon saying, "It was objected to the award that it assumed the jurisdiction of the Ecclesiastical Court in awarding a separation; but it did no such thing, it only assumed that there must be a separation, and provided accordingly." This case coming after that of *St. John v. St. John* (11 Ves. 528), takes off much from the weight to Lord Eldon's observations in that case.

In *Westmeath v. Westmeath* (5 Bli. 367; 1 Dow and C. 519) the objection was, that the deed provided for a future separation; and there Lord Eldon says, "I apprehend that any instrument which provides for a present separation, and which prospectively looks to the parties living together again, and then to a future separation, that such a deed, so far as it provides for that future separation, will never be carried into effect."

The authorities in this House are therefore against the appellant; and a now long train of authorities at law and in equity has proceeded upon the same ground, but I [574] will only mention the case at law of *Wilson v. Mushett* (3 Barn. and Ad. 743). In *Frampton v. Frampton* (4 Beav. 287), Lord Langdale considered the principle established; and the Vice Chancellor has held the same in several cases, such as *Clough v. Lambert* (10 Sim. 174), and *Wellesley v. Wellesley* (*Id.* 256).

It was contended that there was no consideration for the deed, because there was no indemnity against the wife's debts, but only against those then owing by the husband. That, under the circumstances, was probably a more valuable indemnity than the other would have been; and there are other ample considerations for the deed. One part of the consideration is the provision as to the suit in the Ecclesiastical Court. The stopping of those proceedings appears to have been an important object to Mr. Wilson—of the reason for which he was the best judge—and that alone was a sufficient consideration. In *Bateman v. the Countess of Ross* (1 Dow, 135), there was a suit pending for a divorce. Why is not the compromise of such a suit to afford consideration for an agreement? Is it desirable that the parties should be compelled to bring such complaint in the Ecclesiastical Court to public discussion? A similar answer applies to an argument, for which no authority was cited, that the court will enforce such agreement only in cases in which the wife might have obtained alimony in an Ecclesiastical Court. How is a Court of Equity to try that?

and upon what principles can such a rule stand? If the consideration or fact of separation does not contaminate all that proceeds from it, the court is only exercising its ordinary jurisdiction in giving effect to the arrangement of property agreed upon.

It was then said that the suit for nullity might end in a sentence for restitution of conjugal rights, and that the in-[575]-junction was calculated to prevent that object. It only prevents an unjust use being made by the husband of the wife's proceedings, instituted for a very different purpose, and does not interfere with any proceeding that the husband may adopt. It was said that there was nothing to prevent the wife prosecuting that suit. This court does not interfere by injunction, when there is no prospect of danger, and if it should arise, the question might be raised in another suit.

The documents rejected were, I think, inapplicable, and if produced, could not have had any effect, and were, I think, properly rejected.

I therefore advise your lordships to affirm the whole of the decree, and to dismiss the appeal, with costs.

It was ordered accordingly.

[Besides the numerous cases mentioned in the report, the following were also cited, in the arguments: *Mildmay v. Mildmay*, 1 Vern. 53; *Sidney v. Sidney*, 3 P. Wms. 269; *Wilkes v. Wilkes*, 2 Dickens, 791; *Marshall v. Rutton*, 8 T. R. 549; *Seagrave v. Seagrave*, 13 Ves. 437. And manuscript notes and extracts from the registrar's books were read, explaining and correcting the reports of *Wilkes v. Wilkes*, and *Guth v. Guth*, in 3 Bro. C. C. 614.]

[576] EDWARD SHEEHY and others,—*Appellants*; The Right Hon. MATHEW LORD MUSKERRY,—*Respondent* [April 14, 21, 1845; June 23, 29, 30, July 2, 7, 1846; May 25, 1848].

[*Mews'* Dig. i. 331; vi. 489; x. 1575, 1650. S.C. 7 Cl. and F. 1; Macl. and R. 493; Ll. and G. t. Plunk 568, and *sub nom. Muskerry v. Chinnery*, Ll. and G. t. Sugd. 185. Followed in *Mostyn v. Lancaster*, 1883, 23 Ch. D. 601; and *In re O'Brien's Estate*, 1869, 3 I.R. Eq. 80. Distinguished in *Jegon v. Vivian*, 1865, L.R. 1 C.P. 25.]

#### *Power of Leasing—Validity of Leases.*

Husband and wife, by a post-nuptial settlement, conveyed part of the wife's estates to a trustee to the use of the husband for life, remainder to their eldest son for life, etc., with an ultimate remainder in fee to the husband, and a power to him to lease "for any time or term of years or lives, and with or without covenants for renewal; and in case of the determination of all or any of the aforesaid lease or leases, to make new or other leases thereof in manner aforesaid, and with or without any fine or fines as he should think fit." The husband was also empowered to raise, by sale or mortgage, any sum or sums of money not exceeding in the whole £20,000, or to charge the premises therewith, for such uses as he should appoint, and to charge to any amount for younger children. The husband and wife afterwards executed three leases of parts of the estates comprised in the settlement for terms of 999 years, upon which fines were taken. One of the leases contained a clause permitting the lessee to graff and burn the surface, and also a clause of surrender; and another contained clauses making the lessee punishable for waste, and permitting him to cut timber, and to graff and burn the surface, and in this lease was included part of the wife's estate not comprised in the settlement. The latter lease, and another of prior date, were made subject to existing freehold leases. None of the leases was referred to in the power. The fines received on the making of these and other leases amounted to £10,208, and the husband subsequently raised £10,500 by mortgage of the estates subject to the leases:

Held, that all the leases were valid at law, as being authorised by the power in

the settlement; and consequently there was no ground of equity to impeach them.

Regard is to be had to the objects of the settlement, where the power is of doubtful construction; but no such consideration is to control powers expressed in clear terms, according to their ordinary acceptance.

The Bill in this case, filed in 1819 and amended in 1826, prayed, among other things, that certain leases after mentioned, might be declared void, as not warranted by any power contained in a post-nuptial settlement dated [577] the 25th of May, 1779. By that settlement Sir Robert Tilson Deane and Dame Anne, his wife—for assuring the lands therein mentioned, and making a provision for a jointure for Dame Anne, and further provision for their children (two sons being then born)—conveyed to a trustee the Springfield and Farrihy estates (the property of the said Anne), situated in the county of Limerick, to the use of the said Sir Robert for life, without impeachment of waste, with remainder to the said Anne for life; remainder to Robert F. Deane, their then eldest son, for life, without impeachment of waste, and to his first and every other son in tail male; with like remainder to John Thomas F. Deane, their then second son, and his first and other sons, etc., with an ultimate remainder in fee to Sir Robert.

And it was thereby provided “that it shall and may be lawful to and for the said Sir R. T. Deane, from time to time, and at all times during his life, to lease and demise all, every, or any part or parts, parcel or parcels, of the aforesaid towns, lands, tenements, hereditaments, and premises for any time or term of years or lives, and with or without covenant for renewals: And in case of the determination of all or any of the foresaid lease or leases respectively, from time to time to make new or other leases thereof, in manner aforesaid, and with or without any fine or fines, as he shall think fit.”

It was by the said settlement further provided that it should be lawful for Sir R. T. Deane to charge and encumber the said premises, or any part or parts thereof, with any sums for the younger child or children of the said Sir Robert, begotten or to be begotten on the said Dame Anne, in such proportions and manner, and payable at such time or times as he should by deed or will appoint. And it was further provided that it should be lawful for the said Sir Robert to raise and levy, by one or more sales or mortgages of all or any part of the premises, any sum or sums of money not exceeding in the whole the sum of [578] £20,000, or to charge the premises therewith, to and for such use and uses as he should at any time or times by deed or will appoint. And Sir Robert and Dame Anne thereby covenanted that they would, before the end of the then next Trinity Term, levy a fine of the said lands, to the trustee, to enure to the uses of the settlement (which fine was levied accordingly).

By an endorsement on the settlement, it was agreed between the parties thereto, previous to its execution, that the said Robert F. Deane and John Thomas F. Deane, and every other child of Sir Robert and Dame Anne, who should, under the limitations therein contained, be in possession of the premises, should have power to make leases of the whole, or any part thereof, for any term not exceeding three lives, or thirty-one years, provided such lease should be made to commence in possession, and at the best improved yearly rent that could be had for the same at the time of making such lease: And that no fine or other consideration should be taken for or on account of the making thereof.

The settlement did not comprise the lands of Gortaheedy, in the county of Cork, which were the fee simple estate of Dame Anne Deane, nor any estate of Sir R. T. Deane.

By an indenture of lease, dated the 26th of August, 1779, Sir R. T. Deane and Anne his wife, in consideration of £1000, demised to William Sheehy, for a term of 999 years, and at the rent of £20, part of the Springfield estate, called Rosnerilane, containing ninety-eight acres, and another part of Springfield, which was subject to a lease made on the 28th of February, 1746, for three lives, at a rent of £40 3s. The rent reserved in this lease to W. Sheehy, was less than the former rents payable out of the same lands.

By indenture of lease dated the 28th of October, 1779, Sir R. T. Deane and Anne

his wife, in consideration of [579] £2000, demised to Roger Sheehy the younger, the lands of Clonmore, another part of the Springfield estate, and containing 450 acres, for a term of 999 years, at a rent of £50. This lease contained permission to the lessee, his executors, etc., during the demised term, "to graff, cut, and burn the soil and surface of all or any part of the lands thereby demised, without being liable to any penalty or forfeiture for the same, notwithstanding the several acts of Parliament in force in Ireland to prevent the practice of burning lands;" and it also contained a clause empowering the lessee, his executors, etc., to quit and surrender the demised premises at the end of every year of the said term, upon giving six months' notice in writing.

By indenture of lease dated the 14th of June, 1780, Sir R. T. Deane and Anne his wife, in consideration of £5708, demised to Roger Sheehy, the elder, several other parts of the lands of the Springfield and Farrihy estates, containing together about 630 acres, all situated in the county of Limerick, and also the lands of Gurtaheedy, containing seventeen and a half acres, situated in the county of Cork; subject to remainders of unexpired terms of different leases then subsisting, and set out in a schedule annexed to this lease; To hold the said lands for the term of 999 years, at the rent of £50, without impeachment of waste; with power to the said lessee, his executors, etc., to cut, fell, and carry away all timber and other trees then growing, or which thereafter should grow, on the demised premises, and to graff and burn any part thereof as often as he or they should think proper. The schedule specified five leases for lives of different portions of the said lands as subsisting at the date of this indenture, all which were executed previously to the settlement of the 25th of May, 1779. The rents reserved by them were greater than the rent reserved by the last-recited lease.

Each of the above-stated three indentures contained [580] covenants on the part of Sir R. T. Deane and Anne his wife, to levy fines to the lessees, for confirming the said demises, but it did not appear that any fines were ever levied. All the lands demised by them, except Gurtaheedy, were lands comprised in the settlement of the 25th of May, 1779. The several lessees entered into possession of the premises respectively demised to them, and they or their representatives continued in the undisturbed possession for near forty years. The three leases became vested in one or other of the appellants. Other leases of other parts of the estates comprised in the said settlement were granted by Sir R. T. Deane and Anne his wife, about the same time, and the fines received on all the leases amounted to £10,208: And by two mortgages executed by Sir Robert in 1780 and 1783 of the same estates, subject to the leases, a further sum of £10,500 was raised.

Sir R. T. Deane was in the year 1781, created Baron Muskerry in Ireland. He died in 1818, leaving the said Anne, Baroness Muskerry, his widow, and John Thomas F. Deane—who, being then his eldest son, became Lord Muskerry—and Matthew F. Deane, the respondent, his only surviving issue. They filed the original bill in 1819, impeaching the said leases, and on the death of John Thomas, Lord Muskerry, without issue, in 1824, Matthew Fitzmaurice Deane, his brother, became Lord Muskerry, and filed the amended bill in 1826.

The cause was heard in November 1832, by Lord Plunket, then Lord Chancellor of Ireland, who directed a case to be sent for the opinion of the Court of Common Pleas upon the question:

"Whether the leases, dated respectively the 26th of August and 28th of October, 1779, and the 14th of June, 1780, and made by Sir R. T. Deane, afterwards created Baron Muskerry, and Dame Anne his wife, to W. Sheehy, R. Sheehy the younger and R. Sheehy the elder, respec-[581]-tively, or any, or either, or which of them, were or was warranted by any power contained in the deed dated the 25th of May, 1779?"

The Judges of the Court of Common Pleas, after hearing the argument on the case so sent to them, agreed in certifying "that the leases were not warranted by any power in the said settlement."

The cause came on for hearing on that certificate, and for further directions, in February 1835, before Sir E. Sugden, then Lord Chancellor. His lordship called to his assistance the Chief Justice of the Court of Common Pleas and the Chief Baron of the Exchequer, to hear the arguments on the question of the legal validity

of the leases; and, without asking them to deliver their opinions in Court, he delivered his own, which was that the leases were valid, as being authorised by the general terms of the power contained in the settlement (see Lloyd and G., Cas. temp. Sir E. Sugden, 185); and the Chief Baron communicated to him in writing his opinion, which was to the same effect (see 2 Sugden on Powers, 6th and 7th ed., App. No. 18).

The cause was reheard in June 1835, by Lord Plunket, then again Lord Chancellor, who agreed with the opinion given by the Judges of the Court of Common Pleas, that the leases were not warranted by any power contained in the said settlement: And his lordship further declared that there was no ground for sustaining them on equitable principles; and he decreed that they should be set aside as void, and that an injunction should be issued to put the respondent in possession of the premises comprised in them (Lloyd and G., Cas. temp. Lord Plunket, 182; see p. 206).

There was an appeal to the House of Lords from that decree and previous orders, which were set aside by the House, and the cause was remitted for further consideration [582] to the Court of Chancery in Ireland, with a declaration, but without the expression of any opinion as to the validity of the leases (7 Cl. and F. 1; see p. 42).

The cause having been set down for hearing on the remit, on the 5th of November 1839, Lord Plunket (Lord Chancellor) made an order, on the application of the appellants, for obtaining the opinion of the Court of Queen's Bench on the same case and question that were before submitted to the Court of Common Pleas. The case having been accordingly argued in the Court of Queen's Bench (2 Jebb and Symes 300), three of the judges there certified their opinion that none of the leases was warranted by any power in the settlement; the fourth (Mr. Justice Crampton) certified his opinion that they were all warranted by the extraordinary leasing power given to Sir R. T. Deane by the settlement.

Lord Plunket, on the hearing of the cause, upon these certificates, on the 24th of June, 1840, gave his judgment, agreeing with the majority of the judges, and decreed, in the terms of his former decree (Lloyd and G. temp. Lord Plunket, p. 206) that the leases were void both at law and equity.

This appeal against the last decree, and the order of the 5th of November, was partly heard on the 14th and 21st of April, 1845, by Lord Lyndhurst (then Lord Chancellor,) and Lords Brougham and Cottenham, who, before the arguments for the appellants were brought to a conclusion, observed that the question of law on the construction of the power and of the leases, rendered it necessary to have the assistance of the common law judges; and the further hearing was adjourned, and an order made for their attendance.

The case was argued in the session of 1846 (June 23, 29, 30, July 2), before Lord Cottenham, presiding for the Lord Chancellor, and in the [583] presence of the Judges of the common law courts.\* The arguments were confined to the question of law, with the understanding that counsel would afterwards, if necessary, be heard on the equities between the parties.

Mr. G. Turner and Mr. J. Russell were for the appellants.

Sir Fitzroy Kelly and Mr. Peacock were for the respondent.

[The arguments in the Courts below, upon the questions raised in the appeal, are given so fully in the reports before referred to, particularly in 2 Jebb and Symes, pp. 304 to 321, as to render it unnecessary to report them again, especially as it appears, on comparison of the notes of the arguments on the present occasion with those already in print, that no new point was made. The following additional authorities were cited: *Wynne v. Griffith*, 1 Russ. 283, and *Lovell v. Knight*, 3 Sim. 275, on the undue execution of a power, for want of reference to it in the instrument; *Earl of Cardigan v. Montague*, 2 Sugd. on Pow. Appendix, No. 14; *Doe dem. Hartridge v. Gilbert*, 5 Queen's Bench Rep. 423, and *Jack v. McIntyre*, 12 Clark and Fin. 151, on the construction of leases; and *Oddie v. Woodford*, 3 Myl. and Cr. 585, and *Hoare v. Byng*, 10 Clark and Fin. 508; and Sugd. on Pow. *passim* (new ed.), on the construction of instruments generally.

\* The judges were Mr. Baron Alderson, Justices Williams, Coltman, Maule, Wightman, and Cresswell, and Barons Rolfe and Platt. Lord Chief Justice Tindal was present on the first day of the argument, but was next day seized with illness, and died a few days after. Baron Parke also was present on the second day only.



The objections to the leases, and the answers given to them in the arguments, are succinctly stated in the opinion of the judges which follows:]

Lord Cottenham, at the conclusion of the arguments, said he could not frame a question for the learned judges in a better form than that which had been submitted to the [584] judges of the Courts of Common Pleas and Queen's Bench in Ireland (*vide supra*, 580-1.) His Lordship handed a copy of that question to them, and, at their request, time was given to them to consider their answer.

Mr. Baron Alderson delivered the unanimous opinion of the Judges as follows:

The question proposed by your lordships to her Majesty's judges, depends on the proper construction of the power given by the deed of settlement, dated the 25th of May, 1779, to Sir Robert Tilson Deane; for if all or any of the three leases, dated the 26th of August and 28th of October, 1779, and 14th of June, 1780, be a valid execution of that power, it is clear that such lease or leases is or are valid at law. There is no case, we believe, to be found in our books, in which a lease conformable to the literal tenor of the words in which the power is given has been held invalid at law, on the ground of any supposed or real hardship thereby inflicted upon the remainder-man; and it would be strange if such a case could be found, for as the remainder-man takes what is given to him subject to the power, he must take the advantage *cum onere*, and has no reasonable ground for complaint if that should happen which the framer of the power, who had the *jus disponendi*, contemplated. But undoubtedly there are several cases to be found in which the exercise of a power, not literally and in terms executed, has been proposed to be supported as being a substantial exercise of the authority given, and there the general intention of the donor of the power, and the advantage or injury arising therefrom to the remainder-man, have been looked at for the purpose of solving the question before the Court.

And in all cases, in order to determine what is the real meaning of the words of the power itself, it must be competent for the Court to look to the whole instrument in which it is found, and to examine and consider the consequences to the remainder-man and to the other objects of the deed, for the purpose, if the words be ambiguous, of [585] adopting that construction of them which may produce the least inconvenience, and best harmonize with all the other provisions which the parties have thought proper to make. Of this the case of *Talbot v. Tipper* (Skinner, 427) is an instance. There, though the power was to make leases with or without fine, and reserving such rents and services as the donee of the power should think fit, a lease without reserving any rent, though certainly not according to the literal tenor of the power, was, on examining the whole instrument, and looking to the real intention of the donor of the power, held to be a valid lease.

In considering this power, therefore, we shall first examine the words themselves, and then, but only if the words require it, look to the other parts of the deed for the purpose of explaining them. The power itself, which is found in a settlement, made after marriage, of the wife's property, and a settlement no doubt for valuable consideration, is in these words:—

“Provided also, and it is agreed by and between the parties to these presents, that it shall and may be lawful to and for the said Sir Robert, from time to time and at all times during his life, to lease and demise all, every, or any part or parts, parcel or parcels of the aforesaid towns, lands, tenements, hereditaments, and premises, for any time or term of years or lives, and with or without covenant for renewals, and in case of the determination of all or any of the aforesaid lease or leases respectively, to make new or other leases thereof in manner aforesaid, and with or without any fine or fines, as he shall think fit.”

We think that the natural and ordinary meaning of these words imports that Sir Robert should, as he should think fit, make leases of all or any part of the premises; that such leases should be, at his pleasure, for any term of years or any lives; that such leases should be with or without covenants for renewals, as he might think preferable; that on the determination of such leases, similar leases should be granted afresh; and that all such leases, whether original or renewed leases, should be, at his discretion, with or without fines. The words “as he shall think fit,” apply clearly to every clause in the power; and the words “with or without fines,” apply also, as we think, to each of the two classes of leases, original or renewed. No doubt such a power would enable Sir Robert to deprive the other parties to the deed, and

those interested in remainder, of advantages which but for the power would have come to them; but this is an effect consequent in some degree upon the exercise of all such powers; and precisely the same consequences will in this case follow if we adopt that construction of this power, by which the words "with or without fines" are confined to the renewed leases alone; for if this construction should be adopted it would equally be in the power of Sir Robert, by granting an original lease for a short term, upon its determination to grant a lease for a long term upon a fine, thus producing to the remainder-man the same inconvenience practically which would arise from granting an original lease taking a fine; or he might grant a long lease at a peppercorn rent to a trustee for himself, and then dispose of that lease for his own advantage and benefit.

But it is suggested that the clause as to fines may be applied to the covenant for renewal alone. This construction, however, takes the words very far from their natural import, and is so far-fetched, and difficult to be understood that we cannot adopt it, even if it did not, like the others, labour under nearly the same difficulties as to the situation in which it leaves the remainder-man. We think, therefore, that under this power Sir Robert Tilson Deane might well make a valid lease of any part of this settled estate for any period of years or for lives, at his pleasure; that there is nothing in the power to limit him as to the rent; that he was, therefore, at liberty to take a rack rent [587] without a fine, or any other rent with a fine, and upon determination of any such lease, to renew it on the same or similar terms. The parties by whom the settlement was made had the complete *jus disponendi*, and they have chosen to give this unlimited power, knowing, as they clearly did, and as appears from the indorsement on the settlement, how to frame a limited power when their intention was to give one. For there they require the lease to be in possession, and not in reversion; they limit the term; they direct the rent to be the best that can be obtained, and they exclude fines altogether. These limitations of the power, thus imposed, appear to us strong circumstances to show that, inasmuch as in the previous power they are not found, the intention of the donors of that power was that it should be unlimited. And the cases of *Long v. Long* (5 Ves. 445), *Attorney General v. Moses* (2 Madd. 294), and *The Attorney General v. Wray* (Jacob, 307), are authorities in point, to show how such powers are to be construed. We think, therefore, that the first objection taken to these leases, which applies to all, viz., that they are made upon a fine given, is not valid. This power authorized a lease with or without a fine.

The second objection is, that these leases do not purport to be made under the power; but this objection is answered by the case of *Tomlinson v. Dighton* (10 Mod. 35). The opinion of Parker, C. J., in that case, is exactly in point with the present one. This objection, therefore, also fails.

The third objection was, that these leases included as well property in possession as property already under lease, and that as to the latter they were therefore leases in reversion. But there are two answers to this objection: first, the power is general, and is not confined to leases [588] in possession alone, as the limited power endorsed on the settlement is. But, secondly, this is, as to the property under lease, only a concurrent lease; and such a lease, if made for a period within the authority given by the power, is clearly valid. The instance of Bishops' concurrent leases manifestly shows the principle, and demonstrates that such leases, if they do not exceed twenty-one years, are within the statutable power conferred by 1 Eliz., c. 19. Those cases, in which leases in reversion have been held invalid executions of the power, are cases where, from the commencement of the lease at a day subsequent to its date, the land is rendered liable to the burden of the lease for a longer period from the date when the lease was executed than was warranted by the power given. Such are the cases of the invalid ecclesiastical concurrent leases mentioned in Bacon's Abridgement (tit. Lease, E, rule 3). So in *Doe v. Hiern* (5 Maule and S. 40), under a power to lease for ninety-nine years, determinable on the death of one, two, or three lives, a lease was made to commence after the death of J. L. and M. R., for ninety-nine years, determinable on the death of E. H., and it was held bad: For, as Lord Ellenborough said, it certainly was not the intention that the tenant for life should do more than incumber the estate to the extent of a term of ninety-nine years determinable on three lives; yet in that case, supposing the continuance of E. H.'s life, it is obvious that such a lease, if valid, might have exceeded ninety-nine years by the

period during which J. L. and M. R. might have continued to live, or still further, it was an estate for ninety-nine years determinable, but commencing at a future indefinite period, namely, at the death of two subsisting lives. This lease, however, may be, under the power, for any term of years, and consequently the term cannot here be exceeded, being by the power unlimited.

These three objections are all that apply to the lease [589] dated 26th of August, 1779. We are therefore of opinion that that lease is at law valid.

The fourth objection, that the lessee shall be at liberty, on giving six months' notice, to surrender his lease, applies to the lease of the 28th of October, 1779, alone; but we think that it is no objection to its validity; the unlimited power of leasing is an answer to it; for a lease for a term of years, with a clause enabling the tenant to surrender, is still a lease for a term of years; and the donor of the power has not thought fit to impose any such limitation as that suggested; neither is it very easy to see how such a clause in a lease upon which a fine of £2000 has been paid is at all likely to be acted upon to the prejudice of the remainder-man, even if that were, which we think it is not, the proper criterion. No doubt, if a power be given to make leases containing the usual reservations and covenants, and such a covenant to surrender were shown to be an unusual covenant, a lease containing it would be an invalid execution of such a power; such was in truth the case cited at the bar of *Jack v. Creed* (2 Hudson and Brooke, 128), but where the power contains no such limitation, we think there can be no such objection made.

The same answer, that the power contains no limitation, applies also to the objections that the leases of the 28th of October, 1779, and 14th of June, 1780, contain a permission to graff or burn the land, and that in the latter lease the tenant is also allowed to commit waste, and to cut timber. As to grafting, it is by no means clear that in certain cases it may not be advantageous to the land. In the Irish statute on the subject, it is only called bad husbandry, and is made the subject of a fine, unless done by the landlord's consent. This shews that the legislature contemplated the possibility of his giving his consent; and here by the lease made under an unlimited power, he has done so, probably because he did not think [590] it would be prejudicial to the land. As to waste, that is, in an unlimited power like the present, entirely in the discretion of the donee of the power; a discretion in the case of tenants in tail recognized and restrained by the statute 32 Hen. 8, cap. 28. And as to cutting timber, it is only necessary to advert to the duration of the lease, 999 years, which is admitted to be in conformity with the power, to see that it is a very reasonable stipulation.

The only remaining objection applies to the lease of the 14th of June, 1780, alone. This lease contains land not within the power as well as land subject to it, and only one rent is reserved for the whole. Now, if the power had contained any such limitation as that the best, or the ancient, or the usual rent, should be reserved, this would have been a good objection; for in such a case it ought to appear by the lease itself what is the rent for the land subject to the power, that the remainder-man may judge of it, and see whether the power has been duly executed; but here no restriction is found in the power; any rent will satisfy it. Inasmuch, therefore, as, under this reservation, it is clear that some rent is reserved, and any rent is a compliance with the power, we think it is sufficient. Undoubtedly the remainder-man may be subjected to some inconvenience, both in this case and in the case of the concurrent leases; but such an inconvenience does not make the execution of the power in either case invalid.

I have now gone through all the objections to these leases, assigning the reasons which have occurred to my mind why they are all untenable, and for which reasons I alone am responsible. But I am authorized by my learned brethren to express our unanimous opinion on this subject, that in answer to your lordships' question we think that each and all of the three leases, dated the 25th of August, 1779, 28th of October, 1779, and 14th of June, 1780, is and are valid at law.

[591] Lord Lyndhurst.\*—I only heard part of the argument in this case. I entertain, however, a strong impression with respect to it, and that is confirmed by the opinion which has been delivered by the learned judge, speaking for himself and for

\* His lordship had just resigned the great seal; which was then re-delivered to Lord Cottenham.

his learned brethren. I think it would not be proper that I should move for the judgment of your lordships now, because the case was heard throughout by my noble and learned friend, Lord Cottenham. I propose, therefore, that the opinion of the learned Judges should be printed, and that your lordships' judgment be postponed.

Lord Brougham.—I am in the same position with my noble and learned friend. I did not hear the whole of the argument, but, as far as I did hear it, I agree with the opinion which has been given by the learned judges.

I am very glad that this long litigation is at length coming to a close. It has been here a number of years, backwards and forwards in different ways, both in Ireland and here, and is a reproach to the law.

My noble and learned friend who heard the whole of the case not being now present, I agree in the suggestion that your lordships' judgment should be deferred till he attends. The parties, however, may be quite sure that no great length of time will elapse before the decision is given.

Lord Lyndhurst.—I consider this case to be—as my noble and learned friend has stated—quite a reproach to the law.

The Lord Chancellor.—My Lords, in this case questions have arisen of great difficulty, which have occasioned great diversity of opinion amongst the highest authorities. There has been not only a difference of opinion between two eminent Lord Chancellors of Ireland, but on one side there are the opinions of seven of the [592] Judges of the Court of Common Pleas and Queen's Bench in Ireland, and on the other, the opinions of one of the Judges of the Queen's Bench in Ireland and of eight English Judges, who assisted your Lordships at the hearing of this case, and whose opinion is now before us for our consideration.

The appeal, as it originally came before your Lordships, was against two orders of the Court of Chancery in Ireland, dated respectively the 8th and 28th of May, 1835, and against a decree of the court, dated the 13th of July, 1835. The orders and decree were disposed of by your Lordships' order of the 11th of June, 1839, which, after making a declaration that it was competent for the Court of Chancery in Ireland, in the then state of the proceedings, to adjudicate as to the validity of the leases in question, remitted the case to the Court of Chancery in Ireland for the purpose (7 Cl. and F. 42).

The result of the remit has been that the Court of Chancery in Ireland, after taking the opinion of the Court of Queen's Bench there—three of the four Judges of which court concurred with the Judges of the Common Pleas (whose opinion had been before taken) in thinking that the leases were not warranted by the power, and were therefore invalid—made a decree setting aside all the leases in question.

When this decree came before your Lordships by appeal, it appeared to be a case in which the House ought to have the assistance of the learned Judges, and eight of the Judges attended your Lordships at the hearing, and their unanimous opinion declared in this House was, that all such leases were valid at law.

I have considered this opinion with great attention and care, as well as those of the learned Judges of Ireland, and I have, not without some reluctance, but without any doubt, come to the conclusion that the opinion of the [593] learned Judges, delivered in this House, ought to be adopted and acted upon by your Lordships. I say "with some reluctance," because by establishing these leases, and putting that construction upon the power which is necessary to support them, the provisions for the objects of the settlement are or may be defeated. But this consequence, though much to be considered in cases in which the terms of the power are of doubtful construction, cannot be permitted to control powers expressed in words of unambiguous meaning, according to the ordinary acceptation of the terms used; and such, I am of opinion, is the present case. If the exercise of the power given has defeated the intention of its authors, it is much to be lamented. But Courts of Law and Equity can only discover the intention from the terms used, and are not at liberty to speculate upon the possible existence of any intention, not consistent with the plain and obvious meaning of such terms.

I concur in the opinion expressed by the learned Judges, that the leases in question are justified by the power given, and that none of the objections made to them ought

to prevail. The whole question is involved in this opinion, there being no grounds of equity for impeaching the leases, assuming that they are good at law.

The result therefore will be to reverse the decree of the 24th of June, 1840, and in lieu of it to dismiss the respondent's bill as against the lessees, and with costs, notwithstanding the difficulties of the case; but of course there can be no costs given upon the appeals.

The order of the 5th of November, 1839, was, I think, right.

Mr. Turner.—Since the date of the decree in Ireland, Lord Muskerry has been admitted into possession under [594] that decree. I do not know whether it will be necessary to reserve liberty to apply to the court in Ireland to restore possession.

The Lord Chancellor.—The decree in Ireland set the leases aside.

Mr. Turner.—It gave possession to Lord Muskerry, upon the footing of the leases being set aside.

The Lord Chancellor.—Of course, the bill being dismissed, that will fail.

Mr. Turner.—I do not know whether your Lordships would think it right to direct that we should be at liberty to apply to the court to direct restoration of possession.

The Lord Chancellor.—You do not want special leave for that purpose.

[It was ordered that the order of the 5th of November, complained of, be affirmed, and that the decree of the 24th of June, 1840, be reversed, and the respondent's bill dismissed as against the lessees, with the costs in the court below; and that the cause be remitted to that court to do further therein as shall be just and consistent with this judgment. See Lords' Journals for 25th of May, 1848.]

[595] JAMES TEMPLETON,—*Appellant*; MACFARLANE, BROTHERS,—*Respondents* [June 26, 27, 1848].

[*Mews' Dig.* x. 699. Followed in *United Horseshoe and Nail Co. v. Swedish Horsenail Co.*, 1889, 6 R.P.C. at p. 8.]

*Patent—Direction to Jury.*

A patent was taken out for "a new and improved mode of manufacturing silk, cotton, linen and woollen fabrics." The specification, and a disclaimer, subsequently filed under the stat. 5 and 6 Wm. IV. c. 83, set forth that the patentees claimed "the mode hereinbefore described of producing or preparing stripes of silk, cotton, woollen, or linen, or of a mixture of two or more of these materials, in such a manner that the weft or lateral fibres of both cut edges of each stripe are all brought up on one side, and into close contact with each other, and the re-weaving of such stripes with the whole fur or pile uppermost, into the surfaces of carpets, etc." It appeared that one of these processes was old. The Judge directed the jury that if one was new, the patent could be supported for the combination of them, and would only be invalid if there had been a public use of both before the date of the patent:

Held that this direction was erroneous, and that the patent was void.

In the month of July 1839, James Templeton took out a patent, the title of which was for "Machinery for a new and improved mode of manufacturing silk, cotton, woollen and linen fabrics." In October, of the same year, the patentee, under the 5 and 6 Wm. IV. c. 83, amended the title thus:—"A new and improved mode of manufacturing silk, cotton, linen and woollen fabrics." He afterwards instituted a suit against Macfarlane, brothers, for an alleged infringement of this patent. The issues sent to trial were framed in the following terms:—"It being admitted, that on or about the 17th of July, 1839, James Templeton, the pursuer, and William Quigley, weaver in Paisley, obtained letters patent for Scotland, and enrolled a specification in terms of the proviso contained in the letters patent: Whether, in the course of the years 1844, 1845, and 1846, or any part thereof, and during the currency of [596] the said letters patent, the defenders did, at their works, at Bridgeton, near Glasgow, by themselves or others, wrongfully and in contravention of the privileges conferred by

the said letters patent, use a mode of manufacturing substantially the same with that which is described in the said specification, to the loss, injury, and damage of the pursuer? Or, first, whether the invention or mode of manufacture described in the said letters patent and specification was known and publicly used within the United Kingdom, prior to the date of the said letters patent? Second, whether the description contained in the said specification is not such as to enable workmen of ordinary skill to practise the invention or mode of manufacture, so as to produce the effects set forth in the said letters patent and specification?"

The issues were tried before Lord Robertson, in August, 1847 (cases in the Court of Session, vol. x. p. 4), when evidence was given by the plaintiff to show that the mode of manufacture was new and useful, that the specification was intelligible, and that by a piece of stuff surreptitiously obtained from the plaintiff's works, the invention had partly got into use before the date of the patent.

The specification was put in evidence, and it appeared that the invention was there described as follows:—"The nature of the said invention consists in weaving fabrics of silk, cotton, woollen, linen, or other fibrous materials, which are to be cut into stripes and used as weft, somewhat in the manner of chenille weft, but with this difference, that the two edges of the stripe shall incline more towards each other, and then weaving such stripes on a ground, so that all the fur or cut edges of the stripes may be brought to the one side, or surface of the fabric, while the other is plain; and which invention is applicable to the manufacture of carpets, rugs, shawls, mats, covers of stools, chairs, or tables, tapestry, or any cloth or [597] fabric requiring to be raised, so as to have the appearance of velvet, fur, or plush." The specification, as afterwards set forth in disclaimer made under the statute 5 and 6 Wm. 4, c. 38, to disclaim a part of the process which was unquestionably old, described minutely the whole process of manufacture, and concluded thus:—"We declare, etc., that we do not claim as new the machinery or looms with which the fabrics are produced; nor do we claim as new the systematic arrangement of colours, and weaving them in a gauze-web, and cutting the said web up into stripes, and re-weaving the threads, twined or untwined, on being so cut up on another warp, so as to form a regular pattern. And we declare that what we claim as new or improved, and of our invention, is the mode, hereinbefore described, of producing or preparing stripes of silk, cotton, woollen, or linen, or of a mixture of two or more of these materials, in such manner that the weft, or lateral fibres of both cut edges of each stripe, are all brought up on one side, and into close contact with each other; and the re-weaving of such stripes, with the whole fur or pile uppermost, into the surfaces, of carpets, rugs, shawls, or other similar articles, at the same time that a groundwork or platform is woven for the same."

In his charge to the jury, Lord Robertson said, "Now, according to the legal construction of the patent, being one for an improved mode of manufacture, and consisting of an alleged new combination of various particulars with the view of producing a new result, in order to defeat the patent under the issue of prior use, it is not sufficient for the defender to establish that stripes of silk, cotton, woollen, or linen or of a mixture of any two or more of these materials had heretofore been produced in such manner that the weft or lateral fibres of both cut edges of each stripe were all brought up on one side and into close compact with each other. The proof of such prior mode of producing the stripes, and the public use of [598] such stripes, would not be sufficient unless it should also be established that such stripes or weft so produced were publicly used in weaving or reweaving, 'with the whole fur or pile uppermost, into the surfaces of carpets, rugs, shawls, or other similar articles (including therein mats, covers of stools, chairs or tables, tapestry, and any cloth or fabric requiring to be raised, so as to have the appearance of velvet, fur, or plush, as described in the first part of the specification),' at the same time that a groundwork or platform was woven for the same. The proof of the prior use, in order to entitle the defenders to a verdict, must be of the whole mode of manufacture, described and claimed as new, and not of a branch or any part or parts thereof; so that the manufacturing of the weft from the stripes in the manner required, and the public use thereof, without being combined with the weaving or re-weaving in the manner stated, would not be sufficient to invalidate the patent. But on the other hand, the public use of the mode of producing the weft as described, and the use of weaving or re-weaving of that weft, as also described and applicable to any cloth or fabric requiring to be

raised, so as to have the appearance of velvet, fur, or plush; that is, the proof of these two things being publicly used together, would invalidate the patent, but not the separate public use of each." His lordship, therefore, directed a verdict for the pursuer.

A bill of exceptions to his ruling was presented by the defendants in the following form:—*First*, that his lordship had wrongly directed the jury, in so far as regards the legal construction of the patent and specification; *Secondly*, in so far as his lordship did not direct the jury, that if the mode of producing or preparing the stripes described and claimed in the patent and specification, is proved not to have been of the invention of the patentees, but to have been known publicly and used before the date of the letters patent, the pursuer is not entitled to [599] a verdict on either of the first two issues, and the verdict ought to be for the defenders on these two issues.

The Case came before the Court of Session on the bill of exceptions, when the Lord President held the ruling of Lord Robertson to be correct, but Lords Mackenzie, Fullerton, and Jeffrey, were of a different opinion, and the exceptions were allowed (Cases in the Court of Session, vol. x. p. 796). This was an appeal against that judgment.

Sir F. Kelly and Mr. Butt (Mr. Webster was with them) for the appellants.—The decision of the Court of Session is wrong, and the direction of the Lord Ordinary was correct. The claim here is not for the manufacture of a new fabric, but for a new mode of manufacturing an old one; it is for a new combination of the several parts of something, each part of which may have been known before the plaintiff's invention. The novelty in the process is in the mode of combination, and that is all which is claimed in the patent. The parts themselves are not claimed. If there can be a doubt on the words of the claim, the expressions used in the disclaimer must remove it. The plaintiff here does not claim the producing of the stripes, but the mode of preparing or producing them in such a manner that the fibres of the cut edges shall be brought together in a particular way. The claim is for a new combination of old things. Such a claim is good, and a patent for it is valid, when it is plain that that which is old is not claimed, and though in the description what is old may be mixed up with what is new, the patent will be supported. That was the case in *Russell v. Crawley* (1 Crom. Mee. and R. 864). There a patentee claimed the invention of manufacturing tubes by drawing them through rollers, using a maundril in the course of the operation. A later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to [600] the use of the maundril. The court, taking the whole of the latter specification together, held that it would infer that the maundril was not to be used, and so decided that the latter patent was good. *Howorth v. Hardcastle* (1 Bing. N. C. 182; Weba. on Pat. 484), is to the same effect. That was an action for invading the plaintiff's patent right to certain machinery for drying calicoes, where the specification, after setting forth the mode in which the cloth was to be extended for the purpose of drying, proceeded to state that it might be taken up again by the same machinery. The jury found that the invention was new and useful on the whole, but that the machine was, in some cases, not useful for taking up the cloth; the court, however, refused to set aside the verdict for the plaintiff, and enter a nonsuit. That case was much more unfavourable than the present to the patentee, but that which he did claim having been found to be new and useful, the patent was maintained.

It is perfectly clear that a patent may be maintained for a new combination of old materials. The invention is in the combination, which, if useful and new, will entitle the inventor to protection. In *Hill v. Thompson* (3 Mer. 622, 629; S.C. 8 Taunt. 375; 3 B. M. 424), Lord Eldon said, "There may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials; but in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merit of original invention in the use of the materials." Here the specification does clearly express what is the new combination, which is the real subject of the claim, and on this authority the patent ought to be supported. The case of *Gibson v. Brandwell* (4 Man. and Gr. 179), will be relied on by the other side, but the facts of that case shew it to be in-[601]-appli-

cable to the present. There the action was in case for infringing the patent for "a new and improved process or manufacture of silk:" the third and fourth issues raised the question, whether the alleged invention was a new invention: the jury found specially that it was not a new invention, or a new combination, but that it was an improved process; it was held, that upon these issues the verdict ought to be entered for the defendant. And no doubt such must be the result of the finding which expressly negatived the words of the declaration where it alleged the invention to be a new invention. The same observation may be made with respect to the case of *Kay v. Marshall* (8 Clark and Finnelly, 245), for there the patent was for "new and improved machinery for spinning flax," whereas the machinery was old, and the improvement, if any, which was new, was that of an improved maceration of the flax which rendered this old machinery more advantageously available for the purposes of manufacture. But the claim being for a new machinery, which claim was expressly negatived by the finding of a jury, the patent of course could not be supported. It is not so here; the claim here is for a new mode of applying things previously well known; the disclaimer limits, restricts, and defines whatever was doubtful in the first claim, and the specification thus explained is good, and the patent must be supported.

Then as to the bill of exceptions. The objections to the charge of the Judge are not sufficiently set out—

(Lord Campbell.—What do you mean by the insufficiency of the objections in the bill of exceptions? Do you mean that the party excepting should set forth in the exceptions exactly what the Judge ought to say?)

Certainly. The party is bound, where he complains of omission as well as expression on the part of the Judge, to show what the Judge ought to have stated to the jury. Where exceptions are taken to the directions of the Judge, [602] it is not enough to state in the bill of exceptions that he declined to direct the jury in the way suggested, without showing what his direction was, and what it ought to have been; *Macalpine v. Mangnall* (3 Com. Bench, 496).

Mr. Crowder and Mr. Bethell, for the respondents, were not called on.

The Lord Chancellor.—According to the view which I at present take of this case, I do not think it will be necessary to call on the learned counsel on the other side. But as my noble and learned friend, Lord Campbell, has just been obliged to leave the house, I shall not propose immediately to dispose of the case, but I shall state my opinion, and my noble and learned friend may afterwards consider whether it appears to him necessary to hear any further arguments in the case.

The point appears to me to be short and simple. There were three issues (in substance, though not perhaps in form,) presented to the jury, and they embrace all the questions between these parties. The first of the issues (which his lordship read) may indeed be said to do so. On that issue there must be a finding in the affirmative, declaring the right to be in the pursuer, and the wrong to be committed by the defendants, or in the negative, denying both of these things. That issue, in fact, embraces the whole question.

Then comes the second issue, and the matter tendered for consideration by that issue is divided into two parts. The question first presented by that issue is, whether the mode of manufacture described in the patent was known in the United Kingdom before the date of the letters-patent. The second question (which is, in fact, the third issue) relates to whether the description in the specification is such as would enable a workman of ordinary skill to execute the process according to the declared purpose of [603] the inventor; whether, in fact, the invention or mode of manufacture is sufficiently explained in the specification.

The bill of exceptions complains that the Judge did not direct the jury, that if the mode of producing or preparing the stripes was proved not to have been the invention of the patentee, but to have been publicly known before the date of the patent, the pursuer was not entitled to a verdict on either of the first two issues, but the defenders were entitled to a verdict on those issues.

The exception raises the substantive question, whether the supposed invention was new; whether, in fact, it was the subject of a patent. The point attempted to be raised upon this, namely, that the party excepting ought to set forth what he thinks the Judge ought to have said to the jury, is a mere technical objection, which cannot



be supported. Then what is the question left by this exception? whether the Judge ought not to have directed the jury, that if the mode of manufacture, as proved, could not have been the invention of the pursuer, the verdict ought to be for the defenders. What he did tell the jury was this: "the proof of the prior use, in order to entitle the defenders to a verdict, must be of the whole mode of manufacture, described and claimed as new, and not of a branch or any part or parts thereof." The result of that would be, that if the patentee claimed a process as new, but was only able to show that part of it was new, he would still be entitled to maintain his patent as it stands. Such was the direction of the Lord Ordinary. But the cases show the reverse of this, and it cannot be successfully argued that the law is that which this direction supposes.

But it is said that the parties have not claimed here the invention of all the processes, but only a new mode of applying them. On the real merits of the case the question is, whether the party does not claim as new this mode of preparing the stripes which are to be woven into the substance of the fabric. To answer that question satis-[604]-factorily, we must look at the evidence, and see what is new and what is old. In the specification the party goes into an elaborate description of the mode of preparing the stripes. If that had been all, the patentee had nothing to do but to state what he used, and the mode in which he used it. He ought to have said that his was a new mode of arranging old materials; and had he said so, that might have been sufficient to support the patent. But if the party uses such terms as the patentee does here, he states more than he has a right to claim: he says that he claims the invention for weaving "in such manner that the endings are brought up on one side, in close contact with each other, and the re-weaving of the stripes with the whole fur or pile uppermost," and so on. It does not rest there, for he afterwards states more distinctly what it was that he did claim, by stating what he disclaims, or at least what he does not claim to be new by what he disclaims; but even that disclaimer (which his Lordship read) shows that he claimed an improved mode of weaving. Now that is not really his claim, and that circumstance alone is sufficient to dispose of the case. I repeat, however, that I will not decide it now, but will communicate with Lord Campbell on the subject, and then, if necessary, he will state his opinions to the House. If I am right, the judge at the trial mistook the law in supposing it to be immaterial whether all the invention, or only part of it, was new; and whether part only being new, the patentee appeared by his specification to claim the whole. In my view of the case, therefore, the direction of the Lord Ordinary was erroneous; the correction of it by the Inner House was right, and the judgment appealed from ought to be supported.

On the following day the judgment of the court below was (without further observation) affirmed, with costs.

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[605] Sir THOMAS WILDE and Dame AUGUSTA EMMA, his wife,—*Appellants*;  
MAGNUS GIBSON,—*Respondent* [May 22, 23, and 25; June 6, 1848].

[*Mews'* Dig. x. 143, 150; xiv. 1247. S.C. 12 Jur. 527; and in Ch. *sub nom. Gibson v. D'Este*, 2 Y. and C. Ch. 542. Adopted in *Donegal (Marquis of) v. Greg*, 1849, 13 Ir. Eq. R. 43, 44; *Brett v. Clowser*, 1880, 5 C.P.D. 388; *Brownlie v. Campbell*, 1880, 5 A.C. 937; *Joliffe v. Baker*, 1883, 11 Q.B.D. 272; and see *Parr v. Jewell*, 1855, 1 Kay and J. 673; *Debenham v. Sawbridge*, 1901, 17 T.L.R. 441.]

*Vendor and Purchaser—Completed contract—Imputed fraud—Pleading.*

A Bill filed by a purchaser to set aside a purchase and conveyance of an estate, on the ground of fraudulent concealment of a right of way, DISMISSED with costs, there being no proof of concealment by the vendor, although the dealings were inconsistent with any right of way.

To set aside a purchase, perfected by conveyance and payment of the purchase money, for fraudulent concealment by the vendor of a defect in the title, where there was no warranty or statement that there was no defect; proof

of concealment by the vendor's agent, is not sufficient, there must be proof of direct personal knowledge and concealment by the principal.

A purchaser of an estate, having made no inquiry respecting the title from an agent for the sale, is not entitled to any relief for non-communication of any defect by him.

Constructive knowledge of an agent, or knowledge acquired by him otherwise than as an agent for the sale, of a fact, the non-communication of which is made the ground for relief against the purchase, does not at all affect the contract.

Constructive notice is resorted to, from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of direct personal fraud.

Where a purchaser seeks to be relieved against the purchase on the ground of personal fraud by the vendor, and the alleged fraud is not proved, he is not entitled to relief on any other grounds.

This was an appeal from a decree (2 You. and Col. 542) and order of Vice-Chancellor Knight Bruce, upon a bill filed by the respondent, for rescinding a contract made by him in August, [606] 1838, for the purchase of a messuage and land from the appellant, Lady Wilde, then Augusta Emma D'Este, spinster, and completed by a conveyance and payment of the purchase money in December the same year.

The messuage and land in question formed part of an estate at Ramsgate, formerly the property of Lady Augusta De Ameland, the said appellant's mother, who conveyed it to her in fee in 1829. In August 1838, Mademoiselle D'Este caused the whole estate to be set up for sale by auction, in lots, for building purposes. Printed particulars and conditions of sale were published: The third condition stated "that a deposit of £20 per cent., in part of the purchase money, should be paid to the auctioneer at the sale, the purchaser to enter into an agreement for payment of the remainder at the office of Messrs. Farrer and Parkinson, Lincoln's Inn Fields, or at the office of H. Wightwick, Esq., Ramsgate, on or before the 25th of March, 1839, at which time, and at one of those places the purchase is to be completed." The fifth condition was, "that no purchaser should be entitled to require or inspect any title prior to the deeds by which the property was respectively conveyed to the vendor or Lady Augusta De Ameland respectively; or to require or inspect the title to any of the respective roads, walks, or pleasure-grounds, or to any of the premises, except the lot or lots purchased by him or her; and that the vendor should not be called upon to identify the respective lots with the former descriptions thereof; and all the recitals and statements contained in any document should be deemed conclusive evidence thereof." The sixteenth was, "that towards effecting an esplanade and steps to the sea, each purchaser should pay £5 per cent. upon his purchase money, into the hands of the said H. Wightwick, as a trustee for those purposes."

The last of the lots, which was that purchased by the respondent, was described in the particulars as "The [607] capital freehold mansion-house, called Mount Albion, with the offices, etc., and pleasure grounds, containing about one acre, two roods, twenty-three perches." And it was added that the purchaser should inclose this lot by a wall or iron railing.

In a map annexed to the particulars and conditions, the last mentioned lot was described as bounded on the south-west by a new road, called "Victoria Road," forty feet wide; and on the east side of that road, next the lot was marked a dotted line, representing the boundary between the liberty or town of Ramsgate and the parish of St. Lawrence.

The respondent having been declared the purchaser of this lot, at the price of £2030, paid the deposit of £20 per cent. to the auctioneer, and also £5 per cent. to Mr. Wightwick, in pursuance of the conditions. In the abstract of title, which was soon afterwards delivered to him by Messrs. Farrer and Parkinson, Mademoiselle D'Este was represented to be owner in fee of the premises which were described as adjoining the liberty way, and unaffected by any right or liberty of way over them. The respondent having accepted the title, the premises were conveyed to him by lease and release, dated the 28th and 29th of December, 1838. In the release the premises were described as being situate without the liberty of Ramsgate, in the parish of

St. Lawrence, and bounded as they appeared in the map before mentioned. The respondent paid the remainder of the purchase money, and being then let into possession, proceeded to build the wall inclosing the premises, according to the conditions of purchase and to a covenant on his part contained in the deed of conveyance.

In May 1839, the officers of the parish of St. Lawrence applied to the respondent for payment of two shillings and sixpence, as an annual acknowledgment to that parish [608] of a right of way, called "the Liberty Way," through the property on the Victoria Road side, within the wall which he had just erected there; and in January 1840, the officers of the town of Ramsgate applied for the like payment as a similar acknowledgment to their town. They stated that "the Liberty Way" was situated partly within the liberty of the town, and partly in the parish of St. Lawrence, and that part of it was in fact included with the newly erected wall. It appeared on further inquiry that, in the year 1820, Lady De Ameland had, with the permission of the officers of the town and of the parish, inclosed so much of the liberty way as passed through her property, and she thereupon executed a deed poll, which recited that the consent of the vestry of the said parish was given to such inclosure, on condition that, during the time the liberty way should be so enclosed, another road, six feet wide, without the enclosure, should be found and maintained by her, and at the expence of her and her heirs; that the part of the liberty way so enclosed should be marked out by proper mark-stones, and that a deed should be executed by her, acknowledging for her and her heirs, that the said liberty way was enclosed by permission, and not of right, and that the same should be opened whenever the said parish vestry should require it, and that by way of acknowledgment a yearly rent of five shillings should be reserved in respect of such enclosed way, payable in moieties to the surveyors of the said town and parish—by all which terms and conditions she (Lady De Ameland) declared that she, her heirs and assigns, were bound. It was also ascertained that this nominal rent to the said town and parish had been regularly paid by the agents of Lady De Ameland and of Mademoiselle D'Este.

The respondent refused to pay the sums so demanded, and conceiving that the value of the property was materially diminished by such a claim, and his enjoyment of it [609] liable to be disturbed at any time, applied to the vendor's solicitors to take it back, and repay his purchase money, with his costs and other expences. The application was refused.

The respondent filed his bill against Mademoiselle D'Este in 1840, stating to the effect before stated, and further stated, that, until the said rent was demanded of him, he was wholly ignorant that any part of the liberty way was included within the purchased premises, or that the said town or parish had any right of way through any part of them; and the bill charged that the defendant, as well as Lady De Ameland, had acknowledged such right of way; that no notice thereof, express or constructive, was given to the respondent, and that from the abstract of title delivered to him, and from the map annexed to the particulars and conditions of sale, it appeared, and he, in fact, believed, that the liberty way was not included within the premises, but adjoined them, and was comprised in the Victoria Road; and he charged that the defendant fraudulently concealed from him the said deed poll, and the fact that Lady De Ameland and herself had regularly paid the yearly rents of two shillings and sixpence to the said town and parish, in acknowledgement of their right to the said way; that the premises were represented to him to be wholly situated within the said parish, and without the liberty of Ramsgate; and that if he had been aware of the said claim to a right of way, and that the liberty way was included within the premises sold to him, he would not have purchased them.

The bill prayed that the said sale and the deeds of lease and release might be declared fraudulent and void, and that the sale might be set aside, and the deeds delivered up to be cancelled, and that an account might be taken of all sums expended by the respondent in the repairs of the mansion house and the erection of the boundary wall, and of his costs and expences incidental to the purchase and con-[610]-veyance of the premises; and that the defendant might be decreed to repay to the respondent the purchase money, and the five pounds per cent. thereon, which he had paid to Wightwick, together with what should be found due to the respondent upon

the taking of the account for costs and expences, with interest, he offering to account for the rents and profits during his possession of the premises, and to re-convey them.

The appellant, Lady Wilde, in her answer to the bill, after admitting the facts before stated, and that Mr. Wightwick was her solicitor, and Messrs. Farrer and Parkinson her solicitors in London, stated that the property forming the estate, part of which was sold to the respondent, had been purchased by Lady De Ameland, her mother, from different proprietors, previous to which purchases the appellant believed there existed a way, called "The Liberty Way," running from King's-street, Ramsgate, in a straight line, in a south-westerly direction, to the sea cliff, but such way was used only by the proprietors of the adjoining lands, which her mother had purchased, and the right of way had thereby become extinguished. And she admitted that in 1820, before her mother had become the sole owner of all these lands, a negotiation took place between Mr. Daniel, her solicitor, and the officers of the town of Ramsgate, and of the parish of St. Lawrence, when it was agreed that Lady De Ameland should be at liberty to inclose so much of the Liberty Way as passed through the property then belonging to her, on payment of two shillings and sixpence annually to the town and parish, by way of an acknowledgement of a right of way; and she, in pursuance of that agreement, executed the deed poll stated in the bill, but she did so in ignorance of her rights, and the deed was not binding on her or any person claiming under her. And the appellant also admitted that since the year 1830, she had, by her agents, [611] regularly paid the said nominal rent to the parish and town, as appeared by the accounts furnished to her by her agents; and she did not discover to the respondent or his agents the claim of the town or parish to such rent, but she insisted that there appeared, in the map annexed to the particulars and conditions of sale and on the abstract of title delivered to the respondent, sufficient notice of the liberty way to put him, upon inquiry, into the particulars of it, and that it was not necessary for her to give notice of the deed poll or annual payments of said nominal rents. And she denied all fraudulent concealment on the part of her and her agents, and insisted that the respondent was too late in making his claim, and that if he was entitled to any relief, it was by way of compensation, for that one-half in breadth of the supposed way, if it ever existed in the premises purchased by the respondent, had merged in the Victoria Road, a public highway, of which the respondent was cognizant (for other passages in the answer, see 2 Y. and C. 551, 563).

A great deal of evidence was given on both sides, the material parts of which, particularly the examination and cross-examination of Mr. Wightwick, and Mr. Allason, the surveyor who laid out and mapped the estate in lots for the sale, is stated in the Vice Chancellor's judgment (2 Younge and Col. p. 552 and p. 564). It was clearly proved that there was, at one time, a way called "The Liberty Way," traversing the lands forming the estate, before they were purchased by Lady De Ameland, and that such way passed near Mount Albion mansion, but its course was not accurately defined, nor was it clear what was its width, or whether it passed through the part of the estate purchased by the respondent. In 1820, after Lady De Ameland obtained permission to inclose the way, and before she became owner of all the lands, for [612] which the way was serviceable, the officers of the town of Ramsgate and parish of St. Lawrence, caused a line of way to be marked out by three boundary stones placed at distances, on what was supposed to be the liberty way, lying along the boundary line between the town and parish. On these stones were cut letters, on one side indicating the town of Ramsgate, and on the other the parish of St. Lawrence. The way was never used afterwards, nor did it appear that the appellant was at all aware that a way had ever existed, although her agents, in the accounts furnished to her annually, charged five shillings for rent reserved by the deed poll; and from that fact Mr. Wightwick, in his evidence, inferred that she knew there was a right of way. It was from his instructions, as agent for the appellant, that Allason, the surveyor, understood there was a right of way over the estate, and that the line was marked by stones; and being directed to plan a wide public road on that line, he examined the same with a view of setting out the new road over the same line; and finding the marks on the stones indicating the said parish and township respectively, and understanding that the right of way was claimed exclusively by the town, he concluded that the way passed on that side of the stones which was

indicated by the letters, and accordingly he set out a new road, forty feet wide, called the Victoria Road, the edge of which coincided with what he supposed to be the boundary line of the parish, believing that it comprehended the whole of the original way, as he intended.

The Vice Chancellor, upon the hearing of the cause in November 1843, came to the conclusion that there was a right of way over the lands purchased by the respondent, and that it might be claimed and exercised; and although he, and also the respondent's counsel, acquitted the appellant of all wilful fraud or intention of concealment, he [613] decreed that the purchase and conveyance were void, and that they should be set aside (2 Y. and Col. 580).

In August 1845, Mademoiselle D'Este intermarried with Sir Thomas Wilde, and they afterwards appealed against the decree, and an order consequential thereto.

Mr. Bethell and Mr. James Wilde for the appellants.

There was no fraudulent representation or concealment on the part of the vendor or her agents. The map annexed to the conditions and particulars of sale, showed traces of the liberty way sufficient to put the respondent upon inquiry. He never applied to or asked Wightwick any questions about the title, although he was the agent by whose concealment the respondent pretends he was misled. Lady Wilde, of herself, knew nothing of the liberty way; but it appears on the map that she gave the public a way, the Victoria Road, more than six times the supposed width of the liberty way, which is, or is supposed to be, included in it. The respondent's objection is, that though there is a much larger public way given, the people of Ramsgate still have a right at any time to demolish his newly built wall, and claim the old way, which he says lies within it. That is the whole miserable objection to the contract of purchase; and it is made after the contract has been completed by conveyance, and possession taken. Instead of six feet of way, which was the utmost width of the alleged old way, the public have now a way forty feet wide. What benefit could the vendor have from the alleged fraudulent concealment? The evidence does not prove any fraud. The respondent, having in his bill alleged fraud on the part of the vendor, proved, only against her supposed agent, a suppression of a knowledge of the liberty way. He was bound to prove the charge of direct fraud by clear evidence; and the Vice Chancellor under the circumstances, ought to have directed an issue [614] or action, or to have dismissed the bill, especially when he acquits the vendor of all personal fraud, and puts his judgment on the ground of concealment by her agent. A contract, after it is completed, is not to be set aside for fraud, unless the fraud is personal and clearly proved. All that is proved here is that Wightwick knew the boundary stones were not on the margin, but in the middle of the liberty way; and that he, being the agent of the vendor, did not disclose that knowledge to the purchaser. It does not appear that the purchaser ever communicated with Wightwick; his communications and dealings as to the title were with Farrer and Parkinson, who were the proper solicitors and agents for the vendor; and it is not alleged that they had any knowledge of this claim to a right of way. The knowledge Wightwick had of it, if any, was acquired by him in 1820, long before he became agent to the vendor. Lord Hardwicke held, in *Lowther v. Carlton* (2 Atk. 242), that where a counsel or attorney, employed to look over a title, has from some other transaction notice of a defect, that shall not affect the title. The observations of the Lord Chancellor and Lord Brougham, in *Attwood v. Small* (6 Clark and F. 232, see pp. 350, 393, 444, 448), form a digest of the law on this subject. The principles so admirably laid down in that case, and in *De Beauvoir v. Rhodes*, which is reported in a note to it, apply so emphatically to this case as to render it almost unnecessary to offer further argument. (The passages referred to below were read.)

The position that the principal is answerable for the concealment and misrepresentation of the agent, is fully discussed by the Barons of the Exchequer, in *Cornfoot v. Fowke* (6 Mee. and W. 358), and by Lord Denman in *Fuller v. Wilson* (3 Queen's Bench, 58, and again at p. 68); in both which cases it was held that the principal was not answerable for the misrepresentations of the agents—

[615] [Lord Campbell.—In an action upon contract, the representation of an agent is the representation of the principal; but in an action on the case, for deceit, the misrepresentation or concealment must be proved against the principal.]

That distinction entirely supports the case of the appellant. The purchaser here,

in fact, knew as much of the circumstances of the property as the vendor did. The knowledge acquired by the agent, not as agent in the sale, but from antecedent transactions, is not to be imputed to the principal; *Worsley v. The Earl of Scarborough* (3 Atk. 392). [*Pickering v. Dowson* (4 Taunt. 779), *Pasley v. Freeman* (2 Smith's L. Cases, 71), *Haycraft v. Creasy* (2 East, 92), *Polhill v. Walter* (3 Barn. and Ald. 334), *Lery v. Langridge* (4 Mee. and W. 338), *Moens v. Hayworth* (10 Mee. and W. 147), and *Evans v. Collins* (5 Q.B. 804, 820) were cited, among other cases, to show that a knowledge by the principal and a guilty misrepresentation or concealment, were essential ingredients to fraud.] The bill here made a case of direct immediate knowledge, in the vendor, of the right of way; the evidence only proved constructive knowledge: the bill alleged personal knowledge and fraudulent concealment; the case proved was one of constructive concealment, and Wightwick's evidence, which alone attempts to support that case, is not positive, but inferential and conjectural. The evidence in support of his agency for the vendor, is far from being conclusive; there is not a tittle of proof that he was a solicitor for the sale, or that he ever interfered in it. The Messrs. Farrer and Parkinson were the solicitors. It would be a violation of every principle of equity to hold Wightwick the agent, and then fix the principal with his previously acquired knowledge and with his concealment.

[616] If a case has been made to entitle the respondent to any relief under his bill, it is a case of compensation, which the vendor's agents offered, but the respondent rejected.

Mr. Swanston and Sir F. Kelly for the respondent.

[Lord Campbell.—It appears that in the argument in the Court below, and in the judgment there, the defendant was entirely absolved from all blame: Are we to assume that here?]

Certainly, the Vice Chancellor absolved the lady from personal fraud. We mean to argue the case with all possible respect for her; but we do not admit a want of personal knowledge of the right of way as widely as her answer put it.

They then read passages from the evidence, bearing on the point, to show, first, that there was no doubt at all of the existence of a public way over the property; whether it was a carriage way or foot path, was not material to the case. If the stones laid down with the initials of the town of Ramsgate and the parish of St. Lawrence were in the centre of the liberty way, as the evidence showed, then it was clear that the wall built by the respondent, under the direction of the vendor's surveyor, on what he was told was the boundary of his property, was an encroachment on the way, and liable to be pulled down, the way never having been legally stopped. If the old way was six feet wide, and there is now only the width of three feet outside the wall, it is competent to any inhabitant of Ramsgate, and to the public generally, to complain of the encroachment. The property was sold free from all right of way, yet a right of way is now claimed, and the vendor admits its existence formerly, and does not show that it was legally stopped. Has not the purchaser, therefore, a right to be relieved from his contract?

[The Lord Chancellor.—The contract of purchase is perfected by a conveyance. To be relieved against that, [617] fraudulent concealment must be proved. This is different from a bill by the vendor for specific performance of the contract (see *Vigers v. Pike*, 8 Clark and Fin. 646).]

The purchasers' bill to set aside the executed contract in *Vigers v. Pike*, was dismissed, there being long acquiescence in the purchase, after knowledge of the fraudulent representations of the vendors. Here the complaint was made as soon as the right of way was claimed. The dealings between this purchaser and the vendor, or her agents, and the representation of the latter, were inconsistent with any right of way over the property. The vendor must be assumed to have known the existence of a way, from her possession of the deed poll, executed by her mother in 1820. At all events, it is proved that her agent, Wightwick, was aware of the right of way. There is, as has been observed, a difference between the evidence necessary to support an action of deceit, and evidence of fraud necessary to set aside a contract in a Court of Equity. Suppose the vendor had herself been a party to the deed of 1820, she would be clearly guilty of fraud in equity. Representations made by a party, inconsistent with personal knowledge, are, for the purposes of this suit, a fraud, although the knowledge may not be present in the mind of the party at the time of making the

representations. So whether the knowledge of this right of way was present or not to the mind of the vendor at the time of the representations made by her or her agent, she, having the knowledge, and not communicating it to the purchaser, was guilty of a fraudulent concealment, in equity. The cases which will be cited go to that extent. How can she be absolved of the knowledge of the way, when her agent made the annual payments in acknowledgment of it, and she admits she noticed the charges in the agent's accounts, especially when she had in her possession the deed under which the pay-[618]-ments were made? Wightwick swears that "she knew the payments were made by him on her behalf, in acknowledgment of the right of way."

No corrupt motive or moral turpitude is imputed to the vendor, but the case is, that she sold this property exempt from any right of way, and now, when the right is claimed and established, she is found to have known, or to have had the means of knowing, that the right of way existed. This case falls within that of *Edwards v. M'Leay* (Coop. 308; 2 Swanst. 287).

[Lord Campbell.—That was a case of direct fraudulent suppression. But is there any case of a contract completed, being set aside for non-disclosure of mere constructive knowledge; for no more than that is proved?] The evidence shews, and the vendor herself admits in her answer, that Wightwick was her agent. He knew of the right of way, and of the deed of 1820; he paid the annual rents on behalf of the vendor, and she knew it. There was such misrepresentation or suppression of knowledge as constitutes fraud, quite sufficient, in the view of Courts of Equity, to set aside contracts, even after they are completed. In *Fuller v. Benett* (2 Hare, pp. 403-4), Vice Chancellor Wigram states the principles on which a vendor is affected with the knowledge of his solicitors. "It is clear that a purchaser may be affected with notice of what the solicitor knew as solicitor of the vendor" (he being solicitor for the purchaser also) "although as solicitor for the vendor, he may have acquired his knowledge before he was retained by the purchaser. Whatever the solicitor, during the time of his retainer, knows as solicitor of either party, may possibly, in some cases, affect both, without reference to the time when his knowledge was first acquired."

[The Lord Chancellor.—Admitting that Wightwick made the payments in acknowledgment of the right of way under the deed of 1820, and that he was the agent of the [619] vendor, that fixes her with no more than constructive notice of the way.]

But she had, also herself, knowledge of the right of way, from the deed executed by her mother, the former owner of the property, and from the payments charged in the accounts. The case made by the respondent is fully sustained by the doctrines laid down by Sir W. Grant and by Lord Eldon, in *Edwards v. M'Leay* (Coop. p. 311, *et seq.*; and 2 Swanst. p. 289). The observations also made by Lord Lyndhurst in *Small v. Attwood*, in the Court of Exchequer (1 Younge, 407; see pp. 460-1-2 and 480, *et seq.*), and by him and other noble and learned lords upon the appeal to this House (6 Cl. and F. pp. 395, 330, 393, and 444) in that case bear strongly upon the material points in this; the nature of the agency of Wightwick, and his knowledge, and the knowledge of the vendor. [The passages below referred to in the reports of the two cases were read at length; and the following cases at law were cited and applied: *Medina v. Stoughton* (1 Salk. 210), *Hern v. Nicholls* (*id.* 289), *Lisney v. Selby* (2 Ld. Raym. 1118), *Tapp v. Lee* (3 Bos. and Pull. 347), *Doe v. Martin* (3 Term. Rep. 39), *Schneider v. Heath* (3 Camp. 506), *Dobell v. Stevens* (3 Barn. and Cr. 623), *Early v. Garrett* (9 Barn. and Cr. 928), *Foster v. Charles* (6 Bing. 396; see also 7 Bing. 105), *Corbett v. Brown* (8 Bing. 33), *Polhill v. Walter* (3 Barn. and Ad. 114), *Freeman v. Baker* (5 Barn. and Ad. 797), *Cornfoot v. Fowke* (6 Mees. and W. 358), *Moens v. Hayworth* (10 Mees. and W. 147), *Fuller v. Wilson* (3 Q. B. 58, 68, and 1009), *Evans v. Collins* (5 Q. B. 804, 820), and *Humphreys v. Pratt* (2 Dow. and Cl. 288; 5 Bligh. N. S. 154).]

[620] It was contended in the court below that the defect in the title in consequence of the claim to a public way was a fit ground for compensation: It might be so, if the purchase had not been of a mansion-house, with out-houses and pleasure ground only, the privacy and comfort of which were invaded by a public way. No reduction of the purchase money could compensate the respondent for such an annoyance; the contract should be set aside altogether.

Mr. Bethell in reply, again contrasted the pleadings of the respondent with the

proofs, and referring to the allegations of personal knowledge and fraudulent concealment in the bill, shewed that they were most directly denied in the answer. It is a well established rule in equity, that if a plaintiff forces a party to answer a charge upon oath, the latter is entitled to all the benefit of such an answer in denial of the charge, unless the charge is proved by the evidence. Here the denial by answer was complete and there was not a particle of proof to support the charge.

There was a case of *Fuller v. Benett* cited for the respondent, but the judge's observations referred to in that case, which is itself wholly irrelevant to this, appear to be entirely in favour of the appellant. He submitted that the decree should be reversed, and the bill dismissed with costs.

The Lord Chancellor observed that there was a case of *Legge v. Croker*, 1 Ball and Beatty, not cited on either side, though it appeared to him to be remarkably similar to the present case.

The Lord Chancellor (June 6).—The bill in this case prays that the conveyance may be set aside as fraudulent; but the decree, although it sets aside the conveyance, departs from the usual course in such cases, and abstaining from any imputation of fraud, declares that under the circum-[621]-stances the contract was void, and, as a supposed necessary consequence, that the conveyance ought to be cancelled. This is not an immaterial circumstance, as it strongly implies that the Vice Chancellor was satisfied that the evidence did not establish any case of fraud. If that be so in fact, the first question will be, whether, upon a bill framed, as the bill in this case is, a decree can be supported upon any other ground than the case of fraud distinctly charged by the bill.

It is in all cases important to consider how far the case proved is in conformity with the case alleged; but it is peculiarly so in cases founded upon alleged fraud, imputing dishonest practices to the defendants. It is in all such cases essential to prevent the proceedings from becoming instruments of unfounded slander. Plaintiffs should bear in mind that imputations which cannot be supported, will not only not profit them, but may debar them from that relief to which they might be entitled upon other grounds, if properly brought forward.

The bill in this case imputes direct fraud, consisting in this, that the defendant, at the time of the sale, knew the contents of the deed of 1820—that the liberty road passed over the portion of land purchased by the plaintiff—and fraudulently concealed from the plaintiff the knowledge of that deed, and of that fact. The payment of the two and sixpence to the parish of St. Lawrence and to the liberty of Ramsgate, is not charged as amounting to a knowledge of the road, but only as evidence of knowledge of the deed.

The fraud imputed is personal and direct; but the language of the decree abstains from affirming any such case, and the Vice Chancellor in his judgment disclaims any intention of supporting the decree upon the affirmative of such imputation, which was indeed impossible, the truth [622] of such imputation having been distinctly disproved by the evidence on both sides. The deed of 1820 never was in the possession of the defendant, and there is not only no proof of her having had any knowledge of the deed or of its contents, before the sale and conveyance was made to the plaintiff, but the contrary is clearly proved, and no attempt is made to establish such alleged knowledge.

If, therefore, the case proved had been such as, upon a proper bill for that purpose, would have entitled the plaintiff to the relief prayed, the frame of this bill would probably have been a sufficient answer to the claim to such relief as this seeks. The decision upon this appeal does not, however, in my opinion, rest upon that ground. The case alleged might have been sufficient to entitle the plaintiff to relief, if it had been proved; but the case proved would not have been sufficient for that purpose, though properly alleged.

The result of the evidence is simply this: that there was, prior to the year 1820, a right of way passing through the land, belonging to Lady Augusta De Ameland towards the sea; but the particular line of the way was not at that time ascertained. In that year the officers of St. Lawrence and of Ramsgate, assuming that the way followed the boundary between the parish and the liberty of Ramsgate, and con-



sequently that the centre of the way was the true boundary, put up three stones, marking out that line, and, if they were correct in their supposition, the land sold to the plaintiff, abutting upon the line of those stones, would comprise within itself one-half of such way, the width of which, however, is left uncertain. But that depends entirely upon the correctness of the supposition that the centre of the way was the real boundary, which the evidence proves to have been very doubtful, the precise line of way over land then unenclosed [623] being at that time incapable of being perfectly ascertained. That the centre of the way and the boundary line had been considered as identical, depended upon what had taken place in 1820, of which the defendant had no knowledge. The deed of 1820, if the defendant had known its contents, would not have informed her of this, nor would the payment of the two sums of two shillings and sixpence each; for although from both it might have been inferred that in some point the way touched upon land in the liberty and in the parish, neither would show that it touched upon both, at that point of the plaintiff's land; and as to these payments, I must observe that there is not sufficient evidence that the defendant knew that such payments had been made, and none that she knew for what they were made. Mr. Wightwick indeed proves that he paid these sums as agent or manager for the defendant, and that he entered such payment in her accounts; but such accounts were not proved or produced in evidence, and there is, therefore, no proof of the manner in which such payments were entered, and unless such entries had specified that the payments to St. Lawrence were made in respect of the right of way running over the land bought by the plaintiff, they would not have given any information as to the fact of which the plaintiff complains.

It is true that the deed, if it had been in the possession of the defendant, and the payment, if known to her, might have amounted to constructive notice, being sufficient to put a party upon inquiry. The effect of constructive notice in cases where it is applicable, as in contests between equities of innocent parties, is sufficiently severe, and is only resorted to from the necessity of finding some ground for giving preference between equities otherwise equal: but this is the first time I ever knew it applied in support of an imputation of direct personal fraud and misrepresentation. The two things cannot exist together—there can be no direct personal fraud without intention, and there can [624] be no intention without knowledge of the fact concealed or misrepresented; and if there be knowledge, the case of constructive notice cannot arise; it would be absorbed in the proof of knowledge.

It must be observed that there is not in this case any misrepresentation or statement in the nature of a warranty—the utmost that has or can be alleged is that there was a dealing with the property, particularly with respect to the covenant to build a wall, inconsistent with there being any right of way—but no statement or warranty that there was not a right of way, a distinction important to be borne in mind, when this case is compared to actions for deceit; in which, under such circumstances, the *scienter* is the essence.

An attempt was made to affect the defendant with all the knowledge which Mr. Wightwick possessed upon this subject; but that attempt failed, for many reasons. In the first place, although he was the agent of the defendant for certain purposes connected with the sale, it does not appear that the purchaser had any communication with him respecting the purchase, except in paying a stipulated per centage towards the expences of a terrace walk. The whole transaction of the purchase was conducted in London. The documents preparatory to and connected with the purchase may have been prepared by Mr. Wightwick; but when prepared, they became the representations of the vendor, and what knowledge the person may have had who prepared those documents is immaterial. He may have been guilty of neglect towards his employer in permitting the preparation and use of inaccurate papers on her behalf, but not having had any personal communication with the purchaser, the latter cannot complain of having been deceived by any misrepresentation made by him. It is, however, clear that Mr. [625] Wightwick himself cannot, as between these parties, be considered as having more than constructive notice of the fact alleged by the plaintiff. What knowledge he acquired in 1820, is immaterial; as, at that time, he was not acting for the defendant or for Lady Augusta De Ameland, and although he, after he became their agent, paid the two shillings and sixpence to St. Lawrence and Ramsgate for the defendant, such payment would only show that some right of

way had been supposed to pass over some part of the land in each of those districts, but could only be constructive notice of its affecting the plaintiff's land.

It must also be observed, that if the plaintiff had relied upon any supposed fraud or misrepresentation on the part of Mr. Wightwick, he was bound so to have stated his case; and he cannot be permitted to support an alleged case of personal and direct fraud by a principal, by proving misconduct in an agent not named in the bill for that purpose.

If, therefore, the right of way complained of by the plaintiff had been proved—which it is not—and if the case relied upon had been properly stated in the bill—which it is not—the case would have come to this, that the defendant had no knowledge of the fact complained of, but had within her reach means of such knowledge. That is constructive notice of a fact, not consistent indeed with the mode of dealing with the property, but as to which no representation of any kind took place. And the question would arise whether such circumstances would entitle the purchaser to have a completed purchase set aside. It has not been, and cannot be, contended that it could; but attempts were made to support the decree upon arguments resting, as it appeared to me, upon a supposition that there might be direct personal fraud, consistent with perfect freedom from any personal blame or misconduct. [626] The direct personal fraud was attempted to be supported by some expression in Mr. Wightwick's deposition, in which he says that the defendant had knowledge of the right of way claimed over the land purchased by the plaintiff; but he does not say how he proved such knowledge, and, coupled with what he said respecting the deed and the payments, he must be understood as intending to say that the defendant must, as he supposes, have known of the claim, from the fact of such deed having been executed, and such payments having been made.

Finding that there was no evidence to support the charge of direct personal fraud imputed by the bill, and that the evidence, at most, only raised a case of constructive notice of the fact complained of by the plaintiff, I waited with some curiosity to learn the ground or authority on which the decree was to be supported. The case principally relied upon was *Edwards v. M'Leay* (Cooper, 308, and 2 Swanston, 287); but that case cannot assist the respondent, for in that case there was knowledge in the vendor, and a false representation, both of which are wanting in the present case. Lord Eldon says (2 Swans. p. 289), "I agree with the Master of the Rolls that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract." A case much more in point is that of *Legge v. Croker* (1 Ball and B. 506), in which the lessor had assured the lessee that there was no right of way over the ground; that there had been formerly, but that it had been legally stopped by a grand jury presentment forty years before. It turned out that there was a footway, the presentment applying only to a carriage way, and the lessee was convicted for obstructing it, whereupon he filed his bill to be relieved [627] from the lease; but Lord Manners dismissed his bill, saying, "If there were a wilful misrepresentation, the plaintiff might be entitled to relief, but the lessor conceived himself entitled in point of law in asserting that there existed no right of way; it cannot be called a misrepresentation." That was a much stronger case against the lessor than the present is against the vendor.

The result appears to me to be, *first*, that the plaintiff, having rested his case in the bill upon imputations of direct personal misrepresentation and fraud, cannot be permitted to support it upon any other ground; *Secondly*, that the evidence, at the most, proves only constructive notice of the fact, upon the non-communication of which the plaintiff founds his claim for setting aside his completed purchase; and that nothing short of positive knowledge can be sufficient for that purpose. The case alleged is not proved, and the case proved is not alleged; and if it had been, would not have been sufficient to support the decree.

The conclusion to which I have come is, that the decree ought to be reversed, and the bill dismissed, with costs.

Lord Brougham.—I entirely concur with my noble and learned friend in the conclusion to which he has arrived, being clearly of opinion that the case alleged has not been proved, and that the case which has been proved is not sufficient to support

the prayer of the bill, to have the indentures of lease and release, the conveyance, given up and cancelled on the ground stated in the bill and assumed in the decree.

There cannot be anything more vague than the allegation of fraud that is to be found in the pleadings, and what my noble and learned friend has most justly observed is a principle of the highest importance to be kept in view in proceedings in Equity,—for the security of the Court against [628] imposition upon it,—for the keeping straight and clear the principle upon which its jurisdiction is to be exercised,—for the safety of the characters of the parties—and for common justice. My noble and learned friend has next observed, that where fraud is to be the ground of the proceeding, and is made the principle on which the relief is sought at the hands of the court, that fraud must be clearly and distinctly alleged, and if so alleged, must equally be clearly and distinctly proved, if it is the ground on which parties seek the assistance of the court for equitable relief. That fraud, in this case, is clearly alleged, there can be no doubt whatever, because we find in the bill this allegation, “that the said Augusta D’Este, that is to say, the defendant, at the time of the sale to the plaintiff, well knew that the said deed poll had been made and executed by her mother, the said Lady Augusta De Ameland, that is to say, well knew, that the said liberty-way so claimed in the township of Ramsgate and the parish of St. Lawrence was included within the premises so sold to your orator as aforesaid.” That is distinctly alleged: but then nothing of the kind has been proved. Has anything been adduced as a substitute for that proof? Nothing of the kind. It is no question of constructive notice; for, as my noble and learned friend has well observed, constructive notice merges in actual knowledge. Constructive notice is only where actual knowledge is not alleged; and here there is actual knowledge alleged, and thus no question as to constructive notice can arise.

Now, though it may not have been proved that the defendant actually knew of the deed poll, though, on the contrary, it may have been proved that she had not actual knowledge of it, yet by way of substitute for the first allegation, they as much as say, “If we cannot charge you with knowledge of the concealment of the deed poll, we will charge you indirectly, we will charge you by infer-[629]-ence.” In the next paragraph of the bill they go on to state, “That the said Augusta Emma D’Este had, in fact, by her agents, regularly paid the nominal rent reserved to the said township of Ramsgate and parish of St. Lawrence by the said deed poll, as an acknowledgment of their right to re-open the said liberty way, for several years prior to the said sale to your orator,” that is to say, “paid by her agents two shillings and sixpence in respect of the way for several years prior to the said sale to the plaintiff.” Now, in the first place, it is not proved that the accounts in which it is said the two shillings and sixpence paid by the agent was entered, ever did contain that entry; for the accounts were not produced. In the next place, it is not proved that she had that knowledge; therefore in order to prove her knowledge, you must assume three things, *first*, that she knew of the accounts, which she did not know, but the contrary; *secondly*, that the accounts contained the entry; and *thirdly*, in order to make it the least available to the case towards proof of knowledge and suppression of that knowledge, you must go a further step, and prove that the accounts, if produced, and if seen by her, did contain, not only the entry of the payment of two shillings and sixpence by the agent, but also an entry that the two shillings and sixpence was paid in respect of that right of way to the parish of St. Lawrence. It is ridiculous to suppose that you can make all these assumptions in a court where the foundation of the whole claim is fraud, alleged by the concealment of a fact well known.

In one part of the argument a reference was made to the deposition of one of the witnesses: it was in the cross-examination of Mr. Wightwick, the defendant’s witness, and it was said that that went to prove the case alleged by the plaintiff; but, as my noble and learned friend has observed, when you come to look at the question, it turns out that the question by the reference to the last antece-[630]-dent, does not mean what it was alleged to have meant—the position of the way in the parish, and did not therefore refer to the substance of the answer, and consequently there was nothing whatever in that answer to touch the case.

In the case of *Edwards v. M’Leay*, both the learned judges, Sir W. Grant, and Lord Eldon, went on the fact, that there was direct knowledge brought home to the party. That case, therefore, does not help the plaintiff in this case; it does not apply

here; but the case which my noble and learned friend happened to light upon, but which had not been mentioned at the bar, does apply. I do not remember, in the course of my experience, ever to have seen two cases more nearly alike than that case and the present. There is a singular coincidence; if you change the names, they are almost the same cases; though I must observe that it did not require a case of this sort to enable us to arrive at the conclusion at which we now arrive. In the present case there is, first, a total failure in proof of the case alleged; and secondly, the case which is proved is totally insufficient to support the claim.

It is singular to observe how very different the view taken here of the proof of fraud and of the import of it, and its tendency towards a remedy is, from that which is taken in the Courts of Common law, in the celebrated case of *Pasley v. Freeman* (3 T. Rep. 51), but particularly the case of *Haycraft v. Creasy* (2 East, 92). There you find that the knowledge was never alleged; but if you look at that case—which is celebrated by its having shown a rarely occurring difference of opinion between the learned Chief Justice, Lord Kenyon, and the three puisne Judges, they having decided against Lord Kenyon, that the action would not lie—it is singular how clearly you find that the plaintiffs did not allege a *scienter* there; they allege things which might be supposed [631] to amount to a *scienter*, but they never dared to allege a *scienter*. They said that Creasy had given intimation to Haycraft that his opinion was, that Miss Robertson, who turned out to be a swindler, was perfectly solvent, and that he of his own knowledge asserted in words that she was solvent, and that she might safely be trusted to any reasonable amount with goods; and so it was argued that there was a *scienter*; but the pleader, who drew the declaration, knew a little better than that. He was afraid that that would be held only to be a *scienter* of an opinion, and that it amounted only to an opinion; and so the court held. They said we must have knowledge alleged of a fact; but what the party was talking about was not of a fact, but merely of an opinion, viz., the solvency of the lady. The pleader was quite aware that that objection would be raised against him, and accordingly he took special care not to allege the *scienter*; and it is expressly stated in the report that no knowledge was alleged in the declaration, but it was only alleged that the party had given a false representation.

Now what would have been the consequence if he had alleged knowledge? He would have done what the pleader in equity has done in this case in the passage which I have read to your lordships; he would have alleged that the said Creasy well knew the same, but then he would have been obliged to prove that, and as he could not prove it, of course he would have been nonsuited; he therefore took care not to allege it, and he left it to be a matter of implication.

I am therefore clearly of opinion that there has been as great a miscarriage of justice in this case in the court below as I have ever seen, and I am sorry for it, because there is a great proportion, I am afraid I ought to say a great disproportion, between the value of this question and the expenses incurred in litigating it, and I am sorry that our jurisdiction does not enable us to do more than to [632] give to the defendant, the appellant before us, the costs in the court below. It is otherwise in other courts, as my noble and learned friends, who have attended the Privy Council, well know. It is totally different in the Ecclesiastical Court, and the Admiralty Court, and those extensive jurisdictions which are exercised by many of our colonial courts; and I must say that I hope to see, among other improvements of our practice, a little relaxation of that principle as regards the costs in equity cases. Costs at law stand on a different ground, but costs in equity are mere creatures of practice, and out of statute; they are more in the discretion of the court, and therefore I hope to see some such remedy adopted as will prevent the grievance of which the appellant has a right to complain: for after she has got the decree reversed by our judgment; after she has got the costs below given by the reversal of the decree, she will still be left burdened with her own costs of this appeal, which I am afraid bear a considerable proportion, if not a great disproportion, to the whole value of the matter in dispute.

With this expression of a clear opinion, that the decree cannot stand, that it must be reversed with all the costs below, I entirely concur with my noble and learned friend in the motion that he has made.

Lord Campbell.—My Lords, after the very attentive and anxious consideration

which this case has received, I have come to the clear conclusion that the decree appealed against ought to be reversed; and I must say that in the court below the distinction between a bill for carrying into execution an executory contract, and a bill to set aside a conveyance that has been executed, has not been very distinctly borne in mind.

With regard to the first: If there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to [633] complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of actual fraud. And there would be no safety for the transactions of mankind, if, upon a discovery being made at any distance of time of a material fact not disclosed to the purchaser, of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside.

Now, my Lords, the counsel on the part of the respondent acquiesced in the view that this was to be considered as if it were an action of deceit; but they argued that an action of deceit might be maintained without proof of actual fraud. From that position I entirely dissent. If you mean by fraud, an intention to injure the party to whom the representation is made, or to benefit the party who makes the representation, there may be an action of deceit without fraud; but there must be falsehood: there must be an assertion of that which the party making it knows to be untrue; the *scienter* must either be expressly alleged, or there must be an allegation that is tantamount to the *scienter* of the fraudulent representation, and this allegation must be proved at the trial. If your Lordships will examine the cases that have been referred to, of *Foster v. Charles* (7 Bing. 106), *Polhill v. Walter* (3 B. and A. 123), and *Corbett v. Brown* (8 Bing. 37), you will find the judges uniformly lay down the rule that there must be a falsehood stated and proved. If that falsehood is stated without any view of benefiting the person who states the falsehood, or of injuring the person to whom the falsehood is stated, in one sense of the word you may say it is not fraudulent, but it is a breach of a moral obligation; it is telling a lie; and if a lie is told whereby a third person is prejudiced, although there may be no profit to the person who tells it, and although no injury was intended to the [634] party to whom it is told, but a benefit to a third person, it is clearly a breach of moral obligation, and is a fraud which will support an action of deceit.

Now, my Lords, what evidence is there to support such an action? The bill is framed, I may say, *ex delicto*, not *ex contractu*; but it asserts, in the most positive manner (and that is the foundation of the relief which is prayed), that the defendant, at the time of the sale, not only knew of the deed of 1820, but knew of the direction of the "liberty way," and knew that "liberty way" came upon the ground which was sold to the plaintiff. Now, my two noble and learned friends who have preceded me, in the clearest manner have shown that there is not a particle of evidence to support that allegation, and I do not mean to trouble your Lordships by again going through the evidence. Indeed, there has been every desire to conduct a case of this sort with the courtesy and respect to the parties which were indicated in the court below and at the bar here: I will not strictly interpret the disclaimer at the bar, but the learned Judge below, judicially, more than once, said that he acquitted the parties of all fraud:—therefore the notion of this bill being supported on the ground of personal fraud committed by the defendant, must at once be dismissed. That being the case, in the shape in which the bill is presented before us, the case of personal fraud committed by her entirely fails, and we are not at all called upon to consider whether the case of *Cornfoot v. Fowke* in the Exchequer was rightly decided or not, in which the judges were divided as to whether the fraudulent representation of an agent was equivalent to a fraudulent representation by the principal. Here the case alleged is a fraudulent representation by the principal, and not by an agent.

But, my Lords, in the first place, there is no evidence to which we are at liberty to pay attention, to prove that [635] Wightwick, in making the representation at the time of the sale, was the agent of Lady Wilde, and if he was the agent, there is no evidence whatever that he in the course of the agency acquired any knowledge, or at any time had any knowledge of the direction of the road, and on that the whole turns, because the mere knowledge of the liberty way is nothing, and the mere knowledge of the deed of 1820 is nothing, unless he in the course of his agency acquired a knowledge

of the direction of the liberty way, and knew that part of the liberty way extends within the wall which was erected by the plaintiff. The knowledge then amounts to nothing; he had no knowledge which would show that he was guilty of any fraudulent misrepresentation. Therefore, my lords, in the light in which I view this case, it seems to me that the decree cannot be supported.

With regard to the case of *Edwards v. M'Leay*, I most reverentially regard it. I think there is no case of higher authority to be found in our law books. It was decided by Sir Wm. Grant, on the most unexceptionable principles, and it was supported by my Lord Eldon, and he in the most pithy manner states the principle on which he proceeded. This is the principle on which he acts: "If one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this court will rescind the contract."

Now, my lords, this is the first case that we have cited before us, or to be found, of a bill in equity to set aside such a transaction, and we have as yet no authority to go further than *Edwards v. M'Leay*. That is the guide on one side: then what is the guide on the other? The case decided by Lord Manners, a judge of very great experience and very great intelligence, whose opinion on such a question is to be regarded with high respect—that case is the guide on the other side, to show you what you ought to avoid. You may go so far as *Edwards v. M'Leay*; but [636] then you are told how far you are not to go by the warning in the other case.

For these reasons, I am clearly of opinion that this bill ought to have been dismissed, with costs; and that is all that can be given to the defendant, on whom some hardship is thrown, but of course that is a hardship which, under all the circumstances, must be suffered, for we cannot give her the costs of the appeal.

Mr. Bethell.—We have been compelled to pay the costs in the court below; they must be returned, and probably your Lordships will add to your order what you did under the same circumstances, in *Attwood v. Small* (see 6 Clark and Fin. 523; and 3 You. and Coll. 105, 501).

Lord Brougham.—Our judgment is that the bill, instead of leading to the decree cancelling the conveyance, ought to have been dismissed with costs; consequently, if any costs have been paid in the court below by the appellant, they must be repaid.

Mr. Bethell.—The order of the House in *Attwood v. Small*, was that the bill be dismissed, with costs, and then there was a reference to the court to carry that direction into effect. I only want the same words as in that case. Your Lordships did the same in the case of the *Stockton and Darlington Railway Company v. Barrett* (11 Clark and Fin. 590).

[It was ordered that the decree of the 5th of December, 1843, and an order of the 25th of March, 1845, be reversed, and that the costs directed by the said decree be repaid to the appellants, and that the bill in the court below be dismissed with costs, including the costs of the proceedings under the said decree and order, except the appellant's costs of exceptions to the master's report, as to which each party was by consent to bear their own costs. And it was further ordered that the cause be remitted to the Court of Chancery to do therein as shall be just, etc.—See Lords' Jour. for the 6th of June, 1848.]

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[637] JOSEPH LE FANU, and EDWARD BULL,—*Plaintiffs in Error*; JOSEPH MALCOMSON and Others,—*Defendants in Error* [June 27, 1848].

[Mews' Dig. v. 611, 619. S.C. 8 Ir. L.R. 418; 13 L.T. O.S. 61. As to actions by partners, see *Haythorn v. Lawson*, 1827, 3 C. and P. 196; *Robinson v. Marchant*, 1845, 7 Q.B. 918; R.S.C. 1883, Ord. 16, r. 1; Ord. 18, r. 6. As to application of general words to individual, see *White v. Mellin* (1895), A.C. 154.]

#### *Libel—Pleading.*

Though defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable of being, by *inuendo*, shown to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter.

In such a case the *inuendo* does not extend the sense of the defamatory matter, but

merely points out the particular individual to whom matter, in itself defamatory, does in fact apply.

Therefore, after verdict, a declaration which recited that the plaintiff was owner of a factory in Ireland, and charged that the defendant published of him and of the said factory a libel, imputing that “‘in some of the Irish factories’ (meaning thereby the plaintiffs’ factory)” cruelties were practised, though there was no allegation otherwise connecting the libel with the plaintiff, was held good.

A. and B. may join in an action for a libel containing imputations injurious to a trade carried on by them jointly as partners.

This was an action of libel. The plaintiffs in the action were Messrs. Malcomson, the owners of a factory in the county of Waterford; the defendants, Messrs. Le Fanu, were the proprietors of “*The Warder*” and “*The Statesman*” newspapers; and the alleged libel was published in the former journal on the 1st of June, and in the latter, on the 4th of June, 1844.

The declaration contained thirteen counts. The first count set out the libel as published in the *Warder* news-[638]-paper, and alleged the plaintiffs to be persons of good name, fame, and credit, to wit, at Portlaw, in the county of Waterford. It then went on in the usual form to allege that “they had never been guilty of tyranny, oppression, extortion, breach of the sabbath day, etc.,” and proceeded thus: “And whereas, the plaintiffs, before and at the time of the committing of the grievances by the said defendants as hereinafter mentioned, were, and still are owners of an extensive factory for the manufacturing of cottons, linens, and other fabrics, called the Mayfield factory, in which numbers of men, women, and children, are constantly employed, to the great gain and profit of the said plaintiffs, to wit, at Portlaw, aforesaid, yet the said defendants, well knowing, etc., but greatly envying, etc., and wickedly and maliciously contriving and intending to injure the said plaintiffs in their said good name, etc.; and to cause it to be suspected and believed by those neighbours and subjects, that they, the said plaintiffs, had been and were guilty of tyranny, oppression, sabbath breaking, and extortion, and wickedly and maliciously contriving and intending to injure, harass, and oppress the said plaintiffs in their said calling, as owners of the said factory for the manufacturing of cotton, linens, and other fabrics, and wholly to ruin the said plaintiffs in their said trade, and calling heretofore, to wit, or, etc., at Portlaw, aforesaid, in a certain paper called *The Warder*, falsely, etc., did compose and publish, etc., of and concerning the said plaintiffs, and of and concerning the said factory, and of and concerning the manufacturing of cottons, linens, and other fabrics, carried on in the said factory by the said plaintiffs, and of and concerning the said trade and calling of the said plaintiffs, a certain false, etc., libel, containing, among other things, the false, etc., matter following, of and concerning the said plaintiffs, and of and concerning the said factory, and of and concerning the manufactory of linens, cottons, and other fabrics, carried on therein by the said plaintiffs; and of [639] and concerning the said trade and calling of the said plaintiffs, and of and concerning their conduct towards, and their treatment of, the persons employed by them in their said factory.”

That count then proceeded to set out the libel as follows:—

“*The Factory Question in Ireland.*—We beg leave to invite the express attention of our readers to the following letter. We had no notion that the abuses of the factory system were so triumphant in this country; we scarcely thought that there were any factories in Ireland; but it seems that the abuses in the county of Waterford exceed even those committed in England. The Factory Bill must have been an United Kingdom bill, that is, a bill extending to the United Kingdom, and therefore of force in Ireland. If this be so, working on Sundays, or beyond the twelve hours limited, must be illegal, to say nothing of the breach of the common law in the desecration of the Sabbath, as the Christian religion is part and parcel of the common law of Great Britain and Ireland. The public must feel greatly indebted to our correspondent for his valuable communication. It is a discovery of an outrageous and tyrannical violation of the laws for the protection of the poor labourer; and we hope that the subject will be followed up. Our columns shall be ever open to

vindicate the cause of the oppressed. It is scandalous that such slave-driving despotism should be practised with impunity.

"To the Editor of *The Warder*.

"Power, when lodged in their [meaning the plaintiffs'] possession.  
"Grows tyranny and rank oppression."—GAY.

"Sir,—I beg you will say, in the next *Warder*, whether there is a law at present in force which prevents the pro-[640]-prietors of factories from employing their operatives by night and on Sundays; and if there is, who is supposed to enforce it. If the same tyranny is carried on in the English factories as in some of the Irish ones [meaning the factories of the plaintiffs], the English members who opposed Lord Ashley's motion can, I think, lay very little claim to humanity. Factories being much more numerous in England than in Ireland, the English members had a much better opportunity of knowing the great hardships to which the factory labourers are exposed than the Irish members. No person, unless one who is perfectly acquainted with the working of the Irish factories, can form any the slightest idea of the cruelties and miseries to which the Irish factory hands are subject.

"I know some factories [meaning the factory of the plaintiffs] in this country; and the cruelty with which the operatives in them [meaning the factory of the plaintiffs] are used, is really incredible. The cruelties of the slave-trade or the Bastile are not equal to those practised in some of the Irish factories [meaning the factory of the plaintiffs, and meaning thereby that the plaintiffs had treated the persons in their employment in said factory with cruelty.]

"In this country, and I suppose in England also, the factory proprietors [meaning the plaintiffs] keep their own bread shop, their own grocer's shop, their own shoe shop, their own butcher's shop, etc., and they [meaning the plaintiffs] compel their operatives to buy bread from their baker, groceries from their grocer, shoes from their shoemaker, and meat from their butcher, though they [meaning the operatives in the employment of the plaintiffs] could purchase much superior articles in any other shop at a lower rate, but they [meaning the said operatives] dare not; if they did, they would be turned out of work [thereby meaning that, unless the persons in the employment of the said plaintiffs purchased the before-mentioned [641] commodities of life from the plaintiffs, at an exorbitant or unfair rate, the said operatives would be deprived by the said plaintiffs of their employment].

"If in one of the factory rooms [meaning in one of the rooms of the factory of the plaintiffs], where there are perhaps two or three hundred persons at work, a pane of glass is broken by accident, every person in the room is fined sixpence, and perhaps some of those wretched beings [meaning the said persons in the employment of the plaintiffs] who are thus fined, do not earn more than one shilling and sixpence or two shillings a-week. Now, admitting the number in one room [meaning a room of the factory of the plaintiffs] not to exceed two hundred, the fine would amount to the enormous sum of five pounds for one pane of glass; and that is a thing frequently done.

"Whenever the proprietors [meaning the said plaintiffs] are in a hurry to get any work done, the hands [meaning the operatives in the employment of the plaintiffs] must work both by night and on Sundays until it is completed; and if one member of a family [meaning of a family in the employment of the plaintiffs] refuse to work on the Sunday, the whole family are turned off on the following day. Incredible as this may appear, it is a positive fact.

"I have frequently seen them [meaning the operatives of the plaintiffs] on Sundays going in to work at a certain factory in the south of Ireland [meaning the factory of the plaintiffs]; and I beg, through the columns of your widely circulated paper, to call the attention of the authorities to it, in order that some measure may be taken to put a stop to such an iniquitous practice [meaning that the plaintiffs were in the habit of violating the due observance of the Sabbath, and calling on the authorities of the land to prevent such violation of the Sabbath day].

"We may talk of slavery in a foreign country; but if [642] the present factory law allows this, and remains unchanged, we have worse, far worse, at home. We have given millions to abolish foreign slavery, and why not do away with slavery at home? [meaning that the labourers in the employment of the said plaintiffs were



treated as slaves]. A laudable effort has been made by a few to alleviate the slavery at home, but that humane effort has been defeated by the power of a faction. I hope however before long to see humanity triumph over monopoly; and as your paper has always advocated the cause of the oppressed, I beg you will use the power of *The Warder* to do justice to the poor factory operatives of this country. I am, sir, your obedient and faithful servant, H."

The second count alleged that the defendants, further contriving, etc., heretofore, etc., did publish a certain other false, etc., libel, of and concerning the plaintiffs, and of and concerning the said factory, and of and concerning the manufacturing therein of cotton, etc., by the said plaintiffs, and of and concerning the said trade and calling of the said plaintiffs, containing, amongst other things, in one part of the said libel, the false, etc., matter following, of and concerning the said plaintiffs, and of and concerning the said factory, and of and concerning the manufacturing therein of cottons, etc., and of and concerning the said trade and calling of the said plaintiffs, and of and concerning their treatment of the operatives and persons employed in the said factory by them, that is to say, "No person, unless one who is perfectly acquainted with the workings of the Irish factories, can form any the slightest idea of the cruelties and miseries to which the Irish factory hands [meaning the operatives employed in the Irish factories] are subject. I know some factories [meaning the said factory of the said plaintiffs] in this country, and the cruelty with which the operatives in them [meaning the operatives in the said factory of the plaintiffs] are used is really incredible. The cruelties of the slave trade or the Bastile are [643] not equal to those practices in some of the Irish factories [meaning the said factory of the said plaintiffs, and meaning thereby that the plaintiffs treated the operatives in their employment in the said factory with cruelty.]"

There were the same general allegations in the fourth count, which then set out the libel thus: "If in one of the factory rooms [meaning the rooms of the factory of the said plaintiffs] where there are perhaps two or three hundred persons at work, a pane of glass is broken by accident, every person in the room [meaning every person employed by the plaintiffs in the factory room of the plaintiffs] is fined sixpence, and perhaps some of those wretched beings [meaning the operatives of the said plaintiffs] who are thus fined, do not earn more than one shilling and sixpence or two shillings a week. Now, admitting the number in one room [meaning in one room of the factory of the said plaintiffs] not to exceed two hundred, the fine would amount to the enormous sum of five pounds for one pane of glass, and that is a thing frequently done [meaning thereby that the said plaintiffs were frequently in the habit of obtaining sums of money from the operatives and other persons in their employment in a harsh, cruel, oppressive, and tyrannical manner.]"

The fifth count alleged that the defendants further contriving and intending as aforesaid, to wit, on the day and year aforesaid, at Portlaw, aforesaid, in a certain other newspaper, called *The Warder*, falsely, etc., did publish a certain other false, etc., libel, of and concerning the said plaintiffs, and of and concerning the said factory of the said plaintiffs, and of and concerning the manufacturing of cottons, etc., by the said plaintiffs in the said factory, and of and concerning the said trade and calling of the said plaintiffs, containing, amongst other things, and in one other part of the said libel, the false, etc., matter of and concerning the said plaintiffs, and of and concerning the said factory of the said plaintiffs, and of and concerning [644] the manufacturing, etc., by the said plaintiffs in their said factory, and of and concerning the trade and calling of the said plaintiffs, and of and concerning the treatment and dealings of [by] the said plaintiffs with [of] the persons employed by them in their said factory, following, that is to say, "whenever the proprietors [meaning the said plaintiffs] are in a hurry to get any work done, the hands [meaning the operatives in the employment of the said plaintiffs] must work both by night and on Sunday, until it is completed; and if one member of a family [meaning of a family employed in said factory by the plaintiffs] should refuse to work on the Sunday, the whole family is turned off [meaning turned out of the employment] on the following day. Incredible as this may appear, it is a positive fact, I have frequently seen them [meaning the persons in the employment of the said plaintiffs] on Sundays going in to work at a certain factory in the south of Ireland [meaning the factory of the said plaintiffs] and I beg, through the columns

of your widely circulated paper, to call the attention of the authorities to it, in order that some measure may be taken to put a stop to such an iniquitous practice [meaning that the plaintiffs were in the habit of violating the sabbath or Lord's day, by making their operatives work on Sunday, and that they had thereby incurred certain pains and penalties under the provisions of an act of Parliament made and passed, to ensure the better observance of the sabbath, and that the persons authorized to put the law in force, ought to prosecute and punish the said plaintiffs for such infraction of the said act of parliament.]”

The general conclusion of the declaration was as follows:—

“By means of the committing of which said several grievances by the said defendants as aforesaid, the said plaintiffs have been and are greatly injured in their said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all their [645] neighbours, and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects to whom the innocence and integrity of the said plaintiffs in the premises were unknown, have on account of the committing of the said grievances by the said defendants as aforesaid, hitherto suspected and believed, and still do suspect and believe the said plaintiffs to have been and to be persons guilty of tyranny, oppression, and extortion, and have by reason of the committing of the said grievances by the said defendants as aforesaid from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance, or discourse with the said plaintiffs, as they were before used and accustomed to have and otherwise would have had; and the said plaintiffs have been and are by means of the premises otherwise greatly injured, to wit, at Portlaw in the county of Waterford aforesaid, to the damage of the said plaintiffs of £2000, whereby,” etc.

To this declaration the defendants pleaded the general issue and two special pleas under the statute 6 and 7 Vict., cap. 96.

The plaintiffs having replied to these pleas, the cause came on for trial at the spring assizes for the county of Waterford, in the year 1845, before Baron Lefroy and a special jury, when a general verdict with £500 damages was found for the plaintiffs.

Upon this verdict judgment was entered in Easter Term 1845.

Upon this judgment the defendants brought a writ of error to the Court of Exchequer Chamber in Ireland, when the judgment of the Court of Exchequer was affirmed. The present writ of error was then brought.

Mr. T. F. Ellis, for the plaintiffs in error (the defendants in the Court of Exchequer and plaintiffs in the Court of Exchequer Chamber). In an action for libel by two joint [646] plaintiffs, it is requisite: 1. That the libel on the record should point to the plaintiffs, and impute an offence. 2. That it should appear manifestly to do them an injury by which they jointly suffer.

As the damages are assessed generally, if any one count wholly fails to satisfy both these requisites, the declaration is bad: though it is true that a count which contains actionable matter will not be made bad by the occurrence, in the same count, of matter which would not sustain an action. This is the distinction applicable to written libel as well as slander, explained in note (1) to *Hambleton v. Vere* (2 Wms. Saund. 171 d, 6th ed.), and recently recognized in *Griffiths v. Lewis* (8 Q.B. 841). Here it will be sufficient to refer to the second, fourth, and fifth counts.

The second count wholly fails to satisfy the first requisite. In *James v. Rutledge* (4 Rep. 17 a), it was laid down that “in actions for slander, two things are requisite: 1st. That the person scandalized be certain; 2nd. That the scandal be apparent from the words themselves;” and that “the office of an *innuendo* is to designate a person who has been named before, and in effect, it stands in place of *praedictus*: but it cannot make a person certain who was before uncertain. Nor can it alter or extend the meaning of the words themselves.” Now, in the alleged libel set out in the second count, the plaintiffs below are not certainly named: the attempt is to give certainty by *innuendo* to the words “some factories in this country,” and “some of the Irish factories.” It is not shewn that anything preceded pointing the imputation to the particular persons. That this is insufficient, appears from the illustration in *James v. Rutledge* (4 Rep. 17 a). “If one says without any precedent communication, that one of the servants of J. S. (he having many) is a notorious felon, or

traitor, etc., here, for the uncer-[647]-tainty of the person, no action lies; and an innuendo cannot make it certain. So if one says generally, 'I know one near about J. S. that is a notorious thief,' or such like." Similar instances are given in Rolle's Abridgment (1 Ro. Ab. 81, *Action sur Case*, H.). Thus, pl. 12: "*Lou les parols en eux mesme sont incerten, issint que ne poet estre intend, que ils fueront parle d'ascun person certain, là ils ne poient estre fait actionable per ascun averrment*, Mich. 3 Jac., B. R.—*per Tanfeild*. Come si home dit, one of my brothers is, etc. *Nul action gist per ascun averrment*, Mich. 3 Jac., B. R. *per Tanfeild*." So pl. 13. "*En un action enter A. et B. si 3 homes severalement devant les justices d'Assises done evidence al un Jury vers A. et sur ceo A. dit al euz*, There is one of you that is perjured in the giving of this evidence. *Sans nomer ascun de euz, nul de euz poet aver action per averrment que les parols fueront parle de luy*." Placitum 14 is stronger still, and goes much beyond any doctrine necessary for the present plaintiffs in error. "*Si home dit, My enemy, etc. Chargeant luy ove scandalous matters, que voilent maintayner action, uncore nul action gist per ascun*, per un averrment que les parols fueront parle de luy, et per un innuendo, etc. *Pur ceo que les parols en eux mesme sont tout ousterment uncertaine*, Trin. 39 Eliz. B. R. Enter Jones and Daukes adjudge. *Issint en cest case l'action ne giseroit per averrment auxi que al temps del parlance del parols il mesme fuit l'enemie del defendant, et que le defendant adonque navoit ascun auter enemie forsque le plaintiffe, car ceo est uncertain, nec poet estre conus si il avoit auter enemie preter le plaintiffe*." A *quære* is added to this last; and it might perhaps be fairly contended that the averment was enough on demurrer, as here it might have been sufficient to allege that the factory of the plaintiffs below was the only Irish factory known to the defendants below. In *Brown v. [648] Low* (Cro. Jac. 443), where it was held that "Thy master Brown" is sufficiently certain, "for it shall not be intended that he had more masters of that name," it nevertheless was agreed by the Court, if one saith to J. S., "Thy son hath robbed me;" and his son bring an action, he cannot, without averring that he had no more sons, maintain it: "but if one saith to a son, thy father, or to a wife, thy husband hath robbed me, the action lies for the father or husband, without any such averment; for there cannot be more fathers or husbands." In *Pierson v. Dawson* (Aley, 32), however, a declaration was held good, after verdict, where it was charged that the defendant said to "Mary, the mother of the plaintiff," "your son is a thief; innuendo the plaintiff, then the son of the said Mary:" and the reason is important: "for the Court shall not intend that Mary had any other sons besides the plaintiff." And there a case is mentioned by the Court: "where one said your landlord (without a surname) is a thief; in such an innuendo it was, after great debate (the court being at first divided in opinion) adjudged naught. But there, if the plaintiff had averred that he to whom the words were spoken had no other landlord, it had been good." Now it is clear that the least strong of these cases is much stronger than is necessary for the present plaintiffs in error. Not only can it not be intended that there are no other factories than the one factory of the defendants in error, but the contrary appears by the very words, which are "some factories in this country," and "some of the Irish factories." [Lord Campbell.—Do you say that those cases are law now? Is there any subject respecting which the early authorities exhibit greater absurdity than respecting libel and slander?] The absurdity has consisted in straining the meaning of words so as to give them a sense which shall convey no imputation. Words are now to be taken in their natural sense; but the principle of the cases cited is sound: because it is necessary, in order to show a cause of action, that the plaintiff should not only in fact have been the person of whom the defendant was thinking, but that the defendant should have used words pointing out the person. The offence is not in the opinion formed by the defendant, but in his communication of that opinion to others, so that they must understand and may adopt it. And therefore, in this respect, the old cases have not been overruled. [Lord Campbell: But has the principle been recognized in modern times?] Very recently, in a judgment pronounced in the Court of Queen's Bench, after time taken for consideration, *Solomon v. Lawson* (8 Q.B. 823). There the first count of the declaration stated, in effect, that the plaintiff was a merchant at St. Helena, employed in supplying with fresh water, ships which called there, by his ship which was fitted up with wooden tanks, that by this ship he had supplied

*The Moffatt* with good fresh water conveyed in the wooden tanks: yet defendant, contriving to injure him in his employment, and to cause it to be believed that he had supplied *The Moffatt* with unwholesome water, in copper tanks, published, of and concerning him and his employment, and his conduct in supplying the water to *The Moffatt*, a libel, which was set out. The alleged libel, as set out, stated that the passengers in *The Moffatt* had been taken ill shortly after leaving St. Helena, where they took on board fresh water; and added: "there is no doubt that their illness was caused by the water; and it appears the water is run into a copper tank at St. Helena, from whence the casks are filled alongside. There is no doubt, therefore, that the poison is imbibed from this copper tank; and it behoves the authorities immediately to order its removal, and replace it with an iron one." The *innuendo* was, "thereby then and there, meaning and intending that the plaintiff had been guilty of selling, con-[650]-veying, and supplying bad and unwholesome water to the said ship *The Moffat*." After verdict for the plaintiff, a rule was obtained to arrest the judgment. It was pressed upon the Court, in support of the rule, that "a statement is made affecting no particular person; and then the plaintiff comes forward and insists that it shall be understood that he was charged by it:" and, as it clearly appears from the judgment, the rule was, on this objection, made absolute. The Court, after intimating a strong opinion that it did not appear that the imputation was that any one had conveyed the water by tank from on board any vessel, gave judgment on the following ground: "Suppose however (which is perhaps assuming a good deal) that the tank may mean a tank on board a vessel fitted up to supply others with water, and that 'the authorities' are called upon to put down a nuisance belonging to some individual. Still the question recurs, *what* individual? None is pointed at; there is nothing to shew that the plaintiff *alone* had a schooner with a tank to supply ships at St. Helena; it is uncertain, therefore, what number of persons there may be at St Helena similarly situated, to all of whom the observation would equally apply, and to some particularly. We think, therefore, that there is nothing in the letter which warrants the *innuendo* applying the imputation of misconduct to the plaintiff; and that this count cannot be sustained." Now the hypothesis upon which judgment is there pronounced differs from the actual record here only in this: that, whereas there it was uncertain whether there were not other persons in the same predicament with the plaintiff, it here appears with certainty that there were. *A fortiori*, therefore, there can be no judgment here for the plaintiffs below.

The fourth count also fails to satisfy the first requisite. The libel there set out imputes only that, "if, in one of the factory rooms, a pane of glass is broken by accident, every person in the room is fined sixpence." But it is not [651] said by whom the fine is imposed, nor that the plaintiffs below are in any way privy to it. It is not uncommon for work people in some employments to impose fines on each other, by rules among themselves, for the purpose of forming a joint fund, with which the employers have nothing to do. At all events, the fining should be brought home to the plaintiffs below. Nor is it shewn what is meant by "operatives," in the *innuendo*. These defects are not remedied by the general *innuendo* at the end of the count, which, coming where it does, cannot be applied to explain and give certainty to the separate unexplained words, one after another, of the supposed libel; and which, indeed, is applicable only to the words "that is a thing frequently done." Nor if it was distinctly applicable to the word "fined," is it precise enough to give to the word "fined" the meaning of "fined by the plaintiff." Nor could any *innuendo* give such a meaning to so uncertain an imputation: that is not the office of an *innuendo*, which, according to the principle already cited from *James v. Rutledge* (4 Rep. 17 a.), cannot "extend the meaning of words." Suppose the words were, "Young females in factories are often seduced," could that be converted into a libel on J. S. by an *innuendo*, "meaning thereby that J. S. was in the habit of seducing young females in factories?" Nor is this helped by the verdict. The rule as to this is explained by Lord Abinger in *Hughes v. Rees* (4 M. and W. 204, 207). "If, according to their *natural import*, the words are libellous—although they might be explained away—the verdict of the jury is conclusive, but not otherwise. Where they are ambiguous in themselves, the verdict of the jury will not help them."

The fourth count (and a similar objection applies to the fifth) fails to satisfy the second requisite. The injury shown should be an injury affecting the joint interest

of the plaintiffs: it is not enough that it should be shown to be an injury affecting each separately. Two partners [652] may each suffer from the same act, and even owing to the same circumstance, as the ownership of a particular factory, and yet there may be no joint injury: that must be something shown to affect the trade. Now how does it appear that the imputation of fining for broken glass, or forcing the workmen to work on Sundays, affects the interests of the joint trade? There is no allegation that it does so, nor any of special damage. It is no answer at all, that circumstances might be guessed at which would make such an imputation affect the trade. In *Ayre v. Craven* (2 A. and E. 2) the inducement stated that the plaintiff carried on the profession of a physician, and that the defendant, in a discourse concerning him, so carrying on the said profession, contriving and intending to have it believed that the plaintiff had been guilty of a criminal connexion with a married woman, spoke of and concerning the plaintiff so carrying on such profession, and of and concerning him in his profession, words importing that he had been guilty of a criminal connexion with a married woman. The action being for words which imputed no offence punishable by criminal law, it was necessary to show that the words were spoken of the plaintiff so as to affect him in his profession, as here it is necessary, in order to show a joint injury, to show that the alleged libel affects the trade of the plaintiffs below. Judgment was there arrested: and the reason given is applicable here. The declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession." It was urged, in the present case, in the argument below, that evidence might have been given to satisfy the jury that persons had refused, or were likely to refuse, to enter the employment, on account of these imputations. That was the suggestion which is met expressly in the [653] judgment in *Ayre v. Craven* (2 A. and E. 8). The Court thus puts the argument against the rule: "being laid as spoken of the plaintiff as a physician, in which character he may have opportunities of abusing the confidence reposed in him, to commit acts of criminal conversation, the statement must be thought large enough to admit such proof to be adduced on the trial, in which case the necessary proof would be presumed to have been given, and the judgment ought not to be arrested." But to this suggestion the court gives the answer already cited. So, in *Brayne v. Cooper* (5 M. and W. 249), the declaration stated that the plaintiff carried on the trade of a stay-maker, and the defendant, contriving and intending to injure him in his said trade, spoke of him, in his said trade, the words following: "the business of a stay-maker does not keep him, but the prostitution of the person in the shop; after it is shut, it is as bad as any bawdy-house in the town." Littledale, J., directed the jurors to find for the defendant, unless they thought the imputation was that the plaintiff kept a bawdy-house; and, the jury having found for the defendant, the Court of Exchequer held the direction right. There it might be said, as here, that the words might well injure the plaintiff in his trade. But the judges said that they could not consider the words as used in any other sense than as a general imputation on his moral conduct.

Some cases on the subject of joint actions for defamation are collected in *Robinson v. Marchant* (7 Q. B. 918): the point was not, however, there decided: but it seems to have been understood that, to give a joint cause of action to the two parties there, the imputation should be that of insolvency in their joint trade: and that was the case in *Forster v. Lawson* (3 Bing. 452). Several cases on the same point are also collected in *Pechell v. Watson* (8 M. and W. 691, 697). In *Barratt v. [654] Collins* (10 B. Moore, 446) two persons brought a joint action for a malicious arrest in an action by the defendant against the two jointly: and it was held that they could recover only for the joint expences incurred in the first action in procuring their liberation, and not for their personal suffering. In *Cook v. Batchellor* (3 Bos. and Pul. 150) two partners recovered in a joint action for words imputing that they gave false weight. *Smith v. Cooker* (Cro. Car. 512), which is sometimes cited on this point, is inapplicable: it does not appear that the action there was joint; and the question was as to the meaning of the words, which imputed that plaintiff and his wife had bewitched a mare; the argument being that the words meant nothing, because two could not commit one witchcraft; but the court held that the words might mean that the two had severally bewitched the mare. For that, of course, either might have

maintained the action: but no joint action could have lain. Reference was there made to *Dyer* (1 *Dyer*, 19 a., pl. 112), where it was laid down that two could not sue a man jointly for his calling them "two false knaves." In *Coryton v. Lithebye* (2 *Saund.* 115) the declaration showed that there were certain mills, at one or the other of which the corn of the tenants of a manor had been immemorially ground: and it was held that the owners of the mills might join in an action against a tenant for grinding elsewhere; the court saying that, though the interests of the plaintiffs in the mills were several, the not grinding at any of the mills was a joint damage. There the defendant could not injure the one without injuring the other. These cases show the general principle upon which a joint action for injury may be maintained. Here the declaration not connecting the imputation with the interest in the trade, the injury is in imputing unkind conduct. But the unkindness of A. is not the unkindness of B. [655] Suppose the imputation had been that the proprietors debauched young females employed in the factory: could all the proprietors have brought a joint action, without allegation of special damage, or averments connecting the mischief arising from the imputation with the joint trade?

The defendants in error must contend that, to impute that in some out of several Irish factories workmen are extortionably fined by some persons, is an injury for which the partners of any single factory can maintain a joint action.

Sir F. Kelly and Mr. Cowling (Mr. Harris, of the Irish Bar, was with them) for the defendants in error.

It may be admitted that the matter complained of must be defamatory of some known person, and that if not so in itself, it cannot be made so by an introductory averment. But on the other hand, it is not because a libel may, by possibility, be made applicable to other persons, that the libeller cannot be made answerable to the person to whom its application is clear and undoubted. If it can be shewn that the libel does apply to the plaintiffs, that is sufficient. Even *Solomon v. Lawson*, is an authority for that position. Can it be shewn here that the plaintiffs in the court below were persons to whom this libel would apply? If it can, the action is maintainable; for it is not necessary to exclude the possibility of the application to other factories. What is said in *Brown v. Low* (Cro. Jac. 443) is mere *obiter*.

First, there is the allegation that these seven persons were trading together as a firm; that as such they were proprietors of a factory; that they carried on business there, and there employed a great number of men, women, and children to their own great profit; and then comes the allegation that the defendant, intending to injure them in their said business as owners of the said factory, published the matter following. Every count must be taken to import into it the whole of the introductory allegations. [656] If so, then the second count avers that the libellous matter was spoken of and concerning the plaintiffs, and of and concerning the factory, trade, and calling of the plaintiffs, and of and concerning their treatment of the operatives therein. These averments fully connect the libel with the parties libelled. Can it be said that the matter thus set forth cannot be made the subject of an action for libel? The charge that in "some factories" bad practices exist, is undoubtedly a libel on somebody. Is not a party to whom this general statement has been supposed to apply, to shew such application? In one of the old cases the rule is stated that the words complained of are to be construed in *mitiori sensu*. But that is not the rule now. The law now requires that such matter shall be read and construed as mankind in general would read and construe it. According to *Woolnoth v. Meadows* (5 *East*, 463), the words complained of are to be construed not according to any fancied legal signification, but according to their ordinary import.

The case of *Solomon v. Lawson* (8 *Q. B.* 823) does not apply to the present; for there the court held the matter complained of not to be itself libellous on the plaintiff, and consequently it could not be made libellous on him by any introductory averments. But that case does not establish that where, as here, the matter is libellous on somebody, though not in terms libellous upon the plaintiffs, it may not be shewn to apply to them in particular. In that case the court was clearly of opinion that there was not any intention to libel the individual, that the imputations contained in the article were cast, not upon an individual, but upon the authorities of the Island, and consequently that he could not complain of it. That case is not in any way analogous to the present. The true rule is, that whether parties are named or not, if the libel has

an individual application, and if the witnesses shew it to have such application, that is suffi-<sup>[657]</sup>cient. It cannot now be contended that if a libel alleged that in a certain factory a certain immoral practice existed, no action could be maintained without shewing that there was no other factory. The *dictum* in *Brown v. Low* (Cro. Jac. 443), which is merely *obiter*, is not law.

No case can be cited to establish that where, as here, the matter, though not in terms libellous upon the plaintiff, is libellous in itself, it may not be shewn, by proper *innuendo*, to apply to a particular person. If that could not be done, the most malicious and injurious libels might always be successfully disguised. The cases bearing on this subject are collected in the notes to *Craft v. Boite* (1 Wm. Saund. 244), and they shew that when words are in themselves defamatory, they may be applied by an *innuendo* to a particular individual.

Then as to the same objection as applicable to the fourth count. The words there set forth impute great cruelty and oppression to the owners of some factory. It is true that the plaintiffs are not named, but the publication appears in a particular part of the country where every one is capable of understanding its allusions. The reader, therefore, applies what is said of some factories to some particular factory. The owner of the factory thus made the subject of imputation, must surely be entitled to show that his factory has been unjustly held up to public reprobation. He can only do this by introductory averments and *innuendos*, and whether he has done so truly or not, then becomes a question of fact for the jury.

The count now objected to imputes in substance to the proprietors of factories, and therefore to the plaintiffs as the proprietors of a factory, cruel and oppressive conduct towards the workmen in their employment, such as that of compelling them to work on Sundays, and at nights. That must have a tendency to injure the plaintiffs in the way of their trade. The jury found that it had that tendency. In such a case it cannot be held by the court that where <sup>[658]</sup>the matter charged is itself libellous, and where it is charged against persons carrying on the trade of the plaintiffs, and is averred to be applied to them, and is found to be, in fact, so applied, that such an action as the present is not maintainable.

It is then said, that unless the counts complain of matter which not only imputes misconduct to the plaintiffs, but has also a tendency to injure them in the way of their trade, the two matters cannot be joined in one count. Assuming the objection to be valid in itself, it is clear that it cannot affect the judgment in this particular case. If a count contains the statement of one cause of action which may be joined with another, and also of another cause of action which may not be joined with the first, it must be presumed, after verdict, that the judge directed the jurors to confine their attention to that part of the count which was good. It must be presumed here, that the judge directed the jury, that no damages could be given for the injury to the moral character of the plaintiffs alone, but that there might be damages, if, on each count, it appeared that language had been used which would have had a tendency to injure the plaintiffs in the way of their trade. That presumption would confine the damages to the trade injury entirely, and for that injury a joint action is maintainable.

As to the objection that no joint injury is alleged to have been suffered, and that therefore the plaintiffs cannot join in the action; it cannot be denied that if each count contains any cause of action for which two parties may sue jointly, they may also sue separately. *Robinson v. Marchant* (7 Q. B. 918), shews that. There the declaration alleged a partnership between the plaintiff and other persons as bankers, and that divers persons banked with the plaintiff and his said partners; and it averred that the defendant, intending to injure the plaintiff in his credit, and in his said trade and <sup>[659]</sup>business, uttered the words complained of. The defendant pleaded in abatement that the plaintiff carried on the said trade and business jointly with his said partners, and not otherwise; and that all the damage, etc., accrued to him jointly with them; but the plea was held bad, because it was pleaded in terms to damage, and the damage to the partnership was not so essentially the cause of action, that without it the action could not be maintained. The result of the libel must be looked to; and if the natural result would be, as it would be here, a joint injury to the plaintiffs, as by damage to the trade they jointly carry on, then the remedy for that joint injury is properly a joint action for damages.

Though two persons may not join in an action for one utterance of words relating to each individual, they may, if they are partners, join in action for such words as occasion them to sustain special damage in the way of their joint trade. *Coryton v. Lythebye* (2 Wm. Saund. 116 b.). That, too, is the rule in slander. In libel the action is maintainable without special damage. *Craft v. Boite* (1 Wm. Saund. 248, note), *Bell v. Stone* (1 Bos. and P. 231), *Thorley v. Lord Kerry* (4 Taunt. 355); in *Clement v. Chivis* (9 Barn. and Cr. 172), this distinction is fully explained. The cases of *Ayre v. Craven* (2 Ad. and El. 82), and *Brayne v. Cooper* (15 Mee. and W. 249), are not in point on this subject, for they were actions of slander, and were therefore not maintainable in respect of words, not actionable in themselves, and not shewn to have been attended with special damage. The distinction between slander and libel is made, as it is said, on account of the greater danger of written matter. Whether that reason is sound, or the reverse, need not now be considered; the distinction itself is well established.

The cases of *Ayre v. Craven*, and *Brayne v. Cooper*, were cases of slander. In neither of them was special damage [660] alleged, nor was there anything in either of them to shew that the words complained of were directed to the trade of the parties. Here the matter was written libel. There is no doubt that it was libellous in itself: it was averred to apply to the plaintiffs; and was so found by the jury. After verdict, especially upon a plea of Not Guilty only (the effect of which is so much narrowed by the new rules), it must be assumed that those averments were properly supported by evidence; and objections to an *innuendo* that might be available in another way, cease to have any force after verdict.

Mr. T. F. Ellis, in reply.—The plaintiffs in error do not contend that it is necessary that the party libelled should be named, but only that no action lies where the imputation is merely that one of a class has committed the act. [Lord Campbell.—Suppose the libel was, “we know a lady” who has done so and so.] That is not referring to a class, but to an individual; but probably that would not be actionable unless it appeared on the record that something which preceded or followed connected the plaintiff with the charge. [Lord Campbell.—Suppose it was “a Welshman,” or “a lady living in Portman-square.”] That would not be actionable, according to the authorities; and, on the other hand, it may be asked, suppose the words were “a European,” or “a lady living within the four seas.” [Lord Campbell.—What modern authority is there to shew that those words would not be libellous if there were proper *innuendos*? In *Solomon v. Lawson* (8 Q. B. 823), there seems, in the opinion of the court, to have been no imputation at all.] The judgment is there given on the assumption that there was an imputation. The court indeed intimates (and it is not necessary now to question the correctness of that view of the case) that there was no imputation; but that is not the ground of the judgment, which expressly proceeds on the assumption that there was an imputation on some ship-owner who supplied [661] ships with water from tanks. If there was another good ground, as suggested on the other side, upon which the judgment might have been supported, that only strengthens the inference as to the degree of confidence felt by the court on the point upon which it preferred to give judgment, and which is the point for which the plaintiff in error now contends.

[Lord Campbell.—I should like to ask whether you have any modern instance where the principle for which you contend has been applied, the imputation being that of a crime?]

It surely can make no difference, as to the application to a particular person, what the imputation is. But, in fact, in *Solomon v. Lawson* (8 Q. B. 823) the court says: “Suppose the words to be ‘a murder was committed in A.’s house last night:’ no introduction can warrant the *innuendo* ‘meaning that B. committed the said murder;’ nor would it be helped by the finding of the jury for the plaintiff. For the court must see that the words do not and cannot mean it, and would arrest the judgment accordingly.” That is precisely in point, unless there is a difference between the words “a murder was committed” and the words “somebody committed a murder.” And the observation is so far from being a mere *dictum* that it is put forward by the court as an exposition of the general principle upon which the judgment is to be founded. In *Wiseman v. Wiseman* (Cro. Jac. 107), “Tanfield made a difference, when the words themselves import in themselves apparent incertainty,



and when they may be ascertained by intendment. In the first case no averment will aid it; but in the last case by the averment and verdict it may be aided; and therefore if the words had been, *one of my brothers is perjured*, there be in them an apparent incertainty. And although one of the brothers would bring the action, and aver they were spoken of him, because it appears to the [662] court there were divers brethren " (as here divers factories), " and it doth not appear to any, of whom he spake, the action lies not, although he be found guilty by verdict." It does not, however, appear that, on behalf of the defendants in error, it is attempted to distinguish the authorities cited; it is only urged that the law is changed. But no authority has been adduced to show any such change; nothing of the sort follows from the overruling of the decisions where it was held that the imputations themselves were to be construed in *mitiori sensu*. It is said that a libel might, on the principle contended for, be always disguised: but the cases show how that is to be met by apt allegations: and, if there are no means of supporting such allegations, there is nothing to complain of. As to the introductory averments, they are not stronger here than in *Solomon v. Lawson* (8 Q. B. 823).

The only answer suggested to the objection as to the joinder is that the imputation might, in some way or other, capable of proof, injure the trade. But this is directly met by *Ayre v. Craven* (2 A. and E. 2), in which exactly the same argument is suggested and answered. It is said that the rules as to spoken slander are more strict than those as to written libel. But the strictness relates, not to the interpretation of the expressions used, but to the nature of the offence imputed. The imputations are interpreted on the same principles in the two cases: only some imputations, if merely orally made, are not actionable, which would be actionable if written.

The argument as to the effect of the verdict is met by the authorities cited, which relate all to objections taken after verdict.

It is suggested that the effect of the plea of Not Guilty is now narrowed by the new rules. But there can be no doubt that the applicability to the plaintiff, and the effect [663] of the imputation, are still both brought into question by Not Guilty.

The Lord Chancellor.—My Lords, I have paid great attention to the arguments raised in objection to the judgment pronounced below, and I see no reason to reverse that judgment.

The first proposition contended for is, that this is a complaint of the publication of a libel which, although found by the jury as intended to apply to the plaintiffs, is so framed that no *innuendos*, even after verdict, can support the declaration in which that complaint is made. Now the question is not whether the matter complained of is libellous, for about that no question can be raised. If it had been addressed to the plaintiffs by name, and it had been said that the plaintiffs had done so and so in their factory, no question could have been suggested but that that would have been libellous. But the way in which the plaintiffs are referred to is expressed by the term "some factories." "If the same tyranny is carried on in the English factories as in some of the Irish ones," and a little further it goes on—"No person unless one who is perfectly acquainted with the working of the Irish factories can form any, the slightest, idea of the cruelties and miseries to which the Irish factory hands are subject. I know some factories in this country; and the cruelty with which the operatives in them are used is really incredible. The cruelties of the slave trade or the Bastille are not equal to those practised in some of the Irish factories." The declaration after introducing those words has the *innuendo*—"meaning the factory of the plaintiff;" and the jurors have, by finding a verdict for the plaintiffs, found that the words were used in allusion to the factory of the plaintiffs.

In that state the question arose below, and arises here, whether the judgment founded upon that verdict can be [664] maintained on such a declaration; that is to say, where terms are used which must have reference to some one (for the terms "some of the Irish factories" must evidently mean to apply to some Irish factories); and the *innuendo* is that the words do apply to the plaintiffs' factory; and the jurors have found that that *innuendo* is true, and that the plaintiffs, who are the proprietors and owners of a factory in Ireland, were the persons meant. If a party can publish a libel so framed as to describe individuals, though not naming them,

and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels.

Some old cases were referred to, in which some singular opinions appear to have been expressed, and some singular doctrines laid down; but I was anxious to find whether the counsel was able to refer to any modern case, in which after the jurors had found as in this case, the court had held that a party so circumstanced as the plaintiffs were here, were not entitled to the benefit of a verdict so obtained. I have found none but the case of *Solomon v. [665] Larson* (8 Q. B. 823), referred to, and that is supposed to be a case containing the law as it now exists on this subject. Particular expressions of the Lord Chief Justice, who delivered judgment in that case, have been relied on, but it is more important to look at the whole case, and see what it is to which that judgment was intended to apply. All expressions must be construed with reference to the matter then under consideration, and it is clear that the decision in that case turned on this point, whether the matter was in fact libellous on a particular individual. Whether a right conclusion from the facts of the case was or was not drawn by the court in that instance, is immaterial, but the judgment proceeded on that point. The language used by Lord Denman is: "The question therefore, is whether the alleged libel has any reference to the tank being used; and looking at the libel, I should say it certainly had not: it described injury arising from water having been supplied to shipping which had been kept in copper cisterns, and then it says, 'it required the authorities to look after it.'" So far, my Lords, from referring to any individual as having been the author of that mischief, it says "it behoves the authorities at St. Helena," (that being the place where the injury was supposed to have been committed) "to look into it." Therefore, looking merely at the terms used, so far from being an imputation on any individual, it would appear to apply to some arrangement made by the authorities at St. Helena, who had improperly permitted water to be kept in a copper tank instead of being kept in an iron reservoir. In the judgment of the Court the alleged libel was not a libel on the individual complaining of it, but, if a libel at all, was a libel on the authorities. That is the ground on which Lord Denman put his judgment, and he says, "This does not impute a libel to any body, no individual [666] can come forward and say, I am the person intended to be referred to by the libel so used." That being the only case in support of the argument, that the individual libelled must be expressly named, or unmistakably referred to, and there being, I believe, a very general practice to the contrary, and common sense being entirely to the contrary, I cannot think the proposition is at all established, that under the circumstances of this case the *innuendo* found to be proved by the jury is not sufficient to entitle the party to the remedy he asks.

But then, my Lords, other objections are made, applicable to particular counts in the declaration. The complaint is made by the plaintiffs in their character of owners and conductors of a factory, and in some of the counts, it is now said, have made the complaint as if there was an injury to themselves individually, and not to them in their character as joint proprietors of the factory. It is very properly admitted that, if the count contains a complaint of that which affects them in their joint character as proprietors, though it may also make a complaint of certain matters which may affect them individually, inasmuch as the complaint of that which affects them in their joint character may be sufficient to support the action, the additional fact that the count also makes another complaint which cannot be maintained, is not sufficient to vitiate the judgment that has been pronounced. Therefore, in looking through these counts, we must see whether there is anything which

contains matter applying to the plaintiffs individually, and not to their joint character.

I have looked through these counts, and it appears to me, that although there may be expressions which, taken by themselves, refer to the individual character of some of the plaintiffs, they contain matter which shews that the complaint is addressed to their character of joint proprietors of the factory.

The fifth count states that the defendants "did compose [667] and publish, etc., a certain other false, wicked, scandalous, and defamatory libel, of and concerning the said plaintiffs, and of and concerning the said factory of the said plaintiffs, and of and concerning the manufacturing of cottons, linens, and other fabrics by the said plaintiffs in the said factory, and of and concerning the said trade and calling of the said plaintiffs."

Can it be contended that this is a complaint made of injury sustained by the plaintiffs in their individual character? Is it not in terms descriptive of the injury alleged to be sustained by them in their character of proprietors and managers of the factory in question? It seems to me to be clear that it is so, and that although there may be expressions which ought not to be there, if the complaint was intended to be made of injury sustained by them in their character of joint proprietors, it is quite sufficient on every one of these counts to shew that the complaint was intended to apply to the property which belonged to them jointly, in respect of which, therefore, they are entitled to support an action by themselves as proprietors.

On these grounds, on the two points which were relied on as objections to the judgment of the court below, I am of opinion that the judgment of the court below should be affirmed.

Lord Campbell.—My Lords, I am likewise of opinion that the judgment of the court below ought to be affirmed.

The first objection which has been relied on by the counsel for the plaintiff in error, who certainly has argued the case with his usual ability, and has brought forward all the arguments that learning and talent could supply; the first objection is that this libel applies to a class of persons, and that therefore an individual cannot apply it to himself.

[668] Now, I am of opinion that that is contrary to all reason, and is not supported by any authority. It may well happen that the singular number is used; and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and christian name were ten times repeated.

Then where is the authority for the argument which has been urged by the plaintiff in error? Mr. Ellis relies on *Solomon v. Lawson*, but the proposition there laid down, and which I adopt, is this, that where there is a publication or a sentence spoken verbally, which clearly conveys an imputation of crime on some person, that in that case it may by *innuendo* be applied to the plaintiffs; if that proposition is well supported in law, the objection made here fails, because, in this case, there clearly is a gross imputation on some individuals, and the question is whether it may not be applied to the plaintiffs. What is there to shew that that proposition is not well founded according to authority? There is *Solomon v. Lawson*, but there it was an historical fact that was narrated; all that was there stated might be true, without imputing blame to any person. There was no charge brought against either a class or an individual, and by mere *innuendo* you cannot give a new sense to words which they do not naturally bear. It comes round to the old rule, that you [669] cannot by an *innuendo* extend the natural meaning of the words which are spoken or written, but by the *innuendo* you may point out the particular individual to whom these words apply: those words, in themselves, clearly imputing a crime on the part of some

one individual. That being so, I think, according to principle and authority, this objection ought to be overruled.

The other objection which is relied upon is that this is an action brought by several persons, seven I think, and that no joint injury is pointed out on the record; but a joint injury is pointed out on the record, if the libel is speaking of them in a trade which they jointly carry on. The declaration here alleges that the plaintiffs are partners in carrying on this factory in Ireland, and it alleges that the libel is speaking of them in their trade; and there are *innuendos* applying the different parts of the libel to the plaintiffs in their trade. Assuredly that is not enough, unless the language employed will naturally bear the interpretation put on it, and can be shown to refer to them. Then does it so refer to them? I think it does. I do not know whether the second, third, fourth, fifth, or sixth count is considered most objectionable. I suppose the second is as objectionable as any, and therefore I point your Lordships' attention to that count. The libel is there set forth in these terms. (His Lordship first read the libel, and then the libel with the *innuendos*.)

And then there is another count, the fourth count, in which the libel imputes to the owners of these factories that they are guilty of gross oppression; and the fifth count is respecting the working in the factory. All these impute misconduct to the plaintiffs in carrying on their factory, and they all relate to the trade of the plaintiffs. Now suppose that several persons were in partnership as grocers, and it was alleged that they sold by short measure or false weight, or that they adulterated their goods; they might bring a joint action for that; that would be an alle-[670]-gation as to the manner in which the business was carried on, and I apprehend wherever there is slander, whether written or spoken, imputing to partners that they fraudulently and contrary to law employ a particular mode to carry on business, that is a libel in which they must be jointly included as partners in their trade. I know of no case which at all impugns that proposition, and therefore I am of opinion that this is a case in which the plaintiffs below, being slandered as regards the manner in which they carry on their trade, sustain a joint injury, for which they may maintain a joint action.

Judgment affirmed, with costs.

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[671] WILLIAM POTTS, the younger,—*Appellant*; JOHN NARNEY POTTS, WILLIAM POTTS, the elder, and OLIVIA HANDCOCK,—*Respondents* [June 29, 1848].

[Mews' Dig. xii. 929. S.C. 9 Ir. Eq. R. 577; 3 Jo. and Lat. 353. Discussed in *Scarsdale (Lord) v. Curzon*, 1859, 1 J. and H. 40; and see *In re Angerstein*, 1896, 44 W.R. 152. Followed in *Hogg v. Jones*, 1863, 32 Beav. 55; and *In re Cornwallis*, 1886, 32 Ch.D. 394.]

*Will—Chattels real and personal—Vesting.*

A testator, after devising real estates to trustees, to the use of J. D. P. for life, remainder to his first and other sons in tail male, with like remainders to J. T. P. for life, and to his sons in tail male, and to several others, bequeathed real and personal chattels to the same trustees, to permit the said J. D. P. to receive the profits for his life; and from his decease to permit each of the several other persons, to whom an estate for life in the real estates was before limited, as each of them should become seised of said real estates under the aforesaid limitations, to receive the rents and profits thereof for his and their life and lives respectively; and from and after the decease of the last of the said tenants for life as should become seised in manner aforesaid, or if none of them should so become seised, then from the decease of the said J. D. P., upon trust to assign and convey the chattels to such person or persons as should then become seised of the said real estates under any of the limitations aforesaid:

Held, that the chattels vested in an infant, grandson of J. D. P., who was tenant

in tail of the real estates at J. D. P.'s death, and not in his eldest son, a prior tenant in tail, who died in J. D. P.'s life time.

This was an appeal from a decree of Sir Edward Sugden, Lord Chancellor of Ireland, upon the construction of a clause in the will of John Potts (9 Ir. Eq. Rep. 577).

John Potts being seised under the will of his bro-[672]-ther James, of fee simple and other freehold estates, and possessed of leaseholds for years, and other personal estates, including two-thirds of an establishment for printing and publishing a newspaper, called *Saunders' News-Letter*, in Dublin; and having also freehold and personal estates of his own acquiring, made his will in the year 1799, which he republished in 1810: and he thereby devised to the Rev. Abraham Downes and Thomas Handcock, and the survivor of them and his heirs, all the real and freehold estates, of which he was seized under his said brother's will, to the use of James David Potts, second son of his brother William, for his life, remainder to the said trustees to preserve contingent remainders; and after the decease of the said J. D. Potts, to the use of his first and other sons successively in tail male, with like remainders and apt words of limitation to the use of John Tromperant Potts, eldest son of the testator's said brother William, and his first and other sons; and also to the use of William Potts, the said William's third son, and his first and other sons; with other remainders over (the limitations are more fully set out in 9 Ir. Eq. Rep. 577).

Then followed a devise of the freehold estates of the testator's own acquiring, with like limitations to his said three nephews, but in this order, William first, John Tromperant, and James David, and to their first and other sons in the same order, and remainders over. No question was raised on this devise.

The testator, after giving several legacies, bequeathed to the above named trustees and the survivor of them, his executors and administrators: All the estates for years to which he was entitled under the will of his brother James Potts, together with all his right and interest in the printing and publishing of *Saunders's News Letter*, and also such estates for years as he was entitled to by his [673] own purchase and acquirement, to and for the intents and purposes following: "That is to say, as to such terms of years as I am possessed of under the will of my said brother, James Potts, and as to my right, title, and interest in and to the printing and publishing of *Saunders's News Letter*; in trust, to permit and suffer the said James David Potts, the second son of my brother, William Potts, and his assigns, to receive the issues and profits thereof, for and during the term of his natural life; and from and after his decease to permit and suffer each and every of the several other persons aforesaid, to whom an estate for life in the real and freehold estates of my brother, James Potts, is hereinbefore limited, successively, and as each of them shall become seized of said real and freehold estates under the aforesaid limitations thereof, to take and receive the rents, issues, and profits thereof, for and during the term of his and their natural life and lives respectively; and from and after the decease of the last of said last-mentioned tenants for life as shall become seized in manner aforesaid, or if none of them shall so become seized, then from and after the decease of the said James David Potts, second son of the said William Potts, upon trust to grant, assign, and convey, said terms for years, and said right and title to the printing and publishing of *Saunders's News-Letter*, to such person or persons as shall then become seized of said real or freehold estates under any of the limitations aforesaid, their executors, administrators, or assigns."

[As to the terms of years of the testator's own acquiring, he declared similar trusts, but made his nephew William, who was the first tenant for life of the real estates of his own acquiring, the first taker of the rents and profits, etc. No question was raised on these trusts.]

The testator having by a codicil to his will (republished therewith) made his nephew William his residuary legatee, and appointed him and the said A. Downes his exe-[674]-cutors, died in 1811, leaving his said nephews John T., James D., and William, surviving. Probate of the will was granted to William Potts alone.

James D. Potts had three sons, James, John Henry, and William the younger (the appellant), all living at the testator's death, and born before the republication of

his will, James having been born before its first execution. John Henry Potts died in 1835, leaving one son, John Narney, the respondent, then and still a minor.\*

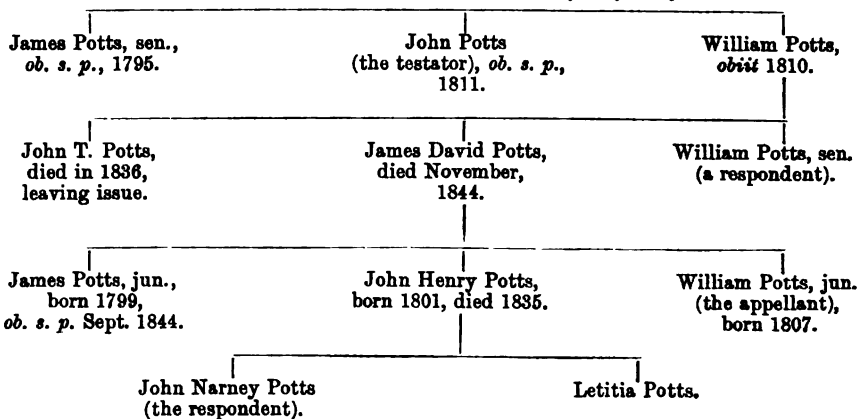
Upon the testator's death, James D. Potts entered into possession of the real and freehold estates acquired by the testator under the will of his brother, and of the rents and profits of the terms for years, and of the two third parts of the profits of *Saunders's News-Letter*, under the limitations and provisions of the said will. He conducted the *News-Letter* in conjunction with his eldest son James, until 1832, when he assigned it to James and William his third son,—for their lives, as the latter alleged. James died without issue in September 1844, having by his will given all his property, real and personal, to his brother William, upon certain trusts, and he appointed him his residuary legatee and executor. James D. Potts, [675] their father, died in November 1844, having by his will left all his personal estate to his son William. He obtained probate of both wills, was then registered as sole proprietor of *Saunders's News-Letter*, and claimed to be entitled to the two-third parts thereof, as well as to the rents and profits of the terms for years under the provisions of the will of his uncle John Potts, and as the personal representative of his brother James Potts.

John Narney Potts, the infant grandson of J. D. Potts, upon his death entered into possession of the real and freehold estates devised by the will of John Potts, as derived from his brother James; and claiming to be also entitled to the rents and profits of the leaseholds for years, and to two-thirds of the *News-Letter* establishment, under the provisions of the will, he by his mother and next friend filed his bill in Chancery, in Ireland, against William Potts, the younger (the appellant), and Olivia Handcock, the personal representative of the survivor of the trustees of the said will, and also (by amendment) against William Potts, the elder, nephew of the said testator, and a respondent to this appeal.

The bill after stating the facts as, or to the effect, hereinbefore stated, prayed that an account might be taken of the rents and profits of the lands and tenements comprised in the terms for years, bequeathed as aforesaid by the will of John Potts, and of the plaintiff's share and interest in the said printing and publishing establishment, which accrued due since the death of J. D. Potts, and had been received by or to the use of William Potts (the appellant), and that the same might be secured for the benefit of the plaintiff, and that Olivia Handcock might be decreed to convey to the plaintiff the terms for years, and all the right, title, and interest now vested in her, under the provisions of the said will of John Potts, in the printing and publishing of *Saunders's News-Letter*.

[676] The appellant, in his answer to the bill, admitted the facts therein and hereinbefore stated, and that the respondent J. N. Potts had, on the death of J. D. Potts, become seised of an estate tail in possession, in the real and freehold estates devised by the will of John Potts, acquired by him under the will of his brother; but the appellant, as residuary legatee and executor of James Potts, jun., claimed to be entitled to the property comprised in the terms for years and in *Saunders's News-*

\* The following Pedigree shews the state of the family :



*Letter*, insisting that under the limitations of the will of John Potts, and upon his death, the said terms and chattels became vested absolutely in James Potts, jun., subject to the life-interest of his father, J. D. Potts.

The appellant further submitted that in his own right, as also under the will of his brother, he was entitled to the steam engines, types, etc., and the capital stock brought into the printing and publishing of the said *News-Letter*, since the assignment thereof to them by J. D. Potts in 1832; and that in case the respondent J. N. Potts should succeed in establishing his claim to the *News-Letter*, the appellant was entitled to an allowance in respect of his capital, labour, and personal skill expended thereon, and for the increased value thereof. The other defendants, the respondent William Potts the elder—who was made a defendant by order of the Lord Chancellor, as being the only survivor of the persons named tenants for life in the will of John Potts—and Olivia Handcock, put in their answers, submitting to the judgment of the court.

The Lord Chancellor decreed (9 Ir. Eq. Rep. 580) that the respondent, J. N. Potts, was entitled to the chattel interests, and to the two-thirds of the *News-Letter*, absolutely; and referred it to the Master to take the accounts as prayed by the bill, and to inquire into and report the value of the [677] capital, stock, machinery, etc., belonging to the said printing establishment, and by whom the same had been brought in and erected; and it was ordered that Olivia Handcock should convey to the respondent all right and interest in the terms for years, and in the *News-Letter*, then vested in her as the executrix of the survivor of the trustees of the will of John Potts.

The appeal was against that decree.

Mr. Napier and Mr. Andrews (both of the Irish bar) for the appellant:

The main question is, whether the chattels—the estates held for terms of years, and the newspaper establishment,—bequeathed by John Potts, vested, on his death, in James, his eldest nephew, who was the first tenant in tail of the real estates; or whether the vesting was suspended until after the death of J. D. Potts, the first tenant for life of the real estates. The chattels were bequeathed in trust to permit J. D. Potts and his assigns to receive the profits for his life, and from his death, to permit “each and every of the several other persons aforesaid, to whom an estate for life in the real and freehold estates of my brother, J. P., is hereinbefore limited successively, and as each of them shall become seized of the said real and freehold estates under the aforesaid limitations thereof, to take and receive the rents, etc., during his and their life and lives respectively; and from and after the decease of the last of the said tenants for life, as shall become seized in manner aforesaid, or if none of them shall so become seized, then, from and after the decease of the said J. D. Potts, etc., on trust to assign, etc.” the terms and news-letter “to such person or persons as shall then become seized of the said real and freehold estates under any of the limitations aforesaid, their executors, etc.”

The true construction of that clause, in the events that [678] happened, is, that James, the eldest son of J. D. Potts, and first tenant in tail of the freehold estates, took an absolute interest in the terms for years and newspaper property; if he did, the appellant, as his executor and residuary legatee, is entitled to them.

The question is, whether the chattels vested in the first tenant in tail simply, or in the first tenant in tail in possession. The principle of the courts is to accelerate the vesting, and leave nothing in contingency that can be held to vest. In *Foley v. Burnell* (1 Bro. C. C. 274) there was a limitation of plate and other chattels by Lord Foley's will, to be enjoyed as heir-looms by the persons who should be in possession of certain freehold houses thereby devised. It was argued that the vesting of the chattels was intended to be suspended until the first tenant in tail of the freeholds came into possession; but Lord Thurlow first, and the Lords Commissioners, on a rehearing, held the chattels to have vested in the first remainder man in tail, an infant, subject to his father's life interest, and on the infant's death, in the father, as his personal representative. Is not that conclusive on the present case? Lord Loughborough, concurring in the opinion before expressed by Lord Thurlow, said (1 Bro. C. C. 274) “if it does not vest in this case, neither would it in a son attaining twenty-one in the lifetime of the father. I do not see it clear that Lord Foley could have any idea of a case in which the estate might be sold, and yet the

plate remain; but the son attaining the age of twenty-one, might, with the consent of the father, sell the estate. If that case had been stated to Lord Foley, he would have said, let them take the plate with the estate;" and so it may be said here, that James Potts the first remainder-man in tail, and his father, the tenant for life, might dispose of the whole estate, cutting off the entail. Lord Commissioner Ashhurst said (Id. pp. 280 and 285), "The general [679] rule is, that when the chattel interest comes to one who would be tenant in tail of land, the limitations over are void. There is another rule that the interest may be so given as not to vest absolutely in the first taker." "The chattels are to accompany the estate—when a tenant in tail comes into *esse*, it must vest, otherwise the absurdity must happen of the personal estate being tied up longer than the real. The testator's intent must be adopted so far as it is legal, and a person becoming tenant in tail must have the absolute interest in the personal property." The judgment was affirmed by the House of Lords (4 Bro. P. C. 319). That case, and *Vaughan v. Burslem* (3 Bro. C. C. 101) were commented upon by Lord Eldon in the case of *The Countess of Lincoln v. The Duke of Newcastle* (12 Ves. 234-5) in this House, and the grounds of the decisions explained and approved of.

But suppose, without admitting, that the ultimate disposition of the leaseholds for years and newspaper property at all rested in contingency, J. N. Potts, the respondent, has not become absolutely entitled to them, but the contingency must be held still subsisting for the benefit of the appellant and the other persons who may become entitled to the freehold estates. The meaning of the word *then* in the ultimate limitation, is important. In the case of *Beaucherk v. Dormer* (2 Atk. 311), Lord Hardwick says, "in limitations of estates, and framing contingencies, it is a word of reference, and relates to the determination of the first limitation in the estate where the contingency arises." And in *O'Keefe v. Jones* (13 Ves. 415), Sir W. Grant says, "A limitation to a man for life, and *then* to his heirs at law, is a fee simple, that word indicating only the order, in which, and not the time, at which, the limitations are to take place."

[680] There is a recent decision, which bears on this case, *Wrightson v. Macaulay*, in which Vice Chancellor Wigram sent a case for the opinion of the judges of the Court of Exchequer (14 Mee. and W. 14). The case came again before his Honour (2 Hare, 487) upon the answers of the judges and on the equity reserved, when he disposed of the point as to the vesting of the personal estate, as it was disposed of in *Foley v. Burnell*, and his Honour's judgment was affirmed by the Lord Chancellor. They cited *Fordyce v. Ford* (2 Ves., Jun. 536) and *Stanley v. Stanley* (16 Ves. 491) on the same point.

They also contended that the decree, if held to be correct on the principal question, did not contain proper directions respecting the allowances to which the appellant was entitled for his labour and skill in the management of the newspaper.

Mr. Bethell and Mr. McCausland (of the Irish Bar) relied on the elaborate judgment in the Court below (9 Ir. Eq. Rep. 580), observing that the Lord Chancellor, in deference to the able arguments made for the appellant, entered more fully than one should think was necessary into the law and examination of the cases on the subject. They also cited *Gower v. Grosvenor* (Barnard, 54), in opposition to *Foley v. Burnell* (1 Bro. C. C. 274), and among other cases *Phillips v. Deakin* (1 Mau. and Sel. 744), and *Doe v. Spratt* (5 Barn. and Ad. 740); and contended that the testator's leading intention was that the chattel property should vest for life in such of the tenants for life as might become possessed of the freehold estate, in the event of their becoming so possessed on the death of J. D. Potts. That intention was effectuated by the construction put on the [681] will in the court below. The word *then* as used in the will, imported contingency until the period thereby referred to arrived, and that was the death of J. D. Potts, so that his eldest son James, having died in his lifetime, could have no transmissible interest vested in him.

Mr. Napier replied.

The Lord Chancellor.—This case has been very ably argued on the part of the appellant, and every thing has been urged to the House, which it is possible to have urged, with a view to impeach the judgment of the court below. But in my mind that judgment is founded upon sound, just, and legal reasoning, and is incapable of being impeached by any argument that has been addressed to your Lordships.



The question that has just been argued is between two tenants in tail, one who died before the property came into his possession by the death of the tenant for life, and the other who has since been put into possession of the real estate under the testator's will.

Now it has been properly admitted that if the intention be clearly expressed in the will, no rule of law can prevent its taking effect. Many cases have occurred which have proceeded upon the ground, that the intention was not sufficiently clear; and when the intention is not sufficiently clear, then there is a rule of law which directs that no property under circumstances of this description is to be held to pass. But if the intention be clear, then it is properly admitted, and cannot for a moment be disputed, that the intention which is so clearly expressed, is to guide those who are to decide between the parties with relation to property of this description.

Now, my Lords, could there be any possible doubt about this? If the cases, which have been quoted, could by possibility have been supposed as being intended to [682] overrule an intention clearly expressed, I should only have thought it sufficient to refer to the judgment of Lord Loughborough in the case of *Foley v. Burnell*, which undoubtedly is one of the strongest cases that could be referred to on this subject. Lord Loughborough there states the doctrine to be this: "The intention ascribed to the will by the plaintiff is not against any rule of law. Lord Foley might have given the personal property in such a way as to carry that intention into execution. The only question is, whether this intention appears clearly upon the face of the will. The words are 'as and in the nature of heir looms,' and 'that one of the services of plate should go to and be enjoyed by the possessor of Witley, and the other by the possessor of Stoke. Upon these words the plaintiff's counsel contend that it is clear that it shall not vest in a son of Edward Foley during the life of Edward.'" And he then goes on and argues as to the intention appearing upon the face of that will, and he states, as he naturally would, that if the intention appeared clearly in favour of the construction contended for by the plaintiff, the intention must prevail, and that Lord Foley might have given the plate; but then he says, "I do not find upon the face of the will any such manifestation of intention, as justifies the court in so dealing with it."

Now, it is clear enough in this and in many other cases, that you may very well guess at what a testator meant, and what he would have done, if he had foreseen the difficulties that might arise in the construction of the will; but courts of law cannot proceed upon a supposititious inclination of intention, they must find the intention expressed in such terms as to enable them to act upon it, otherwise great confusion would arise, and it would be mere speculation as to what the intention of a testator may have been.

[683] There is no question of law in this case whatever, for all the cases concur in saying that if the intention be clearly expressed, there is no rule of law which can prevent that intention from being carried into effect. Here the testator having real estate to dispose of, gives it to James David Potts, his nephew, for life, with remainder to his first and other sons in tail; with remainder to John another nephew, and then with remainder to William another nephew, with limitations respectively to their first and other sons. Having so disposed of his real estate, the events which have happened are these: James David Potts' life estate continued up to November in the year 1844; at that period the eldest son of James David Potts was dead, he having died in September 1844; Henry Potts, the second son, was also dead, he having died in 1835, but having left a son, the present respondent, John Narney Potts, and John Narney Potts being now the tenant in tail, and in possession under that will, says—"I am also entitled to certain personal property," which the testator, in the words I am about to state, gives with his real estate; at least his intention is that it should go with his real estate, and under this disposition the respondent claims.

The testator after having so given his real estate, describes certain personal property which he leaves "in trust to permit and suffer the said James D. Potts, the second son of my brother William Potts, and his assigns, to receive the issues and profits thereof, for and during the term of his natural life." So that up to the year 1844, when James D. Potts died, there is no question who was entitled to the benefit arising from this personal estate; "and from and after his decease to permit and

suffer each and every of the several other persons aforesaid, to whom an estate for life in the said real and freehold estates of my brother James Potts is hereinbefore limited successively, [684] and as each of them shall become seized of said real and freehold estates, under the aforesaid limitations thereof, to take and receive the rents, issues, and profits thereof, for and during the term of his and their natural life and lives respectively;” that, of course, alludes to the two other nephews, John and William, who also had life estates after the death of James D. Potts, provided that James D. Potts did not leave any issue male to take under the limitations; “and after the decease of the last of said last mentioned tenants for life as shall become seized in manner aforesaid, or if none of them shall so become seized, then from and after the decease of the said James D. Potts, second son of the said William Potts, upon trust to grant, assign, and convey said terms for years, and said right and title to the printing and publishing *Saunders's News-Letter*, to such person or persons as shall then become seized of said real or freehold estates under any of the limitations aforesaid, their executors, administrators, or assigns.”

Now no one can dispute that upon the death of James Potts, which took place in 1844, the person then entitled to the real estate under the limitations of the will was the respondent. He is the person who in point of fact answers the description in the will. The appellant never answered that description, for he was only entitled to an estate in the chattel property, if he became seized of the real estate, and he never became entitled to the real estate, because there being a son of an elder son of James David Potts, that descendant took the real estate, and intercepted the limitation under which the appellant would claim the estate. Then what is the construction of law on this point? Were there any persons entitled for life, who became seized of the real estate? Certainly not. Then what does the testator say! “That if none of them shall so become seized, then from and after the decease of the said James David Potts,” it shall go to a person, whose [685] description is answered by the plaintiff (the respondent) only. What the testator said, is that the said James David Potts shall have the estate, and shall be the owner of the chattel property, for life; and upon his death, if there shall be no person who shall be entitled to the real estate for life, then it (the chattel property) shall go to the person entitled to the real estate under the limitations of the will. Is not that the plaintiff? I can hardly conceive a case which is more clear, or where the expressions used by the testator are more unambiguous. If there is any confusion at all, it arises from the mode of intermixing estates for life, and which in point of fact, looking to this part of the will only, would appear to come from limitations in tail which could never arise at all, if the limitation to James David Potts took effect.

That is the whole of the case. The grounds on which the learned Judge in the Court below has decided this case are, as it appears to me, perfectly unanswerable in point of construction of the will, and not at all met by any of the authorities which have been referred to. We have been referred to cases where there is no clear intention expressed in favour of a particular party, and which all proceed upon the ground that the expressions used did not convey a clear intention in favour of the party.

Under these circumstances, I move that your Lordships affirm the judgment of the Court below.

Lord Campbell.—I am entirely of the same opinion. From the explanation which has been given by my noble and learned friend, it appears quite clear to me that the plaintiff (the respondent) is the only party that answers the description of the person who is entitled to the estates mentioned in the will. What is contended for on the part of the appellant might be done by the testator, but [686] I cannot conceive language more clear or unequivocal than the expression of his intention the other way. I quite agree in what has fallen from my noble and learned friend, and concur with him in the opinion that the judgment below should be affirmed.

It was accordingly ordered that the appeal be dismissed, and the decree affirmed, with costs.

[687] DANIEL LEDSAM and others,—*Plaintiffs in Error*; JAMES RUSSELL,—*Defendant in Error* [July 11, 1848].

[*Mews' Dig.* x. 825, 826, 831, 833. S.C. in Ex. Ch. 16 M. and W. 633; 16 L.J. Ex. 145; and, in Ex., 14 M. and W. 574; 14 L.J. Ex. 353; 9 Jur. 557. As to assignees and extension see now ss. 25 and 46 of the Patents Act, 1883, and *In re Bower-Barff Patent* (1895), A.C. 675.]

*Patent—Pleading.*

The assignees of letters patent may, under the first and fourth sections of the 5 and 6 W. IV., c. 83, lawfully obtain a renewal of such patents.

The statute does not authorise the Judicial Committee of the Privy Council to impose terms as conditions on which patents are to be renewed. The authority of the committee is limited to reporting on matters as between the public and the party applying.

There is nothing in the statute to fetter the discretion of the Crown in the renewal, except the length of time for which that renewal is to be granted, and which must not exceed seven years.

An application for a renewal is "prosecuted with effect" within the terms of the statute, if the party applying obtains the report of the Judicial Committee of the Privy Council before the expiration of the original patent.

The Crown is not restricted as to the time within which it may act upon such report, and renewed letters patent are not void, because they are dated after the expiration of the original letters patent.

If the Judicial Committee should impose a condition on a party applying for the renewal of a patent, such party need not, in an action for the infringement of the patent, aver that such condition was complied with before the patent was renewed.

This was a writ of error upon a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Exchequer. Upon the 26th of February, 1825, a patent was granted to Cornelius Whitehouse for "certain improvements in manufacturing tubes for gas and other purposes." On the 9th of April, 1835, James Russell became the assignee of the patent, which was soon after [688]-wards the subject of much litigation, but it was finally maintained. In the year 1838, a petition was presented to the Queen, praying for the extension of the term of the patent. This petition was referred to the Judicial Committee of the Privy Council, and the hearing upon it took place on the 12th of December, 1838, when the lords of the committee expressed an opinion favourable to the application; and on the same day the committee made a report, formally declaring that opinion. This report was submitted to the Queen, and her Majesty in council, on the 4th of February, 1839, approved of it, and ordered the warrant for new letters patent for the term of six years to be prepared. This warrant was signed on the 7th of February, 1839, and on the 26th of February the new letters patent were duly sealed and issued.

The order on the report of the Judicial Committee recited the reference to the Lords of that committee, and stated "their Lordships do agree humbly to report to your Majesty as their opinion that, in case your Majesty should so think fit, a further extension of the letters patent already obtained, should be granted to the said James Russell, in whom the legal interest in such letters patent is now vested, upon the securing to Cornelius Whitehouse aforesaid, the original inventor, an annuity of £500 sterling per annum, as long as the said extension of the said letters patent shall last, and that such extension should be for the term of six years from and after the expiration of the term in the original letters patent." The warrant for the preparation of the new letters patent contained the same recital, and both declared her Majesty's adoption of the report, and ordered accordingly.

In July 1841, Russell filed a bill against Ledsam and others, alleging the grants of the original and renewed patents, and charging them with an infringement thereof, and praying for an account. The novelty and usefulness of the invention being disputed, the injunction was re-[689]-fused. Russell then commenced an

action in the Court of Exchequer, in which he set forth his title as assignee of the patent, the proceedings in the Privy Council, and the renewal of the patent, and averred that "from the making of the said letters patent, the said annuity of five hundred pounds has been duly secured to the said C. W., according to the true intent and meaning of the said letters patent, and of the proviso in that behalf in the said new letters patent contained."

The defendants pleaded not guilty, and several special pleas; the seventh and ninth of which alone formed the subject of discussion on this writ of error. The seventh plea alleged that the new letters patent were void, as being granted after the expiration of the term granted by the first patent, and the ninth, that the annuity of five hundred pounds had not been duly secured to the said Whitehouse from the making of the new letters patent, according to the intent and meaning of the said letters, and of the proviso in that behalf contained.

The cause came on for trial before Mr. Baron Alderson, on the 7th of December, 1843, and continued till the 4th day, when it was postponed on account of the illness of one of the jury, and resumed on the 24th of June, 1844. A verdict was found for Russell, but leave was reserved for the defendants to move to enter a verdict for them on the seventh and ninth pleas. Russell also had leave to move to enter judgment on the seventh plea, *non obstante veredicto*, in case the court should think that on that plea the verdict must be entered for the defendants. Rules were accordingly obtained, and were argued in Trinity Term, 1845. The court gave judgment for Russell (14 Mee. and W. 574). The defendants then brought a writ of error in the Exchequer Chamber, where the judgment was affirmed (16 Mee. and W. 633). The present writ of error was then brought.

[690] The grounds of error relied on here, were, among others, that the 5 and 6 W. 4, c. 83, did not authorise the grant of an extension of a patent to the assignee of the original patentee; that the declaration did not shew that an application for the renewal of the patent was made and prosecuted with effect before the expiration of the original term; that the securing of five hundred pounds per annum to Whitehouse was a condition precedent to a valid renewal, and was not shewn to have been performed; that the patent had expired before the grant of the new letters patent, and that such new letters were therefore void; and that these letters patent granted a renewal on a condition subsequent, whereas the recommendation of the Lords of the Committee was for a renewal on a condition precedent, and that the renewal was therefore void.

Mr. M. D. Hill and Mr. Hindmarch for the plaintiff in error: There is nothing to shew that the application for the renewal of the patent was prosecuted with effect, and, consequently, the Privy Council had no authority to make a report to the Crown, recommending a renewal. [Lord Brougham:—I think the matter stands thus: that supposing an application for the renewal of a patent is not prosecuted with effect, according to the statute, though the Privy Council may have the right to make a report, there is no use in making it.] *Bodmer's case* (Webs. Pat. Cas. 740), which was decided on the 5 and 6 W. 4, c. 83, s. 4,\* is an authority for the appellants.

\* By which it is enacted, "That if any person who now hath or shall hereafter obtain any letters patent as aforesaid, shall advertise," as therein directed, "that he intends to apply to his Majesty in Council for a prolongation of his term of sole using and vending his invention, and shall petition his Majesty in Council to that effect, it shall be lawful for any person to enter a *caveat* at the council office; and if his Majesty shall refer the consideration of such petition to the Judicial Committee of the Privy Council, and notice shall first be by him given to any person or persons who shall have entered such *caveats*, the petitioner shall be heard by his counsel and witnesses to prove his case, and the persons entering *caveats* shall likewise be heard by their counsel and witnesses, whereupon, and upon hearing and inquiring of the whole matter, the judicial committee may report to his Majesty that a further extension of the term in the said letters patent should be granted, not exceeding seven years; and his Majesty is hereby authorised and empowered, if he shall think fit, to grant new letters patent for the said invention, for a term not exceeding seven years after the expiration of the first term, any law, custom, or usage to the contrary in anywise notwithstanding; provided that no such extension shall be granted if the

[691] In that case there was a petition for renewal presented on the 31st May, 1838, and the intention to apply, on the 26th of June, for a day for hearing was duly advertised. On that day, two *caveats* were entered, under which each of the parties was entitled to four weeks' notice. The ordinary sittings of the Judicial Committee would, therefore, terminate before the cases could be heard. The Lords, however, specially appointed a sitting for the 17th of August. On that day there was not sufficient members to form a committee. The 29th of November was then appointed for the hearing. On that day the Attorney General, on the part of the Crown, objected that there was no jurisdiction in the Lords to proceed with the case, as the letters patent appeared to have been granted on the 14th of October, 1824, for fourteen years, and the application had not been in the terms of the statute 5 and 6 W. 4, c. 83, s. 4, "prosecuted with effect before the expiration of the term originally granted by the letters patent," for that the statute required more than the petition and the fixing a day for the hearing. The Lords held the objection fatal. That case, therefore, decided that something beyond mere formal matters must be performed, or the party could not be held to have complied with the statute, and that his in-[692]-ability to do more, though not through his own *laches*, was no answer to the rule which required the report to be made pending the existence of the patent.

[Lord Brougham.—By the law in cases of writs of error, they are required to be prosecuted with effect. Would not that rule be satisfied by the plaintiff in error doing what was required of him within a certain time, though the decision did not take place within that time?]

Here it is found as a fact that the extension of the patent was sealed after the original patent had expired. The words "prosecuted with effect" must refer to a result, and that result certainly did not take place "before the expiration of the term originally granted," but after it.

Then as to the annuity to Whitehouse. The securing of that annuity, was by the Lords of the Judicial Committee made a condition precedent to the grant of the renewal of the patent. The applicant himself did not perform all that was required of him, and all that it was in his power to perform as conditions for obtaining a renewal of the patent, for he did not secure this annuity to Whitehouse. The non-performance of that condition is an objection to the renewal of the patent, but, even if that condition had been performed, the declaration is bad for not shewing it to have been performed.

[Lord Brougham.—Is the Crown so far bound by the report of the Judicial Committee, as to see that every one of its recommendations is carried into effect?]

Certainly; and it would be most dangerous if it should be otherwise. There is a vast difference between the grant of an original patent, and the extension of a patent. The act of the Committee is a judicial act, and the Crown is, therefore, bound by it. The Crown could not grant an extension of a patent contrary to the report of the Committee.

[Lord Brougham.—The act says the Judicial Committee may report to his Majesty, and his Majesty is authorised, if he shall think fit, to grant new letters patent [693] for a term not exceeding seven years. If it was meant that the Crown was to be bound by the report, the act would have said that the Committee should report for what term the extension might take place, and that the Crown should then grant "for such term as aforesaid."]

That supposition leads the argument to an extreme length. The Committee reports that the Crown may grant a renewed patent for six months. Could the Crown, on such a report, grant it for seven years? It could not. The Crown must act in pursuance of the report, and must see that what has been required by the Judicial Committee, as a condition for the renewal of the patent, has been complied with, and the plaintiff, in a case of this kind, must aver performance of such a condition. The plaintiff in error is entitled here to take any objection to the declaration which in the court below might have been taken on general demurrer, unless the finding on the issue in the court below should prevent him. There is no such finding here. If therefore a condition precedent can be shown to exist, and if the declaration does not

application by petition shall not be made and prosecuted with effect before the expiration of the term originally granted in such letters patent."

show it to have been performed prior to the making of the renewed grant, that is sufficient to invalidate the grant. That is the case with respect to the securing of the annuity. It is clear that the condition must be performed. That is so even in the case of the Crown's prerogative of pardon. If the party pardoned should not perform the condition of the pardon, as for instance that of transportation, the original sentence would be restored to its full effect, or rather the pardon itself would be without effect.

[Lord Brougham.—The power of the Crown, in that case, rests on the common law. Here it is the creature of statute, and it has been repeatedly changed.]

But here the statute requires the performance of certain conditions, and in this case there is no allegation of the performance of this condition of the grant of the annuity. [694] As that is, even on the face of the warrant for the renewal, a condition precedent to the renewal of the patent, the want of such an allegation makes the declaration defective.

Lastly, it is submitted that as the fourth section of the statute solely refers to the "person who hath obtained or hereafter may obtain letters patent;" and as the whole authority of the Crown to grant a renewal of such letters depends on that section, no such renewal can be granted to the assignee of a patent. The words of that section must be strictly construed; for the power thereby conferred on the Crown is one of a new and exceptional kind.

Mr. M. Smith and Mr. Webster, for the defendants in error, were not called upon.

The Lord Chancellor.—My Lords, I am not at all surprised to find that the judgments of the Courts of Exchequer and Exchequer Chamber were adopted with the unanimous concurrence of the learned judges who were present at the time of pronouncing those judgments; because after attending to all the learned and ingenious arguments which have been addressed to your Lordships' House in support of the case of the plaintiff in error, it does not appear to me that any real doubt can remain as to the propriety of the decision of the court below. It appears in the case of the defendant in error, that the plaintiff in error intended to take only two points, it being stated, "Take notice, that a writ of error has been allowed in this cause, and that the following are the grounds of error which will be argued:—First, that on the seventh plea judgment has been given for the plaintiff, notwithstanding the verdict found for the defendants on the same plea, whereas such judgment should have been given for the defendants; the same plea, and the matters therein stated, disclosing a valid defence in the law, viz., that the letters patent in the declaration secondly stated, were granted after the expiration of the term of fourteen years, [695] granted by the letters patent in the declaration first mentioned: Secondly, that the declaration is insufficient, a prolongation of the term granted by the original letters patent not being by law, at the time of the granting of the letters patent, in the declaration secondly mentioned, capable of being granted to the assignee of the original letters patent."

Those were the two points that originally were intended to be brought under the consideration of this House. They have since been added to by a supplementary paper, by which another reason has been assigned, namely, "That the declaration shows that the recommendation by the Judicial Committee to her Majesty to grant an extension, was conditional upon the plaintiff below first securing an annuity to a Cornelius Whitehouse, the inventor. The condition contained in the report of the Judicial Committee being therefore a condition precedent, the new patent is void, if it was not performed previous to the making of the patent, and the declaration is bad, because it does not show that the condition was so performed."

Now, my Lords, upon the first points which were originally intended to be taken, it is clear that they must turn upon the construction of the act of Parliament, and all the clauses necessary to be adverted to for the purpose of showing that the construction put upon the act by the court below is correct, are the first and the fourth sections.

By the first section it is enacted, "That any person who, as grantee, assignee, or otherwise, has obtained, or who shall hereafter obtain letters patent, may, if he thinks fit, enter a disclaimer of any part." The object of referring to that clause is that it

takes notice of the person to whom the letters patent are granted, whether he be grantee, assignee, or otherwise, of the patent.

Then you come to the clause in question, the fourth, which provides "That if any person who now hath, or shall hereafter obtain, any letters patent as aforesaid." The first [696] question raised is, to what does the word "aforesaid" refer? The judges in the court below have construed it to refer to the description of persons entitled to the letters patent, that is to say, to the persons who, as grantees, assignees, or otherwise, may be entitled to the letters patent; and that appears to be the only construction by which any sense can be derived from the words so used—those are the persons "aforesaid." If we look through the prior part of the act of parliament, we do not find any person entitled to the benefit of the patent, except those described in the first clause. The first clause does contain a description of the persons who are entitled to the benefit of it. Then, if that be so, this clause must be read thus:—"That if any person who now hath or shall hereafter obtain any letters patent, or who is grantee, assignee, or otherwise, thereof," and that would dispose entirely of one of the grounds upon which this matter is brought under your Lordships' consideration.

Then we come to the other and far more important one, which is, the fact of the new grant not having been made until a day after the period at which the first grant would expire, because, although it bears date the same day, yet there is a day between the expiration of the former grant and the day when the new grant was made.

It is said that the clause of the act of Parliament does not authorise the Crown to grant new letters patent after the period at which the former letters patent have expired, and, consequently, that the Crown has exceeded the power given to it under the act of Parliament, which was merely the power under certain circumstances, according to the terms of the act, of granting new letters patent for the protection of the patentee during a certain period.

The conclusion of the section is that the Crown is to be at liberty to refer the petition to the Lords of the Judicial Committee of the Privy Council, who are to make a report to the Crown. It provides the mode in which the Judicial [697] Committee of the Privy Council is to hear the application, and after hearing it, to make a report; and we find these words [His Lordship read the section, see *ante* p. 690.]

In order to authorise the Crown to grant an extension of the term of any letters patent, according to the terms of this clause, there must be a report of the Judicial Committee of the Privy Council in favour of such extension of the letters patent. When the report has been so made, the only limit to this discretion of the Crown is, that the renewal shall not exceed the term of seven years from the period of the expiration of the first patent. There is no limit upon the discretion of the Crown, or the right of the Crown in renewing the letters patent, further than that restriction as to the period of seven years. The Crown cannot be bound beyond the terms of the act of Parliament. The act imposes no other limit upon the Crown than the period for which the new letters patent are to be granted. Therefore if there was any doubt as to the construction of the act generally, or if it was capable of being construed in the way contended for by the plaintiff in error, it appears to me that this clause removes all doubt, because the proviso does not apply to what the Crown is to do, but it applies to the right of the party asking for the extension of the patent. It is, "provided that no such extension shall be granted, if the application by petition shall not be made and prosecuted with effect before the expiration of the term originally granted in such letters patent."

The question is, to what extent does the expression "expiration of the term," limit the authority of the Crown given by this notice? Does it limit the power of the Crown? Certainly not. What then does it do? It prevents the party from taking the benefit of the act of Parliament unless he does something. In order to entitle himself to have the benefit of the new grant of letters patent by the Crown, he must make the application for that new grant, and prosecute the application with effect [698] before the expiration of the term originally granted in such letters patent. In this case he did so. He applied before the expiration of the term originally granted in such letters patent, and he proved his case to the satisfaction of the Judicial Committee of the Privy Council; and the Committee made a report that a further extension of the term in the said letters patent ought to be granted. It is not pos-

sible, looking through the whole of this clause, to find any restriction upon the power of the Crown with respect to the granting of new letters patent for a period not exceeding seven years. That has been the construction of the Court below, and it is the only possible construction which, consistently with the terms used by the act of parliament, could have been adopted. That being the case, that objection has no foundation whatever.

I have already disposed of the other point, namely, the question as to the assignees and grantees. I have said that the construction to be put upon the fourth clause ought to be that the party intended to be described here by the word "aforesaid," may be a grantee or assignee, a party competent to enjoy or obtain the benefit, a party who has patent rights, which he may be disposed to apply to the Crown to have further extended.

Then comes the last and only remaining point, namely, that the Judicial Committee of the Privy Council intended by the report to her Majesty, that there should be a provision made, before the granting of the new letters patent, to secure a certain sum to Cornelius Whitehouse, the inventor, and that the declaration does not state that that was done.

What the declaration does state upon that subject is this—"That from the making of the said letters patent, and thence hitherto the said annuity of £500 sterling per annum has been duly secured to the said Cornelius Whitehouse, according to the true intent and meaning of [699] the said letters patent, and of the proviso in that behalf in the said new letters patent contained."

In the view which I take of this case, it is not material in what way it is stated in the declaration, because I can find nothing in the Act of Parliament which authorises the Judicial Committee of the Privy Council to impose any terms, or to make any recommendations to his Majesty with respect to the parties seeking for the grant of the new letters patent, except the fact of whether the letters patent shall be extended or not. The payment of this £500 is a matter between the assignee and the original inventor. What the Judicial Committee is to report upon is merely as to matters between the public and the party applying, whether the party applying for the new letters patent has made out a case as against the public to have the old letters patent renewed. But as to imposing any condition upon the Crown, which has otherwise the right to make the grant, there is nothing in the act to restrain the Crown from exercising any discretion it pleases. If this objection could prevail, it would be upon this ground, that the Crown had no right to make the new grant unless upon the terms recommended by the Judicial Committee, in other words, that if terms were recommended by the Judicial Committee, the Crown must be bound by them. If we look to the act of Parliament which regulates the mode in which the Crown is to exercise the right of granting an extension of a patent, there is nothing that I can find in any of the clauses of the act, which at all interferes with the discretion of the Crown. If there is any matter in dispute with respect to the patent which is brought before the Judicial Committee, the right of the Crown is not restricted or confined by any thing which that Court has done. What the Act of Parliament meant the Judicial Committee should do, was merely to recommend that the Crown should grant an extension of the term, or not, and if an extension was [700] recommended to be granted, then it was to be kept within certain limits. That is the only restriction which the Act of Parliament imposes upon the Crown.

Upon these grounds, my Lords, I think that the judgment of the Court below should be affirmed.

Lord Brougham.—My Lords, I entirely agree with my noble and learned friend. As the act of parliament is one which was drawn by myself, and which vests certain powers in the Judicial Committee of the Privy Council, or rather in the Crown, I think it much better to rest the construction of that act upon the opinion of my noble and learned friend, than to give my own opinion upon it; but at the same time I cannot avoid adding that my opinion is very clear upon the point. I might state what was my intention when the act was introduced; but I will not do so. We have now only to consider the points that have been brought before us; and I shall not say any more upon the act than what appears to me to be its proper construction. I repeat that I entirely agree with the opinion which my noble and learned friend has expressed. I have every reason to believe that the legislature itself, and not merely the individual who framed the act, meant that the Judicial Committee was to do



something, namely, to inquire into the expediency of the granting the renewed letters patent; (I am not speaking from any supposition of intention, but with reference to the words of the act itself;) and when the Committee had done that, the rights of the Crown would remain the same, with the limitation only of the period of seven years, as that within which the renewal of the patent, if made, must be restricted.

I entirely agree in the construction which has been put upon the act of Parliament in the Court below by the unanimous judgment of the Court of Exchequer Chamber, from which this writ of error is prosecuted before your [701] Lordships; and I am of opinion that on the first point there can be no doubt that the plaintiffs in error are not entitled to the judgment which they seek.

Upon the second point also I have no doubt at all. When we come to construe the act of Parliament, and to look at the points which have been raised by the counsel for the plaintiff in error, however ingeniously they may have been raised, I consider it would be a waste of time to call upon the counsel for the defendant in error for an answer to those points. The second point is with respect to the limitation of the time, and is this, that the old patent should not have been allowed to expire before the new patent was granted, because a grant of a new patent, after the original is at an end, cannot be called an extension. When we come to construe the act of Parliament with respect to that, I do not think it requires that the old patent should not have expired before the renewal was actually granted. There is no pretence for saying that the act of Parliament binds the Crown to act upon the application of a party requiring a renewal of the patents, before the time when the old patent has expired. The Act requires that the party should have proceeded to prosecute his claim in a certain way; that he should have prosecuted it with effect before the expiration of the term, and there is an obvious reason for that, because it might happen that the Judicial Committee which is to hear the evidence and make the report, might, after hearing the evidence of the party petitioning, be of opinion that there was not sufficient ground shown for the renewal of the letters patent; and therefore it is that the party must take the step of prosecuting his claim with effect before the Judicial Committee, before the renewal of the letters patent can be allowed by the Crown. That is the only limit. Has he done so here? It seems to me that he has. Then having done so, that is all that he is required to do: [702] that is one of the limitations upon the Crown in granting the prayer of the petition for the renewal of the letters patent. The other limitation is that it shall not be for more than seven years; it is not to exceed seven years after the expiration of the first term.

Then as to the securing of the annuity to Whitehouse. The Crown has nothing to do with any agreement between individuals, it has only to do with this, that the grant shall be to the first and true inventor thereof (that is, of the thing patented) or his grantee or assignee at the time. The other proviso is that it shall not be for more than seven years. Monopolies are now abolished, and, therefore, what is provided for in the new Act is that the Crown shall have the power, upon the recommendation of the Judicial Committee, to extend the period for the term of seven years only. But I do not think that the Crown is bound to grant the renewal of the patent in the very terms that are stated in the report of the Lords of the Privy Council, or to see that the terms mentioned in that report have been complied with.

I entirely agree with all the learned Judges of the Court below, and, I think, that as this writ of error has been prosecuted, we shall do well to give judgment, and I recommend judgment to be given for the defendant in error, with costs.

Judgment affirmed, with costs.

[703] CECILIA FULHAM, MARGARET LYNCH, and MARIA M'CARTHY,—*Appellants*; JOHN M'CARTHY (Administrator of ALEXANDER M'CARTHY), CATHERINE M'CARTHY, and Others,—*Respondents* [July 14, 17, 25, 1848].

[*Mews'* Dig. iv. 84; xi. 39; xii. 104. S.C. 12, Jur. 757, and, below, *sub nom. M'Carthy v. M'Carthy*, 9 Ir. Eq. R. 620. Commented on in regard to position of nun, in *Allcard v. Skinner*, 1887, 36 Ch. D. 160.]

*Pleading—Misjoinder—Issue.*

Parties having adverse or inconsistent rights in the subject matter of a suit, cannot be joined as co-plaintiffs. (*Infra*, p. 715.)

Nor can a party who has no interest, be joined as a plaintiff with one who has. (*Infra*, pp. 716 and 722.)

Therefore, where one of the next of kin of an intestate, after assigning her distributive share of his estate, is joined, as co-plaintiff with the assignees in a bill against the administrator and the other next of kin, for an account and payment, there is a misjoinder of plaintiffs, of which the defendant may take advantage at any stage of the cause, and such misjoinder will, even on the hearing, be sufficient to occasion a dismissal of the bill.

In a suit in which an assignor and the assignees of an equitable interest are made plaintiffs, an issue directed to try the validity of the deed of assignment is improper, as being an issue between co-plaintiffs, and not between them and the defendant.

*Quære*, Whether an assignment of property by a nun, in pursuance of a vow made on entering the convent, is valid.

This was an appeal from a decree of the Lord Chancellor of Ireland, in a suit instituted there for the purpose of obtaining payment of two distributive shares of an intestate's personal estate (9 Ir. Eq. Rep. 620).

Alexander M'Carthy, of Cork, merchant, died intestate, in July 1843, leaving a large personal estate and ten children, five sons and five daughters, his sole next of kin him surviving. He also left a widow, but she was, by a proviso in their marriage settlement, excluded from any share in his personal property.

[704] Two of the intestate's daughters, Maria M'Carthy (an appellant) and Catherine (a respondent), in his lifetime, and with his approbation, became professed nuns, of the Ursuline order, in a religious house or convent, at Blackrock, near Cork, and he paid, for each, one thousand pounds to the convent, as her portion, that being about, if not more than, the sum usually paid on the entry of persons of their station in life into the convent.

It is a rule of all the convents of the said order, that any property to which the nuns become entitled, after being professed, becomes the property of the community of their convent.

Soon after the intestate's death, John M'Carthy, one of his younger sons, obtained letters of administration to his estate in the proper Ecclesiastical Courts in Ireland and England, and other countries where parts of the estate had been invested. Having possessed himself of the assets, to the amount of £90,000, after payment of debts, etc., he distributed their respective shares among all his brothers and sisters, except the said Maria and Catherine, to whom he made no payment. Some attempts at an arrangement with them, whereby their shares might be divided among their four younger brothers,—the eldest being amply provided for by the real estate, in addition to his share of the personalty,—were unsuccessful.

In December 1843, Maria M'Carthy executed an assignment of all her share of the intestate's estate to the other appellants, Cecilia Fulham and Margaret Lynch, professed nuns of the same convent, their executors, administrators, and assigns, as trustees for themselves and the other members of the convent, with power to compel payment, and give receipts, and put in answers for her in Chancery, etc. Catherine M'Carthy executed a similar deed of assignment in March 1844.

The assignees (the two first-named appellants) and Maria (the other appellant), one of the assignors, filed a [705] bill in Chancery, in July 1844, against the said administrator, and the other sons and daughters of the intestate, including Catherine, who declined to join as plaintiff, although she concurred in the object of the suit. All the other members of the convent were made formal defendants. The bill, after stating to the effect above mentioned, prayed that accounts might be taken of the debts of the intestate, and of his personal estate and effects, etc., and that the appellants might be declared, in right of Maria and Catherine, entitled to two equal tenth shares thereof; that the amount of such two shares might be ascertained, and that each of the respondents, the sons and daughters of the intestate, except Catherine, might be decreed to pay to the appellants, Cecilia Fulham and Margaret Lynch, as

assignees of Maria and Catherine, a proportional part of the assets of the intestate, which had been paid to them respectively by the administrator, and that they (the said assignees) might be declared entitled to a lien upon such assets of the intestate as were still subsisting in specie, for satisfaction of the full amount of the distributive shares of the said Maria and Catherine.

The defences made by the several answers of the administrator and the intestate's other sons and daughters, except Catherine, were that the sums of £1000 and £1000 paid on the profession of Maria and of Catherine respectively, were understood and intended by them and their father to be their full portions; and they were barred by the arrangement then made from any further claim on him or his estate; that the deeds of assignment executed by them, were extorted from them by undue influence and coercion, and were therefore void in equity; that even if the assignments were truly executed, it was contrary to public policy to give effect to instruments executed in obedience to religious vows, and disposing of property to religious uses at the will of a superior, without regard to [706] the moral or civil obligations of the parties making such vows; that Maria and Catherine being professed nuns at the time of executing the said assignments, they were in a state of civil death, and incapable of acquiring or disposing of any property.

An answer put in for Catherine M'Carthy, without oath, by consent, stated that she was desirous to have her share of the intestate's property applied to the purposes of the convent, and that she executed the assignment in order that her share should vest in the assignees for the said purposes; and that, although she concurred in the objects of the suit, she declined to be a plaintiff therein, as she had no wish to be engaged in litigation with her brothers.

A great body of evidence was taken on both sides.

The Lord Chancellor, upon the hearing of the cause, offered the plaintiffs an issue to try whether the deeds of assignment were executed by Maria and Catherine of their own free will; and their counsel declining the issue, his Lordship decreed "that the Court offering to direct an issue at law to try whether the two deeds of assignment in the pleadings mentioned, bearing date the 29th day of December, 1843, and the 13th day of March, 1844, were respectively executed by the said plaintiff, Maria M'Carthy, and the said defendant, Catherine M'Carthy, as free agents; and the counsel at the bar for the said plaintiffs declining to take such issue, they insisting that without any such being directed, the plaintiffs were entitled to a decree; and it appearing to the Court that the said deeds were not, nor was either of them, executed by the said plaintiff, Maria M'Carthy, and the said defendant, Catherine M'Carthy, as such free agents, but that, on the contrary, the same were executed by them respectively not of their free will, but under the pressure and compulsion of the vow of obedience taken by them respectively on becoming professed [707] members of the convent in the pleadings mentioned, and wherein they then still remained as such members, and under the obligation of the said vow; the Court doth declare that no relief ought to be given by the Court, founded on deeds so obtained, and thereupon his Lordship doth dismiss the plaintiffs' bill, with costs, to be paid by the plaintiffs, Cecilia Fulham and Margaret Lynch, without prejudice to any suit which the plaintiff, Maria M'Carthy, or the respondent, Catherine M'Carthy, may be advised to institute as the next of kin of their father, Alexander M'Carthy, deceased."

The appeal was brought against that decree.

The case was argued on the questions of undue influence, public policy, and misjoinder of parties. The last was raised by the sixth reason for the respondents in these terms:—"Because, upon the bill as framed, there was a misjoinder of parties, inasmuch as the said Maria M'Carthy, who was alleged to have assigned all her interest (if any), in the assets of her said father, had rights and interests conflicting with the claims of the said Cecilia Fulham and Margaret Lynch, with whom she was joined as co-plaintiff." As the judgment was confined to this last question, the arguments on the others are not reported.

Mr. Turner and Mr. Bethell (Mr. Chisholm Anstey was with them) for the appellants: The decision in this case did not proceed on the misjoinder. The Lord Chancellor thought that the case was before him on the merits and on the principles of law, and on them he decided it. In this view of the case he was right, for the case

was before him on the merits; but he was wrong in the construction he put on the case as then presented to him. At all events, no question of misjoinder was raised, nor could it be, for there has not been any misjoinder here. The plaintiffs had not conflicting interests. On the contrary, as against the brothers [708] and sisters who had received distributive shares of the father's estate, they were united in a common interest. The Court has no right to anticipate their possible disagreement. The Court cannot stay to inquire whether, when the daughter Maria has been declared entitled to her share of her father's personal estate, she may dispute the deed of assignment, and so to conjecture a possible conflict of interest among these co-plaintiffs. All that can be asked is, whether the co-plaintiffs have now a common interest under this bill in asserting her rights? The answer must be in the affirmative. They have a common right, and a joint interest against the brother, the administrator, and the rest; and having such an interest, they may join in enforcing it. *Campbell v. Dickens* [4 Younge and Collier, 17], is a clear authority in favor of the bill as it now stands. There the assignee of a legatee was held to be a necessary party to a suit brought by the legatee for the recovery of the legacy, where the assignment took place before the institution of the suit. The same rule was held in *Humble v. Shore* (3 Hare, 119), where a suit was instituted to administer and ascertain the residue of an estate, and one of the residuary legatees, after the bill was filed, and before he was served with the subpoena to appear and answer, assigned his share. It was held that he was a necessary party to the suit. The principle adopted in those cases must govern the present.

Sir F. Kelly and Mr. Rolt (Mr. Napier and Mr. Hetherington were with them) for the respondents:

The bill here improperly mixes a legal chose in action with an equitable claim to a share of residue. This is a mistake of interest. It is not a legal chose in action which is claimed, but an equitable chose in action, vested in two of these plaintiffs by assignment. The parties who claim the chose in action, and the parties who claim the share [709] of the residue being different parties, and having different interests, there is a misjoinder of parties in making them co-plaintiffs. This alone was sufficient to call on the Court below to dismiss the bill, and justifies its dismissal. The authorities cited on the other side, to shew the necessity of joining the assignor and assignee as parties to a bill, do not apply to this case, and do not justify the purpose for which they were cited. In *Campbell v. Dickens* (4 You. and Col. 17), the legacy was expressly charged on land; and in *Humble v. Shore* (3 Hare, 119), there was, though it is not mentioned in the report, an outstanding interest in the assignor. It was, therefore, absolutely necessary to make him a party to the suit. There too, as in the previous case, a legal interest was assigned. Here the assignment is that of an equitable interest alone; and where the holder of an equity assigns the whole of his interest, and the assignee could establish his title by proof at law, it is not necessary to make the assignor a party to the bill.

[The Lord Chancellor.—The assignment of all interest in a mere equity would leave nothing in the assignor. Is that so here?]

It is; and that shews that the assignor and assignee in this case ought not to have been joined as co-plaintiffs. In the case of *Cator v. The Croydon Canal Company* (4 You. and Col. 405), it appeared that a party, who believed himself entitled to compensation under the act for making that canal, assigned his interest before the award was made. Mr. Baron Alderson held that this assignment might be made, but that the assignor need not be a party to the bill filed by the assignee for the recovery of the money, he not having then any legal title to it. The principle to be found in that and other cases is, that if a legal chose in action is assigned, the assignor may join in the suit; but [710] not so if a mere equitable interest is assigned. Here the interest was purely equitable.

[The Lord Chancellor.—May not the assignor remain a trustee, and if so, may he not be required as a party to the cause?]

Not necessarily. Some light is thrown on this matter by reference to the case of *Bill v. Cureton* (2 Myl. and K. 503). In that case there was a settlement by a single woman in trustees for her own benefit. In a bill, afterwards filed by her for the purpose of setting aside this settlement, the mortgagee of her interest under it was joined as a co-plaintiff. It was held that he could obtain no relief in such a suit. In

giving judgment there, the Master of the Rolls said,—“The purchaser not having the protection of the statute 27 Elizabeth, because there was a settlement of personal property only, cannot have a better title than the settlor from whom he purchased; and if he had a good title in himself, he can have no relief in the suit, having associated himself as a co-plaintiff with the settlor; it having been, in several late cases, decided that under such circumstances no decree can be made, although the plaintiff might, in a suit in which he was sole plaintiff, have been entitled to relief.” Here it is clear that the assignor has no interest in common with, but only adverse to, the assignees, and yet she is made to appear as a plaintiff in respect of an interest, which, if fraud and undue influence did not impeach the transaction, she had entirely transferred to others. This is erroneous in any view of the case. Assuming that the assignment is void, then her interest is adverse to that of the assignees. Assuming, on the other hand, that the assignment is valid, then her interest is entirely gone, and having none, she cannot be allowed to influence that of others. The case of the *King of Spain and others v. Machado* (4 Russ. 225), decided that if of several plaintiffs, [711] some have an interest in the matter of the suit, and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. *Cuff v. Platell* (4 Russ. 242), is to the same effect. Both these cases were decided on demurrer, and it must be admitted that that makes some difference. But other cases establish the same point. In *Jacob and others v. Lucas* (1 Beav. 436), the personal representative of a deceased trustee, together with infants beneficially interested in a fund, were co-plaintiffs in a suit, the object of which was to make the tenant for life, and his interest in the trust funds, answerable for part of the trust funds which the tenant for life had applied to his own use. There were other parties interested in the restitution of the fund who were made defendants. The Court being of opinion that the trustee's assets might, in the progress of the suit, have to be resorted to for the purpose of making good a breach of trust, and that the interests of the personal representative and of the infants would thereby alternately become conflicting, dismissed the bill with costs, on the ground of the misjoinder of the plaintiffs, but without prejudice to any new bill. The same principle was acted on in *Hunter v. Richardson* (6 Madd. 89).

The case here presents itself in an alternative point of view. Either the assignment is good,—is made without undue influence,—and then it must be sustained; or it is bad, and then the assignor's rights must be restored. When the importance of the question is considered, whether Maria ought not, so far as a Court of Equity is concerned, to have her rights kept alive, it is plain that she ought to have the opportunity, as a defendant, of stating objections to this assignment, and not to be prevented from making them by being put into the bill as a co-plaintiff. On this ground alone the bill ought to be dismissed. This view [712] of the case is justified by the authority of *Wake v. Parker* (2 Keen, 59). There a bill was filed by husband and wife and their infant children by their father, as next friend. The bill prayed for the administration of the estate of a testator under whose will the wife was entitled to separate estate. There was a demurrer on the ground of misjoinder, and the Court held the demurrer to be good, and gave leave to amend, by inserting a next friend for the wife and children, and making the husband a defendant. The various interests of the different parties were there ascertained and acted on, and the possible conflict among those interests properly provided for. A similar rule must be applied in this case, and the bill, as now filed, must be dismissed.

Mr. Turner in reply.—If this House should act upon what appears on the face of the bill, it will exercise an original and not an appellate jurisdiction. This bill does not set forth a title in either of the original parties; it sets forth a title in trustees for the benefit of the members of a community, of which Maria M'Carthy is one. There can be no objection to a bill filed by the trustees and the *cestui que trust* for the purpose of recovering from the administrator, who has the control of the property, money which he ought to pay to one or the other. The bill shews the principals of the convent to be trustees, and to sue as such. If Maria M'Carthy had claimed an adverse interest to the trustees, it would have been necessary that the members of the convent should be called on to answer. But here her interests are the same as those of the trustees, for she appears not merely as the assignor,

but as a *cestui que trust*. It is necessary that the assignor should join in the bill, since the title of the trustees, as such, is disputed. This itself is an advantage to the [713] administrator, the holder of the fund, since by the decision in this suit, and without further litigation, the assignor as well as the assignees will be bound. The administrator might otherwise say that he could not pay because the validity of the assignment was in dispute between the assignor and the assignees. It is said on the other side that the assignor has no right or interest, if the assignment is valid. But why has not the assignor an equitable interest in the suit for enforcing her own assignment? Because it is said that the assignment is fraudulent. But if the assignor appears and says that it is not fraudulent, it does not lie in the mouth of the defendant to say that the assignor has no interest and cannot be heard—

[The Lord Chancellor.—They do not say that Maria M'CCarthy has no interest, but that she has an adverse interest.]

That objection cannot be heard from the administrator, whose only interest is that he should be enabled with safety to pay what is undoubtedly not his to retain, but what belongs either to the assignor or assignees.

But how does the case stand with regard to Catherine? She too has made an assignment. She is not a plaintiff but a defendant; she admits the assignment, and desires that effect should be given to it; and then the Court says, effect cannot be given to that assignment as against you. The Court dismisses the bill, and decides in substance that the deeds are void as against the parties who declare their desire to see those deeds receive their full effect. Such a decree is entirely without precedent. It is a new head of equity to hold that, in a bill by M. and her assignee, against an administrator, who is bound to pay to somebody money which is due to all, he may set up a question of right as between M. and her assignee. The joinder of these parties as plaintiffs is for his protection, and cannot be objected to by him.

[714] It is quite plain that the decree is wrong. The course should have been,—if there was a misjoinder of plaintiffs—not to dismiss the bill, but to allow it to be amended, by making Maria a defendant; and then the administrator and the party seeking to impeach the deeds should have been required to file a fresh bill, and the hearing in the first cause should have been suspended till both could have been taken together. As the decree now stands, it must be reversed.

The Lord Chancellor (July 25).—This case, which, no doubt, if we were in a situation to deal with the merits of it, would be one of considerable nicety, must, in the view I take of it, be disposed of without at all entering into or discussing any question on the merits, which may ultimately arise between the parties.

The bill was filed by parties claiming, under an intestacy, distributive portions of the intestate's estate. One of the plaintiffs had entered into a convent, the rules of which appear to have been, that any party becoming a member of that society should devote all the property either in possession, or which might thereafter come to the party so entering the house, for the benefit of the establishment. It appears that after the plaintiff had entered into this religious house, this property devolved upon her, upon which event happening, she, in pursuance of the rule of the house, and of the vow which she had been called upon to take upon entering the house, executed a deed by which that property was transferred to two members of the society, the other plaintiffs, for the benefit—though not expressly upon the face of the deed acknowledged to be for the benefit—of the establishment.

The party administering the estate from which this money was to come, being a brother of the individual upon whom it had devolved, and who had so become a [715] member of the religious house, very naturally felt reluctant to transfer the property, to which his sister was entitled for the purposes to which it appeared to be devoted. Accordingly difficulties were made, and as the sister could not enjoy the property in consequence of those difficulties, arising from the rules of the religious house, and the vow into which she had entered, the rest of the family became anxious that, if she renounced the property at all, she should renounce it for the benefit of members of the family. This raising a difficulty to the obtaining payment of what would ultimately have belonged to the sister, if she had not entered into this religious house, and which does still belong to her, unless she thinks proper in an effectual manner to dispose of it, the bill is filed, not merely by the party entitled to the money

under the intestacy, but also by the persons to whom it was assigned. It is in fact a suit in which they concur as co-plaintiffs; and—what is singular enough, as shewing that the party who prepared this bill must have been aware of the difficulty arising from such a joinder of plaintiffs—the bill sets out the objections made by the rest of the family, and makes the defendants object to the validity of the assignment; and then the bill goes on to charge that it was a proper assignment, that there was no objection to that vow or that undertaking to which the party had come, and that the members of the society for whose benefit that obligation was imposed had a right to the property coming to that individual, and which had been assigned to them in pursuance of that vow. That, however, could make no difference, and therefore it was quite unnecessary to raise that question, because, if the co-plaintiffs, the assignor and the assignees, had properly joined in order to compel payment of this money, it became quite unnecessary to the issue between them and the defendant, the intestate's personal representative; for if they together were competent to sue and to assert their right against the [716] personal representative, the latter could make no objection to the validity of the assignment, and it was therefore, in fact, raising an issue between the co-plaintiffs, which was unnecessary for the purpose of the litigation between the plaintiffs and the defendant.

When this cause was before the Lord Chancellor of Ireland, he was struck, as well he might be, by the position in which the party, a young female, is placed, who, having entered a religious house, is called upon, in virtue of her vow, to transfer all the property to which she might become entitled, for the benefit of the establishment into which she has entered; and thinking that he saw traces, at least, of undue influence, arising from the position in which the party had so placed herself, he declined to administer the claim made on the part of these co-plaintiffs, without resorting to a mode by which, as it appeared to him, the validity of the assignment might be tried. He therefore proposed to direct an issue to try whether the assignment had been executed at the free will of this young person who had entered into this religious house. The issue was not accepted. From the decree, dismissing the bill under those circumstances, this appeal comes to your Lordships' house.

Now, it certainly appeared to me, that whatever ground there might be, and in my opinion really existed, for the difficulty which the Lord Chancellor of Ireland felt in giving effect to this transaction, the mode in which he attempted to get over the difficulty, by enabling the parties to ascertain what their rights really were, was one which was not quite consistent with the course and practice of Courts of Equity; because it appears to me, that this was an issue between the co-plaintiffs, and not between the plaintiffs and the defendant; and that the defendant was equally bound, whether the assignment had been properly [717] executed or not; that he was equally responsible, as the personal representative of the estate, to pay the money to the party entitled, whichever it might be. It might well be that the administrator, seeing the position in which his sister had placed herself, was reluctant to pay over the legacy, knowing the purpose to which it would be applied. If the return to the issue, offered by the Lord Chancellor, had been that the deed of assignment was properly executed, of course, the defendant would have been obliged to pay the money. But he is equally bound, whatever may be the validity or invalidity of this deed, to pay to one or other of the plaintiffs, either to the party originally entitled, or—if it should appear that this transaction is not capable of being impeached—to her assignees, the trustees of the religious house. Therefore, it does appear to me that this mode of trying the question was one which ought not to have been resorted to, and which in its results could produce no beneficial fruits. It is singular enough to have an issue directed where one party has no interest in the matter. The defendant had no interest in the issue thus framed. He could have no interest in the result of the trial; he has nothing that he can claim for himself; he has property belonging to his sister in his hands to be made over to her or to persons claiming through her; therefore I expressed, at the hearing, my opinion that that part of the decree could not be maintained.

But then, another question is raised here, which does not seem to have been much adverted to in the Court below, but which appears to me to be fatal to the present suit. The position of the parties is this:—If the transaction between the sister and the religious house be a valid transaction, then the bill ought to have been filed by the trustees of the religious house. It is not an assignment of a legal right, it is an

assignment in equity of a purely equitable interest; in which case, as Mr. Turner very properly admitted at the bar, the course of practice of Courts of [718] Equity is to file a bill, not by the assignor, who, if the assignment be valid, has no longer any interest in the property assigned, but by the party claiming as assignee. If the assignees, that is, the trustees of the religious house, had filed a bill, then the defendant would have an interest in the question on the issue, because every defendant has an interest in shewing that the party suing him has no interest in the subject-matter of the suit; and it would be a perfectly valid course of defence to shew that this deed was not a deed which a Court of Equity could recognize as giving a beneficial interest to the party claiming under it. But the plaintiffs were afraid of putting themselves into that position; they thought that by joining the assignor and the assignees as plaintiffs in one suit, that question would be evaded.

It so happened that they mistook the rules and practice of Courts of Equity, which, in order to meet questions of this sort, and in order to do justice to defendants, have established a very different rule. Two co-plaintiffs having inconsistent rights, cannot join in a suit. Some doubts have formerly been entertained about that, but it was established and settled in one of the most important causes that ever came for decision before a Court of Equity: I mean the case of *The Marquis of Cholmondely v. Lord Clinton* (see 2 Jac. and W. pp. 26, 55, and 135, where the point is raised; and 4 Bligh, pp. 81 and 124, where it is decided by Lord Redesdale and Lord Eldon, Chancellor). In that case one party claimed as devisee, and another party claimed as heir. Together they might say, and they did say, What is it to you, (the defendant), whether the property belongs to the devisee, or whether it belongs to the heir? It belongs to one or the other, and you ought to shew a preferable right to those who represent the interest vested in either one or other of those parties. But the Lord Chancellor said,—"No. [719] The defendant has a right to know by whom he is to be compelled to pay; and he has a right to avail himself of any infirmity in the title of the party suing him, and he has a right, therefore, to know whether he is to contest the question with the heir or with the devisee."

Now, in this case, in point of principle, the position of the parties is precisely the same; for here are two parties, both of whom cannot be entitled. If the assignment be valid, the assignees are entitled; and if the assignment be invalid, then the party making the invalid assignment is entitled. There are two parties having interests which cannot co-exist—one of them must be entitled to the exclusion of the other; but both concur for the purpose of preventing the defendant setting up an infirmity in the title, either of the one or the other. In order to effect this purpose, the plaintiffs have necessarily run counter to an established rule, namely, that a party having no interest cannot join in a suit with a party who has an interest. If, therefore, what the plaintiffs allege be true, they have put a matter in issue as between the co-plaintiffs, and not between themselves and the defendant; and if it be true that this assignment is valid, then the difficulty is, that a party having no interest in the question cannot join, and there is a misjoinder, which certainly will cause a dismissal of the bill at the hearing, and which, whether taken advantage of at an earlier stage or not, may be taken advantage of at that time. Therefore, according to their own statement, the suit is open to the objection that the issue is an issue between the co-plaintiffs, and not between them and the defendants; and it is open to the other objection, that if what the bill alleges is true, and this is a valid assignment, then one party before the court cannot possibly take any interest in it, and she is, therefore, improperly brought before the court as co-plaintiff.

My Lords, the question between the parties was not [720] disposed of altogether at the hearing, an issue having been offered, which the plaintiffs declined to take, the Lord Chancellor dismissed the bill, and very properly, if the issue had been a proper one; but if the issue was not a proper issue, then that refusal of it could not be a ground for the dismissal of the bill. But I have stated other grounds, which appear to me quite sufficient to justify that part of the decree which dismisses the bill, although not the ground appearing upon the record as that upon which the Court below proceeded.

The Lord Chancellor of Ireland decreed the dismissal of the bill, and reserved the interest of the party entitled under the intestacy, which is tantamount to a decision, that the religious house was not entitled to the money, on the grounds that the assign-



ment was bad. It appears to me that in this suit, with these parties as co-plaintiffs, that was going beyond what a Court of Equity ought to do, because that question could not properly be decided in this suit. It appears to me, therefore, that although it is impossible for your Lordships to sanction this proceeding to the extent of pronouncing any decree which could possibly be operative against the defendant, your Lordships will do right to dismiss the bill, but without prejudice to any parties filing any other bill for the purpose of obtaining payment of that portion of the property to which the sister was originally entitled. The decree, therefore, which I should propose to your Lordships would be, to reverse the decree of the Lord Chancellor of Ireland, so far as it proposed to direct an issue, but to maintain that portion of the decree which dismissed the bill; and instead of reserving the right merely to the party originally entitled, to reserve the right generally to all the parties, to file any other bill for the purpose of obtaining payment of this money.

Lord Brougham.—I take entirely the same view, and did so throughout the hearing, as my noble and learned [721] friend. I think we are not called upon to enter upon the merits of the case in this proceeding, though I certainly have great doubt with regard to something that I have seen of the judgment of the Lord Chancellor upon the merits, respecting the compulsion said to be exercised over a party who is under the influence of a vow voluntarily taken to do something which another shall direct. That is a question which I wish to have no necessity of ever deciding, which, I think, is involved in very considerable doubt and difficulty, and which I am very happy, upon the present occasion, to think that we are not called upon to discuss or dispose of. But upon the ground taken by my noble and learned friend, there can be no doubt whatever that in this case there has been a miscarriage in the course adopted, of directing the issue between the co-plaintiffs; and I take it to be quite clear that advantage may be taken, at the hearing, of the other ground stated, that of the misjoinder.

At the same time that we give this judgment, reversing the decree offering the issue, as my noble and learned friend has justly added, there ought to be a proviso annexed to this judgment of reversal, to the effect that it shall be without prejudice to the right of these parties to institute another proceeding.

Lord Campbell.—I entirely agree with my noble and learned friends with reference to the manner in which this case should be disposed of. I shall most cautiously abstain from giving any opinion upon the important points which have been adverted to with respect to the merits of the case, as to the effect of a person entering into a religious house, now that the Roman Catholic religion is not the established religion of the state, but that certain toleration is granted to those religious houses. I likewise abstain from giving any opinion with respect to the merits of the transaction between the parties. But upon the [722] ground which has been stated by my noble and learned friend, I have no hesitation at all in agreeing that this decree should be in part reversed. It is quite clear, both at law and in equity, if there be a party who has no interest in the suit, he cannot possibly be joined as a plaintiff. If you can join one who has no interest, you may join fifty. Then it is quite clear that, *quacunqve via data*, here is a party joined who has no interest. Although the assignor of a legal interest still has an interest, being trustee for the assignee, the assignor of an equitable interest has no interest whatever. It is quite clear therefore that there is a misjoinder; either the one party or the other has no interest; and consequently, upon that ground, an objection might have been taken in an early stage of this cause; and no doubt it may be taken in this stage, upon the principle laid down in the case to which my noble and learned friend has referred (*supra*, p. 718).

Mr. Turner.—The bill was dismissed with costs, to be paid by the assignees. I apprehend that the direction will now be to strike out that part of the decree, which directs the issue, and the declaration that the Court ought not to grant any relief upon deeds so obtained, and to dismiss the bill generally with costs, without prejudice to any bill to be filed by any of the parties; because the costs are thrown here upon the assignees, which would be necessarily implying that the assignment was wrong and fraudulent.

The Lord Chancellor.—We dismiss the bill on the ground of its having been improperly filed. All the plaintiffs are equally answerable for that, and therefore it must be dismissed with costs generally.

Mr. Turner.—Your Lordships strike out that part of the decree which directed the issue—

[723] Sir Fitzroy Kelly.—Or rather which offered the issue; it is not a direction.

Mr. Turner.—Which offered the issue—your Lordships strike that out, and the declaration that “the court ought not to grant relief upon deeds so obtained,” and dismiss the bill with costs generally, without prejudice to any parties to file a fresh bill.

Sir Fitzroy Kelly.—Exactly; we shall have no difficulty upon that point; your Lordships, I presume, give no direction as to the costs of the appeal.

The Lord Chancellor.—No.

[It was then ordered and adjudged that the decree be varied, by omitting the words, “And the Court offering to direct an issue at law to try,” etc. (*vide supra*, p. 706-7), down to and including the words, “founded on deeds so obtained;” and also by omitting, after “costs,” the words, “to be paid by the plaintiffs, Cecilia Fulham and Margaret Lynch;” and also the words, “which the plaintiff, Maria M’Carthy, or the defendant, Catherine M’Carthy, may be advised to institute, as the next of kin of their father,” etc.; and by substituting, in lieu of the last-mentioned words, the following, “which any parties may be advised to institute in respect of the personal estate of the said Alexander M’Carthy, in the pleadings mentioned;” and it was further ordered that the cause be remitted back to the Court of Chancery in Ireland, etc.]

[724] ANN FARMER (Widow),—*Appellant*; JAMES FARMER,—*Respondent*  
[Mar. 4, 8, 9, 13, and 15, 1847; July 25, 1848].

(Two Appeals.)

[Mews’ Dig. vi. 1760; vii. 410; x. 1468; xii. 918.]

*Conveyances impeached—Fraud—Incapacity—Undue Influence—Acquiescence—Pleading—Parties.*

A bill by A. F., as heiress at law of J. J. and E. J., to set aside conveyances made by them to W. F., of real and personal estates, on the ground of fraud, undue influence, and want of consideration, alleged that J. J.—who was deaf and dumb all his life—was incapable of executing or understanding any deed, and that E. J. was seduced by W. F., and being subject to his authority, executed the deeds without professional advice, and for insufficient consideration, consisting only of a bond of W. F. for securing the price. There was not sufficient evidence of J. J.’s incapacity, nor did the deeds executed by him convey any property descendible to his heirs. The allegations of the seduction of E. J., and of improper influence over her, were not sustained by the evidence, although there was some evidence of an illicit connexion between her and W. F. It appeared also that A. F. had the benefit of the bond given to E. J., and had long acquiesced in and admitted the validity of the transactions:

Held, that the bill was properly dismissed for want of sufficient proof of the charges as alleged, so as to justify the Court to set aside concluded transactions.

Held also, that the want of parties to represent the personal estate comprised in the impeached conveyances, was a fatal defect.

*Semble*, that by an appointment duly made of a whole estate to the uses of a marriage settlement by a party thereto, who thereby also granted and released a moiety only of the estate to the same uses, the entirety of the estate passed.

These appeals were brought against two decrees made by the Vice Chancellor of England in two causes.

The appellant was the widow of William Farmer, and sole surviving child and heiress-at-law of John Jones, and also heiress at law of Elizabeth Jones. The object of the appellant’s suit was to set aside conveyances exe-[725]-cuted by John and Elizabeth Jones to W. Farmer, on the grounds of incapacity, fraud, undue influence, and inadequate considerations. The respondent was the brother of W. Farmer, and heir at law of his only child, Fanny Farmer. The bill, in the second cause, was filed by him to establish the said conveyances, and for partition.

John Jones’s father, who died in 1795, devised his real estate, consisting of a farmhouse and lands, called “The Hill Farm,” in the parish of Suckley, in the county of

Worcester, to trustees, charged with an annuity of £80, for his said son for life, and subject thereto to the use of Ann Jones, the testator's wife, for her life, with remainders over; but he authorized his wife, in case the son should marry in her lifetime, and she should be of opinion that he was capable of taking the management of the testator's real and personal estate into his own hands, to appoint the same to him absolutely, or in such manner as she should think proper, and thereupon the remainders over should cease.

In the year 1800, J. Jones, being then forty-three years of age, was, with the approbation of his mother, married to Frances Ewens, and by a settlement made before the marriage, by the mother and son and the said Frances, of the first, second, and third parts respectively, and by Thomas Jones and Edward Archer, of the fourth part, the Hill Farm estate was limited to the use of J. Jones, for life, subject to his mother's life interest, with remainder, in the events that happened, to the use of the said Frances, the wife, for her life, with remainder on failure of sons of the marriage, which happened, to the use of all the daughters in fee, in equal shares.

The settlement recited that J. Jones, party thereto, was deaf and dumb from his birth, but was of sound reason, and readily communicated his meaning by writing and gestures; and that Ann Jones, his mother, was of opinion [726] that he was capable of taking the management of the estate. By a memorandum annexed to the settlement, signed by John Jones, he certified that the same had been explained to him by his mother and wife, and that he understood its effect.

The only issue of the marriage was the appellant and Elizabeth Jones.

Ann Jones died in 1809, having devised certain freehold and leasehold property (not in question in the appeals) to the appellant, and also bequeathed to her and her sister, the said Elizabeth, £1000 due on mortgage, with directions for accumulation of the interest, until both should attain the age of twenty-one years, the principal and interest to be then divided equally between them; and she gave the residue of her estate to J. Jones, and appointed him and his wife, and the said Thomas Jones and Edward Archer trustees and executors of her will, which was soon afterwards proved by Thomas Jones and E. Archer alone.

Frances, the wife of J. Jones, died in 1816, and Thomas Jones, the trustee, died in 1817.

The appellant was married in 1820 to William Farmer, and by settlement then made, her father appointed the entirety, and granted and released a moiety (for the construction of this deed, *vide post*, pp. 731, 734, and 749) of a small estate, called "Bill's Lands"—which he had purchased in 1813, and was conveyed to him to such uses as he should appoint, etc., with a limitation to a trustee, etc., in the then usual form of conveyances, to bar dower—to himself for life, remainder to W. Farmer for life, remainder to the appellant for her life, if she survived her husband, remainder to the use of the children of the marriage as tenants in common in tail, and if but one child, to the use of that child in tail; with remainder, as to one moiety, to the use of W. Farmer in fee; and as to the other moiety, to the use of the appellant and her right heirs.

[727] This settlement contained a covenant by W. Farmer, that he and the appellant, after she should attain her age of 21 years, would levy a fine of or otherwise assure the moiety of the Hill Farm, to which she was entitled under her father's marriage settlement, subject to his life estate, to the same uses as were by this settlement declared concerning the moiety of Bill's Lands. [A deed was executed by them in 1827, in pursuance of that covenant.]

Annexed to the settlement was a memorandum, signed by J. Jones, that the same had been explained to him.

The property of J. Jones, after the death of his wife, in 1816, was managed under the advice and superintendence of Edward Archer, and on his recommendation, a lease for fourteen years of the Hill Farm, including Bill's Lands, which adjoined the farm, was made to W. Farmer upon his marriage with the appellant, at a rent of £250. The farming stock, implements of husbandry, furniture, and other effects, were taken by him at the same time, at a valuation, for £1200, for payment of which, with interest at five per cent., he gave his note, payable to Edward Archer, then sole surviving trustee of J. Jones's marriage settlement, executor of Ann Jones's will, and trustee with a Mr. Parker, of the appellant's marriage settlement, and also

trustee for John Jones in an agreement in the said lease, whereby it was provided, that during the term thereby granted, W. Farmer should furnish him with board and lodging in the farm-house, for £50 a-year.

From that time [John] Jones, and his daughter Elizabeth,—except while at school,—resided with W. Farmer and the appellant.

Edward Archer, having died intestate, in 1824, Richard Yapp, his nephew, obtained letters of administration of his estate, and was elected to succeed him in the above-mentioned trusts for J. Jones, and Elizabeth, and the appellant.

[728] By indentures of lease, and release and assignment, dated the 28th and 29th of September 1827 respectively, John Jones conveyed his life estate in the entirety of the Hill Farm and Bill's Lands, and also his supposed moiety of the reversion in fee in Bill's Lands, expectant on his own death, to W. Farmer; and he assigned to him all his personal estate—which included the said note for £1200, with interest thereon for four years, and also four years' rent of £250. The consideration for this conveyance and assignment was a bond given by W. Farmer to secure payment of £50 a-year to J. Jones during his life. This was one of the deeds impeached by the appellant.

By indentures of lease and release of the same date, also impeached, Elizabeth Jones, who had then attained her age of twenty-one, in consideration of £2800, conveyed to W. Farmer, his heirs and assigns, her moiety of the Hill Farm, in remainder expectant on her father's death, to which she was entitled under his marriage settlement. By a bond of even date, reciting that it was agreed that the £2800 should remain in the hands of W. Farmer, at interest, and that he was indebted to Elizabeth Jones in an account stated, in the further sum of £2200, making together, £5000, W. Farmer bound himself in the sum of £10,000, to secure £5000, with interest, to Richard Yapp, in trust for her, which trust Yapp afterwards declared to be, in the events that happened, subject to her appointment.

Elizabeth Jones having fallen into bad health, without hope of recovery, in 1828, appointed the £5000 to the appellant, and died in August of the same year.

W. Farmer claimed by his marital right to be entitled to the sum so appointed, and he demanded his bond and a release, which Yapp gave, after getting an indemnity.

William Farmer died intestate in 1833, leaving the appellant, his widow, who took possession of all his property, real and personal, and one child of their marriage, [729] Fanny Farmer, then an infant, his heiress-at-law, who soon afterwards filed a bill by the respondent, her uncle and next friend, against the appellant, administratrix of W. Farmer, for an account of his estate. The appellant in her answer admitted her daughter's title, as heiress-at-law of her father, to the fee simple in possession of one moiety of the Hill Farm, and one moiety of Bill's Lands, and to an estate during the life of J. Jones in the other moiety of Bill's Lands, under the conveyances executed by him and Elizabeth Jones, in September 1827.

John Jones died in 1836, leaving the appellant his heiress-at-law. And Fanny Farmer died in 1839, under age, unmarried, and intestate, leaving the respondent her heir-at-law.

The appellant filed her bill in 1840—amended in 1842—against the respondent, and therein stated, among other things before stated, that in 1827 John Jones was much afflicted, being both deaf and dumb, only capable of communicating by signs, unable to read or write unless some one guided his hand, and incapable, from age and weakness of body and mind, of transacting any business, or understanding the effect of deeds: that his property was managed for him by his mother till her death, afterwards by his wife and the trustees of their marriage settlement until the wife's death, after which, Edward Archer assumed the entire control and direction of him and his affairs, until, in consequence of the arrangement made by Archer with W. Farmer, J. Jones and his daughter Elizabeth, went to reside with him, and thereby he obtained complete power over both, taking advantage of the imbecility of the former, and of the age and position of the latter: that he first seduced her for the purpose of effecting his designs on her property, and she being with child by him, in September 1827, became consequently subject to his authority and influence, and in that state she executed the deeds before stated, which the bill [730] charged to have been prepared by W. Farmer's solicitor from his own instructions, and executed by her without any professional advice; and that by those means W. Farmer obtained possession of all

the freehold estates and other property of John and Elizabeth Jones, without advancing any money, but merely securing by his bonds, sums which were grossly inadequate considerations for the property conveyed. The bill further stated that the appellant did not impeach the said deeds as fraudulent, in her answer to the bill filed against her by Fanny Farmer, because she was desirous to conceal from her the bad conduct of her father, and she submitted that her forbearance in that respect ought not to preclude her, after her daughter's death, from setting them aside as fraudulent.

The bill prayed that the said deeds so executed as before mentioned by John and Elizabeth Jones might be declared fraudulent and void, and that the respondent might be decreed to convey the moieties of Bill's Lands and the Hill Farm to the appellant, as heiress-at-law of John and Elizabeth Jones, and might be restrained by injunction from bringing actions against the appellant for recovering the deeds in her possession, or for recovering possession of the said several moieties of the said estates.

The respondent in his answer said the deeds in question constituted a family arrangement, first proposed by John Jones himself, for the purpose of freeing himself from care, and of disposing of his property in his lifetime, as he would by his will, to make provision for W. Farmer and the appellant and his other daughter: that, although he was deaf and dumb all his life, he was notwithstanding of sound reason, and readily communicated his meaning by writing and gestures: that he was (in 1827) about the age of sixty-eight years, and was more hearty and vigorous, and much more capable of transact[731]-ing business than men of his age and similarly afflicted usually are; nevertheless that attention to business was irksome to him, and he desired to be released therefrom by his said son-in-law, in whom he reposed confidence: that his property, at the time of executing the deed of September 1827, consisted only of his life estate in possession in the Hill Farm and in Bill's Lands, both being of the annual value of £250; and he had no estate in fee in a moiety or in any share of the latter estate, the entirety of that estate having passed by the appointment to the uses of the appellant's marriage settlement of 1820: that his personal estate consisted of the farming stock, etc., valued at £1200. The respondent denied that W. Farmer prevailed on J. Jones or Elizabeth by any deception, undue influence, or any improper means, to execute the said deeds, but the same were executed in pursuance of the family arrangement previously agreed to by them and W. Farmer and the appellant: that J. Jones, considering the £50 secured to himself during his life sufficient for his general purposes, and being desirous to provide a fortune of £5000 for his daughter Elizabeth, it was arranged that W. Farmer should secure that sum to her by bond, in consideration of her conveyance to him of her moiety in reversion of the Hill Farm, valued at £2800, and of a sum of £2200 due from W. Farmer, not to her, as the bond erroneously recited, but to J. Jones, for the farming stock and rent: that the respondent did not necessarily claim any interest in Bill's Lands under the deeds of 1827, having been advised that the appointment thereof by J. Jones in the marriage settlement of 1820 operated to pass the entirety of that estate to the uses of the settlement, although a moiety only purported to be thereby granted and released; but that if a moiety in fee remained vested in J. Jones, the same was effectually conveyed by the deed of 1827 to W. Farmer, and descended to the respondent as heir-at-[732]-law of his daughter and heiress-at-law. The respondent denied that W. Farmer was an immoral man, and that he seduced Elizabeth Jones, or was the father of her illegitimate child.

A cross bill was filed by the respondent against the appellant, praying that the deed of September 1827 executed by Elizabeth Jones, and, if necessary, the deed of the same date executed by John Jones, might be established; and that an account might be taken of the rents and profits of the Hill Farm and Bill's Lands received by the appellant since the death of Fanny Farmer; and that a receiver might be appointed, and partition decreed of the Hill Farm between the appellant and respondent.

The appellant in her answer put her defence on the same grounds on which, in her bill, she impeached the said deeds.

A great number of witnesses (eighty-nine altogether) were examined on both sides in the first cause; and an order was made that their depositions might be read in both causes at the hearing. The examination of the witnesses was directed to the competency of J. Jones for business, and to the conduct of W. Farmer towards him and

Elizabeth Jones. The material parts of the evidence on these points are stated in the Vice Chancellor's judgment.

The causes were heard by his Honour in January 1844, and by the decree made in the first cause, the appellant's bill was dismissed, with costs.\* By the [733] decree

\* The following are extracts from a short-hand writer's notes of the judgment, admitted by the counsel on both sides, to be correct:—

The Vice-Chancellor.—Upon the marriage of J. Jones, a settlement was made, whereby, in the events that happened, the two daughters of the marriage, Ann and Elizabeth, became entitled, as tenants in common in fee, in equal shares to the "Hill Farm" estate. In the year 1813, J. Jones purchased an estate called "Bill's Lands," which was conveyed in the common manner, with a trustee to bar dower, but giving him the general power of appointment, which is found in such conveyances. Upon the marriage of Ann with W. Farmer in 1820, a settlement was made, comprising her moiety in reversion in fee in the Hill Farm; also comprising Bill's Lands; and it was supposed by the parties, that the effect of it was to settle a moiety of Bill's Lands to the uses of the settlement, and to leave the other moiety vested in J. Jones, just as he had taken it by the conveyance of 1813.

Elizabeth Jones attained the age of twenty-one in 1827, and several conveyances were then executed; and, amongst others—besides a conveyance for giving effect to the settlement of 1820, which, as far as Ann was concerned, could only operate as articles upon her estate—there was a conveyance made by J. Jones to W. Farmer, of such estate in the Hill Farm and in Bill's Lands as it was supposed J. Jones had by virtue of his own marriage settlement and of the marriage settlement of his daughter Ann; and there was also a conveyance made to W. Farmer by Elizabeth Jones, of her moiety of the Hill Farm. Part of the consideration which she was to receive for the estate, as appears upon the face of the conveyance, was a sum, for which, together with another sum, a bond was given by W. Farmer, and which bond, having been given to Mr. Yapp, was declared, by a declaration of trust, to be held by him, in effect, according to the appointment of Elizabeth Jones, and she, in July 1828, made an appointment of her interest in the bond after her death, to her sister Ann, and died in the August following. W. Farmer died in 1833, and J. Jones in 1836. There were two children of the marriage of Ann, a son, who died in 1831, and a daughter, Frances, who survived the father. In 1833, soon after the death of W. Farmer, an infant's bill was filed by Frances against her mother, the present plaintiff; and she put in her answer in November in that year. Frances died in 1839.

The present bill was filed in 1840, by Ann Farmer against the defendant, who is the brother and heir-at-law, in the events that have happened, of W. Farmer, for the purpose of setting aside the conveyances of September 1827, executed by J. Jones, and by Elizabeth Jones; and the bill prays that those several conveyances may be declared fraudulent and void, and may be cancelled, and then that there may be reconveyances ordered, and consequential relief. The bill is framed upon the allegation that these conveyances were obtained by fraud; and there is a long statement of circumstances, in order to make out the case of fraud. With respect to J. Jones, it is alleged that he was born deaf and dumb, and there are several allegations to shew that he, in effect did not understand what he was doing, and that he was treated in the most tyrannical manner by W. Farmer; and that W. Farmer exercised various acts of cruelty over Elizabeth Jones also; and that he had both John and Elizabeth Jones completely in his power, and that having them in his power—that is the substance of the case, as I understand it, not that there was any direct circumvention by means of fraudulent representations, but that he, having them in his power—procured them to execute the conveyances in question.

Now, with respect to the conveyance by J. Jones, he had certainly a life estate, which he could part with, but that has ceased by his death; and, therefore, unless he had any estate of inheritance which would pass by the conveyances that he executed, of course there could be no relief as to him; and it struck me at the hearing, that a very material question arises upon the deed of 1820, how far—looking at it both as an execution of the power which F. Jones had over Bill's Lands, and as a conveyance—it had the effect of leaving in him any estate at all in Bill's Lands. I have read it over most attentively, and it does appear to me that the true construction of that deed, is

made in the cross cause, it was declared that the respondent was entitled, under the conveyance by Elizabeth Jones to W. Farmer, to the fee simple [734] in possession of one moiety of the Hill Farm, and the appellant was entitled to the other moiety, and a partition was decreed of that estate; and it was [735] ordered that the appellant

this—that it commences with a limitation and appointment to uses of the whole of Bill's Lands, followed by a conveyance, a grant and release, of a moiety of Bill's Lands to uses; and then, without any further reference, uses are declared, the effect of which is, in the events that have happened, to have made Ann Farmer tenant in fee of one moiety; and that James Farmer, as the heir of William, has acquired the fee simple in the other moiety. The result therefore is, that though the parties supposed that the conveyance would have an effect according to the grant, yet if, in point of law, it took its effect, as I think it did, according to the appointment, the result is, that J. Jones had nothing to convey except his life estate; and that upon his death, the fee simple being wholly vested in one moiety in W. Farmer, has passed to James Farmer, and that the conveyance of 1827 operated nothing as to that supposed moiety of Bill's Lands; and, therefore, whether there was fraud or not exercised in the procurement of the conveyance from J. Jones, it appears to me, that of necessity there can be no relief as to what it was supposed that J. Jones conveyed by the indentures of 1827, and the bill must be dismissed with costs.

But the story that is told by the bill respecting Elizabeth Jones, mixes itself in a great degree with the story about J. Jones; and when I say the bill, I mean to include also the evidence given by the plaintiff, which is most distinct and minute with respect to a vast number of facts, which are not put in issue by the bill. The consequence is, that observations which apply to that part of the case in which J. Jones alone is named, have considerable weight upon the part which relates to Elizabeth Jones; and it is a most striking thing that this case should have been put upon a fraud exercised by W. Farmer upon J. Jones, in respect of his utter incapacity, when it is plain, that when J. Jones married, a settlement was made by his mother, by virtue of a power which she had under her husband's will, which settlement, on the face of it, proceeded on the footing that her son was competent to contract the marriage, and to manage his own affairs. The recital, which is introduced, and which is made to tally with the words in the will of the father, must have been utterly false, and the whole thing a fraud, unless it was taken to be, as we must suppose it would have been in the eye of the mother, a reasonable and fit thing that her son should marry, and that she should make the settlement. If he was so utterly incapable as the bill represents, how happened it, not only that he purchased Bill's Lands, but that he made a settlement of them upon the marriage of the present complainant.

There was another transaction with respect to the sale of J. Jones's farming stock and effects, the benefit of which, it appears, passed to W. Farmer, who died intestate, whereupon the plaintiff, his administratrix, had the benefit of that transaction; and therefore with respect to matters of such great importance as marriage, as purchase, as settlement, as sale of property, all those things are admitted to be valid, and yet the plaintiff, who so admits and takes benefit under them, now states on the face of her bill, that this J. Jones, her father, was all along incapable of taking ordinary care of himself in the common affairs of life. Now, these general observations greatly affect the case presented by the bill and by the evidence, before you come to consider particular parts of it, and naturally induce a reluctance to believe that the things can be true, which are specifically stated for the purpose of supporting the general allegations; for you have the general facts, which quite contradict the general allegations.

With respect to Elizabeth Jones, there is a vast deal of charge in this bill; but it really comes to this, that W. Farmer seduced her, was the father of her illegitimate child, born in May 1828, and at the same time treated her with great cruelty; and that by force, in effect, she was compelled to execute the conveyances which are complained of. Now I have read every word of the evidence given by all the witnesses, both in chief and upon cross-examination; and the evidence, if you believe some of the witnesses, would establish the fact of an incestuous intercourse; but there is not one word of it that proves seduction, and seduction is the thing that is stated, because illicit concubinage may take place without seduction; and it is remarkable that one of the witnesses, a Mrs. Robertson, who is brought forward to prove the fact of seduction,

should pay the costs up to the hearing, and that a receiver be appointed over the Hill Farm, including Bill's Lands, and that he should receive [736] from the tenants the rents from April 1835, when Fanny Farmer died, and pay the same to the appellant and [737] respondent in such proportions as the Master should find they were entitled.

if she proves anything, proves a rape; which evidence, I must also observe is not admissible as against the defendant, because the witness is only stating what Elizabeth Jones stated to her. What Elizabeth Jones stated to her is not evidence against the defendant, but may be evidence for him, and, according to this witness's representation, it is evidence that force was used against Elizabeth Jones, but not that she was seduced. I do not think it necessary to comment on the the evidence that is given of the illicit concubinage; but I must observe that there is a great deal of evidence in favour of the general character for uprightness which W. Farmer possessed, and, in a case where so grave a charge is made, weight ought to be given to the character which a party is proved to have had, independently of the general presumption which the law would make that a party standing in the situation of W. Farmer, is not to be suspected, without strong proof of such circumstances as are alleged against him.

[His Honour then stated and contrasted the depositions of several witnesses who were examined with reference to the paternity of Elizabeth Jones's child, and came to the conclusion that the allegation in the plaintiff's bill that W. Farmer was the father was not proved, and therefore her case failed on that point also. His Honour proceeded.]

With respect to the other branch of the plaintiff's case, that the conveyance by Elizabeth Jones was the result of fraud and intimidation, there is no evidence directly of it, none whatever; but there is the evidence of Mary Jones, a witness for the plaintiff, that Elizabeth Jones told her, speaking of the conveyance, "I have done it in the hope that it will make him kinder to myself and Ann." That is not evidence of fraud or force, but of a spontaneous act, done by herself, for the purpose of procuring greater kindness. But with respect to the mode in which the thing was done, there is a witness altogether not only unexceptionable, but in a remarkable degree credible, from the degree of bad character which he has given to W. Farmer; I mean Mr. Yapp, who, in his answer to the fourth interrogatory, says, "I am unable of my own knowledge to depose, but I have heard and am rather disposed to believe that William Farmer was of a cruel and sanguinary and selfish disposition." Now, who was Mr. Yapp? He was the personal representative of Mr. Archer, who had been the surviving executor of the will of the grandmother, and Mr. Yapp was introduced in his place as a trustee in the plaintiff's marriage settlement, and was the confidential friend of the family; and it appears distinctly from his evidence that he was the principal person who regulated the transactions that took place between Elizabeth Jones and W. Farmer. He appears to have made a minute calculation as to what was the sum proper to be paid; he took into consideration accounts for a considerable period of time; he determined in his own mind that such a sum—I think originally it was £2900, and there is a particular explanation given afterwards why it was reduced to £2800—should be taken as the price of Elizabeth Jones's reversion in the moiety of Hill Farm; he took into consideration what was due upon a promissory note, which had been given to her by W. Farmer and himself, making a very minute calculation; he comes to the conclusion that the transaction should proceed on this footing—that W. Farmer should give a bond to secure £5000. Some acute observations about an error in the account were made in the course of the argument; there may have been error, the thing is not impeached on the ground of error, but on the ground of fraud; and, therefore, supposing there was an error, that, of itself, is no reason for upsetting the transaction.

But it appears, with respect to the error, a lease had been granted of Hill Farm to W. Farmer for £250 a year; that being taken to have been a fair rent, at thirty years' purchase, it would have been £7500, and the moiety of that would have been £3750. I am speaking of the whole estate in possession, at thirty years' purchase, and supposing you had then said that the £2800 or £2900 should have been taken as the value of the reversion of a moiety, is there anything so grossly unfair in that, on the face of it? It really does appear to me, that supposing the fullest value was not extracted, yet Mr. Yapp, the friend of the family, interposing between W. Farmer and Elizabeth



The appeals were against these decrees.

[738] Mr. Turner and Mr. Bacon for the appellant:

Two decrees have been made in a cause and cross-cause, a thing quite unusual, and the appellant has been [739] forced to bring two appeals. Both causes relate to the

Jones, obviously not having any great respect for the character of W. Farmer, but thinking enough about him to see the importance of acting fairly towards Elizabeth Jones, takes the trouble to go through the whole matter, and to fix a price in the way I have mentioned.

This part of the case is also made to rest upon this, that the conveyances were not properly read over and explained. That surmise on the part of the plaintiff is abundantly refuted by the evidence that has been given, both by Mr. Parker and by Dooley. So that here we have got a case in which it is proved, as a matter of fact, that pains were taken by a disinterested person, with a full knowledge of the character of the parties, in order that that might be done which was fair, and the conveyances were executed, not in a hurry, but after full explanation.

[His Honour then, with respect to other allegations in the appellant's bill, referred to the depositions of several of her own witnesses, shewing that some of the deeds complained of, especially the appointment by Elizabeth Jones of the £5000 secured by the bond, were executed in her presence, with her apparent approbation; that she and W. Farmer were always on the most affectionate terms; that she used to speak of him as the best of husbands; and that J. Jones also appeared to regard W. Farmer with respect and affection, and cried for him upon his death.] His Honour added, My opinion is, that upon the substance of the case, the case of fraud as against J. Jones and against Elizabeth Jones is distinctly disproved; not only not proved by the plaintiff, but disproved by the defendant.

Then there is, last of all, this observation to be made, that Ann Farmer files her bill in the year 1840, complaining of all these transactions. She does not pretend to have been ignorant of them at the time of her husband's death, but she represents, that she did not like, as against her daughter, to bring them forward, and the consequence, therefore, is, that in that suit, of the infant Frances Farmer against the present plaintiff, she herself represented that her daughter was entitled to that very estate by descent from W. Farmer, which she now seeks to set aside, because it was not the estate of W. Farmer. Now this is the proceeding of Ann Farmer, that, being contented, during the lifetime of her daughter, to say nothing about these transactions, and not taking that very wise and sensible advice which Mr. Yapp, in his answer to the 48th interrogatory, says he gave her, "that it was not to her interest to prosecute this suit, and that it had better be compromised," she did not choose to follow that advice; nor to consider that it might not be to her interest to prosecute the suit; and still less did she choose to consider that it might not be for her character; because, here you have a woman, in the year 1840, with a deliberate knowledge of these transactions, as it appears upon her own evidence, which, if they ever existed, she must have had, stating as part of her case, that her husband was of so gross and bad a character, that not only did he carry on an incestuous and adulterous intercourse with her own sister, but ill-treated her and the plaintiff, and, moreover, made attempts actually to take away the life of her father. Though some of the witnesses have given evidence of that attempt to suffocate him, it is remarkable that even there the story is not consistent; because upon pursuing the thing, from beginning to end, you find that other witnesses give a different version of the transaction, and represent that old Jones used to run away, from a freak, to hide himself, and that so far from an intention to suffocate him in the tool-house, the object was to get him out by means of suffocation; and therefore the case is not so bad as some of the plaintiff's witnesses would have represented. But nevertheless, for the sake of subverting transactions which took place, as it appears to me, in the fairest manner, the plaintiff has morally destroyed her own character, by coming forward and avowing these most horrid circumstances against her husband, whose character she was bound to protect.

I cannot but think the advice of Mr. Yapp was the best, which she did not choose to follow; but, having thought proper to file this bill, my opinion is that it has failed in all its parts, and that both as to the relief asked with respect to the conveyance by Elizabeth Jones, as well as the conveyance by John Jones, the bill must be dismissed with costs.

same properties, consisting of two estates called "Hill Farm," and "Bill's Lands." The bill filed by the appel[740]lant, which is the subject of the first decree, dismissing that bill, impeached deeds of conveyance executed by John Jones and Elizabeth, his daughter, on the ground of incapacity of the former to understand what he was made to do, and of undue influence and coercion in obtaining the execution of the deeds from the latter; and for want of sufficient consideration, which is applicable to both.

It was sufficiently proved in the first cause that John [741] Jones was not, at the time the deeds of September 1827 were executed, competent to understand the nature of those deeds, or to consent to any proposal or arrangement such as the respondent alleges.

It was pressed in the argument before the Vice Chancellor—and his Honour was also of opinion—that by the appointment of John Jones in the appellant's marriage settlement in 1820, the entirety of Bill's Lands passed to the uses of the settlement, and that, therefore, he had nothing but his life interest in that estate to convey by the deed of September 1827. But the grant and release in the indenture of 1820, and the subsequent limitations therein of Bill's Lands, are expressly confined to a moiety; and that must have been the intention of the parties, there being the two daughters, each was to have a moiety of this estate, as each had of the Hill Farm—

[The Lord Chancellor.—The two parts of the indenture are inconsistent; one part conveys the whole estate, while the other part grants and releases a moiety. Whether that was an error or not, we cannot say. The bill does not ask to correct an error, but proceeds on the ground that the plaintiff is heir-at-law of John Jones. But if he conveyed all his interest to the uses of the settlement of 1820, there was nothing for the heir, and there is an end of the plaintiff's case as to J. Jones.]

If any doubt exists on the construction of the settlement, a case ought to be sent to a court of law for the legal construction of it.

But even on the supposition that John Jones had only his life estate to convey by the deed of September 1827, surely for that interest—for which W. Farmer was then paying £250 a-year—and for his whole personal property an annuity of £50 secured to him for his life by Farmer's bond, was a grossly inadequate consideration. The personal estate included four years' rent—equal to £1000—and the same rent for his life might be estimated at £1000 [742] more at least, to which two sums, if the debt of £1200—for which, with interest, W. Farmer passed his note as being the value of the farming stock and furniture—be added, there would be a round sum of £3200. The consideration for the whole property was board and lodging for J. Jones, and £50 a-year—for half of which, it must be borne in mind, Elizabeth Jones passed her bond to W. Farmer. Could any man of a particle of common sense, deal with his property in that manner? Was any other evidence necessary to demonstrate J. Jones's incapacity for business? He never was considered capable of transacting any business. The recitals to the contrary in his marriage settlement were introduced as of course from his father's will—which in effect declared him incapable—and his property was always managed by others, first by his mother, then by his wife, after whose death, Mr. Archer took the management of it, not for J. Jones merely, but for his daughters as well, until having brought about the marriage of the appellant with W. Farmer, his nephew, he transferred to him the management of the property, and of the family of J. Jones. It was then that the alleged family arrangement was planned by the grant of the lease of the two estates to W. Farmer. after which, both John and Elizabeth Jones became resident in his house, entirely dependent on him, and subject to his authority and influence.

Not content with getting all J. Jones's property without payment of one farthing. W. Farmer also contrived to obtain all the property, real and personal, to which Elizabeth Jones was, or would become, entitled, for a sum of £5000, secured by his own bond. Her moiety of the Hill Farm, in fee, was worth at least three-fourths of that sum. Jointly with the appellant, she would be entitled to the fee simple of the moiety of Bill's Lands on the death of their father, if the entirety of that estate did not pass by his appointment in the settlement of 1820, and if he was incapable—as he clearly was—of making a will, devising [743] it away from them. But besides

these freeholds, Elizabeth Jones was, under the will of her grandmother, entitled to a moiety of a legacy of £1000, with its accumulations since 1809, and to other personal property. She was made to convey and assign the whole of her property for a nominal consideration, in ignorance of her rights, without professional advice, and under the influence of W. Farmer. How he gained that influence is matter of controversy, but the preponderance of the evidence is, that he seduced her before she attained twenty; at all events, had illicit connexion with her, which must be assumed to be the result of seduction, although seduction is not proved. The result of that connexion was this—she became pregnant just at the date of these deeds, and being in that situation, she was unable to resist his designs on her property.

She had an illegitimate child soon after the execution of these deeds; and one would suppose, very naturally, that when on her death-bed, she would appoint to that child the £5000 secured by Farmer's bond, but his influence still prevailing, she made the appointment in favor of the appellant, not excluding his marital right, and, therefore it was an appointment in effect to him. Accordingly, immediately after Elizabeth Jones's death, he exercised his right, and Mr. Yapp, the obligee and trustee in the bond, gave it up to be cancelled. Was not this proof of undue influence as charged in the bill? But W. Farmer was not content with the conveyances, thus obtained without consideration, of the moiety of Bill's Lands from J. Jones, and the moiety of the Hill Farm from Elizabeth, but in further prosecution of his designs, he induced the appellant at the same time, to execute a deed with him, whereby, instead of settling her moiety of the Hill Farm to the uses limited in her marriage settlement of the moiety of Bill's Lands, in pursuance of their covenant in that settlement, it was so settled that she was not to exercise her [744] power of appointment until after his death, which was a clear departure from the purpose of the settlement.

It is the duty of the respondent, claiming title to property under deeds of so suspicious a character, to shew that they were fairly obtained. There was no attempt made to shew that J. Jones, or even Elizabeth, was capable of understanding the deeds of 1827, or that either of them had professional advice, or the benefit of a valuation of the property they were severally made to convey. It appeared to the Vice Chancellor that Mr. Yapp entered into some calculations of the value of Elizabeth Jones's property, but of his evidence, indeed, of the whole of the evidence, his Honour took a one-sided and an erroneous view. All the witnesses were more or less connected with the respondent, and the proper course at the hearing of the cause would have been, instead of dismissing the appellant's bill, to direct an issue or action, in which the witnesses would be subjected to a *viva voce* examination and cross examination—

[The Lord Chancellor.—What form of issue would you have?]

An issue to try whether the deeds were obtained by fraud.

[The Lord Chancellor.—That is an issue to try a point of equitable construction.

Lord Brougham.—If the jury found that there was undue execution of the deeds, there would still be a point of equity reserved. If parties knew how these issues are tried, they would never incur the expence.]

Probably an inquiry before a Master in Chancery would, in this case, be more satisfactory, especially as to the accounts of the rents and the interest.

The second appeal depends on the decision of the House on the first. If the first decree be affirmed, the second decree is of course; but, if the first be reversed, as it is submitted it ought to be, and further proceedings directed, [745] then the second decree must be suspended until the appellant's suit shall be brought to a termination.

Mr. Bethell and Mr. Bird for the respondent:

There never was a case presented to the House with less reasonable cause of appeal than this. There is no ground whatever for the frightful and scandalous accusations contained in the appellant's printed cases. It is impossible not to be disgusted with the charges she brings against her deceased husband.

First, as to J. Jones, the appellant's bill states, and it is part of her case, that he contracted a valid marriage in 1800, made a valid purchase of Bill's Lands in 1813, and did other equally valid acts previously and subsequently, the admission of all which might well relieve one from producing other evidence of his competency to transact business. Her own marriage, while she was under age, and the settle-

ment made thereon, derived validity from her father's consent to the former, and being a party to the latter. The provisions in that settlement in favour of the appellant, and the recitals in it, and in the settlement made on the marriage of J. Jones, ought to preclude the appellant from questioning his competency; yet those deeds are equally as liable to be impeached as the deeds executed by J. Jones in 1827. They, as well as the two marriage settlements, were prepared by Mr. Parker, who was the solicitor and professional adviser of the Jones family for forty-five years, and never knew or heard of W. Farmer till his marriage with the appellant. He was examined as a witness in this cause, and he proves the execution of the deeds in 1827, by J. Jones, and proves his competency at the same time. All the deeds came out of the appellant's own custody, and she derived benefits under them, as it was intended she should. All these deeds were intended by the parties as a family arrangement, by which J. Jones, having but two daughters, disposed of all his property between them as he would by his will. Who could be selected to carry this arrangement into effect for their benefit so proper as the husband of one of them? All the evidence on the part of the respondent proves the arrangement effected by the deeds to have been, under the circumstances, reasonable and proper on the part of Elizabeth as well as J. Jones; that they were both competent to form a judgment, and did, in fact, form a judgment, and approved of the deeds by which the arrangement was effected, under the advice of competent professional and other advisers, and free from all control and improper influence.

There was not a particle of evidence in the large mass of depositions in this case to prove the exercise of any improper influence or authority or coercion over either John or Elizabeth Jones. There was no evidence that she was seduced by W. Farmer; there is some, though not conclusive evidence, that he was intimate with her, but none that he used improper influence over her to obtain this deed; it was her voluntary act.

It is not indispensable, and it is never required in Courts of Equity, that adequate value should be shown to be given in arrangements between members of a family for the disposition and settlement of their property. But there does not appear to be any want of adequate consideration for these conveyances; for as to J. Jones he had no freehold interest beyond his life estate, which terminated before this suit was commenced. There is no doubt, upon the true construction of the appointment in the indenture of 1820, that the whole of Bill's Lands passed to the uses of the settlement; and as to Elizabeth, the £5000 secured to her by bond of W. Farmer included not only the price of her moiety of the Hill Farm and some personal estate of her own, but also part of the personal estate of J. Jones, who was desirous to make up £5000 for her fortune.

These are all completed transactions; they were begun [747] and completed with the knowledge of the appellant, who not only acquiesced in them during and after W. Farmer's death, but upon the latter event entered into possession of all the estates, real and personal, as the widow of W. Farmer, and in her answer to the bill filed against her by her daughter, admitted her title to the real estates in question as the heiress of W. Farmer, thereby admitting the validity of the conveyances; she is therefore estopped from denying the title of the respondent to the same estate as heir-at-law of Fanny Farmer.

The appellant claims as heir-at-law of John and Elizabeth Jones; and her bill prays for a reconveyance of the real estates, but the deeds comprised personalty as well. It is impossible to undo these transactions partially, and if they were to be set aside, restitution of the personalty must be made by the appellant to the personal representatives of John and Elizabeth Jones. She is not their personal representative, and there is no such representative brought before the Court. The statements and allegations in the bill to sustain the relief prayed are inconsistent and contradictory, and are not only not proved by her witnesses, but even disproved by the general evidence in the cause.

Mr. Turner, in reply, again read the evidence as to the capacity of J. Jones, and concluded from it that, though he was not an idiot, he was not able to understand a complicated transaction like the alleged bargain with W. Farmer. With respect to the objection to the frame of the bill for want of personal representatives of John and Elizabeth Jones, the matter stood thus: The appellant made no claim against their personal estates: The bond for £5000 given to Elizabeth was by her assigned

to the appellant, and vested in her husband, upon whose death it would, if it existed, belong to the appellant as his personal representative. She is answerable to his creditors, if any re-[748]-main unsatisfied. She closed the transaction as to the bond by cancelling it. The personal property of John and Elizabeth Jones was all disposed of by the transactions in question; and all that the bill seeks is Elizabeth Jones's moiety of the Hill Farm, for which no consideration, in the events that happened, was ever given. If, however, their Lordships should be of opinion that the personal representatives of John and Elizabeth Jones should be parties to the suit, then let the appeal stand over until the bill is amended. As, however, the Vice Chancellor's decree proceeded on the merits, and the merits were now, as he submitted, displaced, he hoped their Lordships would reverse the decree, or direct an issue for the purpose of ascertaining the capacity of J. Jones, and the value of Elizabeth's moiety of the Hill Farm, and whether the nature of the transactions had been explained to her.

The Lord Chancellor (July 25). -In this case the bill was filed by the widow of William Farmer, to set aside two deeds executed in the year 1827, by one of which it is alleged that John Jones, her father, transferred all his interest in certain property to W. Farmer, her husband, and that by the other Elizabeth Jones, her sister, assigned certain interest which she had, to the same W. Farmer; and the bill seeks to set aside the two conveyances; as to John Jones, on the ground of incapacity and infirmity in him, and advantage taken of that infirmity; and with regard to the property of Elizabeth Jones, on the ground of her having been seduced by W. Farmer, by which great influence and power was obtained by him over her, by means of which it is alleged he induced her to execute the deed in question.

The Vice Chancellor was not satisfied that there was evidence showing that there was fraud and misconduct in obtaining these deeds, and he dismissed the bill. And to that conclusion, to which his Honour came, I entirely assent.

[749] If this case were looked at simply upon the evidence, I think it would wholly fail in showing that a case is made out, which would justify a Court of Equity in interfering to set aside a concluded transaction. But independently of that, there is a very great peculiarity in this case, that for a great length of time, and pending the interest of the daughter of the plaintiff, no attempt was made to complain of the transaction, which is now the subject of this suit. If this property had remained in John Jones, it would have come to the plaintiff, as his heir at law. If it was transferred to W. Farmer, it would then have descended to his daughter. The daughter died in 1839, and up to that period no complaint was made of the transaction in question, nor any attempt made to set it aside.

It may, no doubt, be said that during this period of time the mother was not called upon, and was not very likely to interfere for the purpose of taking, as between her and her daughter, any step to disturb the arrangement that had taken place. But it must be recollected that these transactions related not only to lands, but that a great portion of personalty was included in them, and therefore that opens another question, which I think would of itself have been fatal to this suit, even if the facts had been much stronger than they appear to be.

John Jones, it is alleged, was, at the time this transaction took place, entitled to one moiety of Bill's Lands. It is said that, on the marriage of the appellant, who was entitled by a settlement made on her father's marriage to one moiety of land called the Hill Farm, her father, who was absolutely entitled to Bill's Lands, settled one moiety of that estate on her, reserving the other moiety to himself. The Vice Chancellor in giving his judgment intimated a very strong, and indeed a very conclusive opinion, that the effect of the deed was to settle the whole of Bill's Lands; there being an inconsistency between the different parts of the deed, which operates as an appointment [750] and as a conveyance. If the appointment be looked at, it operates on the whole of Bill's Lands; but when you come to the conveyance, it proposes to deal only with a moiety. The Vice Chancellor was of opinion that, as the proper mode of transferring that interest was by appointment, and the appointment applied to the whole land, the whole of that interest had passed by that deed. If that be so, John Jones had no interest whatever in Bill's Lands, beyond his life interest, to transfer to W. Farmer, by the conveyance of 1827; and therefore if that

transaction were set aside, nothing would descend on his heiress-at-law. His life interest lasted from the year 1827 until the time of his death in 1836. If the deed therefore were void, he would be remitted to his life interest, and the consideration which he received, of course, would be to be returned. That, however, was very small. Upon that transaction the result would be that the personal representative of John Jones would be the party essentially and alone interested in the question if the whole of Bill's Lands passed by the deed of 1820. But even if a moiety of Bill's Lands remained in John Jones after the settlement of 1820, the life income to which he would be remitted by setting aside that transaction, would be a benefit going to his personal representative, and there is no personal representative before the Court. The suit is brought by the heir-at-law alone, alleging that the property was taken improperly from John Jones, which otherwise would have descended on her. But there is no party brought before the Court interested in the question of the personalty which would arise, and necessarily come to be decided, growing out of that transaction.

With regard to Elizabeth Jones, she undoubtedly had a vested interest in one moiety of the Hill Farm; but there is a total failure of evidence to show any oppression or influence used towards her. The property was transferred to her brother-in-law, and there is nothing but the [751] fact, more or less to be believed, open certainly to some doubt, as to the connection which is alleged by the appellant to have existed between W. Farmer and her. But there is a total failure of evidence to show whether that connection had taken place or not, or that there was that degree of oppression used with regard to her as to justify the Court in setting aside the transaction. And with regard to her also, if the transaction should be set aside, then the £5000 which she was to receive, and for which she obtained security, as to the consideration of £2800 for her interest in that property, and as to £2200, a debt alleged to be due to her from W. Farmer, would, of course, have to be dealt with. But the suit does not bring any person before the Court interested in that subject.

Then she assigned her interest in the £5000 to the appellant, and the appellant is claiming it as assignee of the purchase money, and as assignee of the purchase money, she is seeking to set aside the transaction, which is the consideration for the money. How comes she to claim as assignee of the purchase money in the transaction? She does not renounce; she does not repudiate it; she does not say "this is a sum of money which I do not wish to receive, and to which I am not entitled, because it was the result of a fraudulent transaction between my sister Elizabeth and W. Farmer," but she claims as assignee, and takes the benefit of the assignment so long as it is convenient to keep it in that quality, and then, when it is more convenient to her to do so, she seeks to set aside the conveyance from her sister to W. Farmer, but does not bring before the Court any person interested in the question of personalty, which would necessarily arise if that transaction were set aside.

I think the case totally fails upon the merits. I think that there is a deficiency of evidence to show that the transaction ought to be set aside; and I am of opinion also [752] that, from the way in which this suit is framed, it does not resolve itself into a mere question of want of parties, but into misapprehension of the shape and form in which the claim ought to have been brought forward; on both grounds I think the decree below was correct, and that your Lordships would do right to affirm it with costs.

Lord Brougham.—I have no doubt whatever upon the question of fact that the Vice Chancellor of England has come to a right conclusion, and that this decree ought be affirmed with costs.

With respect, in the first place, to the capacity of John Jones to make the conveyance which he did, and with respect to the validity of that conveyance under the circumstances, I have no doubt whatever upon the facts.

With respect to what is set up about Elizabeth, that she yielded to the pressure of extraordinary influence from W. Farmer, in consequence of the connection said to have subsisted between them, it did not appear to me, on the evidence, at all clear that that connection did exist. But supposing it did, it does not at all follow, from admitting the connection, that therefore she should be so entirely under that influence. It was not of that nature to make it a necessary consequence that what she had done ought to be made void; even admitting it to have been proved, which I do

not think was sufficiently proved, that she was under that influence, and that that influence was exerted over her. It is upon these grounds that I have no doubt that we ought to affirm the decree of the Vice Chancellor.

With regard to another point; I had, at one time during the argument, some little doubt with respect to the point upon which my noble and learned friend seems to be entirely of opinion with the Vice Chancellor, namely, with respect to the appointment extending over the whole of Bill's Lands, and the conveyance which extended only to the moiety. That is a very material point, no doubt, in the case, whether, independently of the question as to the [753] condition of J. Jones to make the conveyance, and as to the free will of Elizabeth, or the pressure upon her, there was sufficient in the present frame of the suit to justify the decree. Upon that I had some little doubt, but that doubt is very much removed, first, by considering the very clear and unhesitating opinion which his Honor expressed upon that, and secondly, by the opinion of my noble and learned friend, who appears to go along with the opinion of the Vice Chancellor. It is unnecessary for me to say more upon that question, than that, whichever way you dispose of that question, it appears to me there is enough to sustain the decree below, without deciding that question, because the decree cannot be set aside unless we are against the Vice Chancellor upon both the other points; we must be against him upon the ground of John Jones's conveyance not being valid, and upon the ground of Elizabeth Jones's conveyance not being valid in consequence of the pressure exercised upon her mind at the time; but being for the decree on both those points, the other point, respecting the moiety, becomes comparatively immaterial, even if we were against the Vice Chancellor upon it. I have no hesitation whatever in recommending your Lordships to affirm the decree, with costs. This is a mere question of fact and circumstantial evidence, and when the Court has given an opinion one way, we are not likely to reverse it, unless we were quite sure that it was wrong.

The Lord Chancellor.—There were two appeals. Who was the plaintiff in the second cause?

Mr. Turner.—James Farmer, the respondent, claiming under the deeds for a partition of the estates.

The Lord Chancellor.—The decree in that cause is of course, being for a partition, assuming the property passed to W. Farmer, and the appeal against that also must be dismissed with costs.

It was ordered that both appeals should be dismissed, with costs.

[754] WILLIAM HENRY KING,—*Plaintiff in Error*; JOHN SIMMONDS, and Others,—*Defendants in Error* [March 15, 1847; August 4, 1848].

[*Mews'* Dig. ii. 20; viii. 384. S.C. 12 Jur. 903; and, in Ex. Ch. 7 Q.B. 289; 14 L.J. Q.B. 248; 9 Jur. 761.]

*Bankruptcy—Trading—Interpleader—Feigned Issue—Writ of Error.*

If a writ of error does not lie in a particular case, the Court of Error may properly—upon a rule obtained for that purpose—order the writ to be quashed.

A writ of error, alleged error in the judgment in “an action on promises.” The transcript of the record shewed that the judgment was given, not in an action on promises, but on a feigned issue: Held, that this was a fatal variance, and that the Court of Error was warranted in quashing the writ.

A person who keeps a lodging-house, and supplies the lodgers with food and wine, is a trader within the meaning of the bankrupt laws.—Per Lord Brougham.

A writ of error will not lie on a judgment on a feigned issue directed under the Interpleader Act.—Per Lord Brougham.

This was a writ of error, on a judgment of the Court of Exchequer Chamber, by which a writ of error brought in that Court upon a judgment of the Queen's

Bench had been quashed (14 Law Journ. N.S., Q.B., 248; 7 Q.B. 289). The main question intended to be raised, was on the construction to be put upon the statute 1 and 2 W. 4, c. 58.\* The circumstances out of which the case [755] arose were these:—A person named Emily Ann Birch, had carried on the business of a lodging-housekeeper, and being, as it was alleged, indebted to William Henry King, and the debt being secured by a warrant of attorney, he had issued a *fiery facias* against her goods, and taken them in execution. A fiat in bankruptcy had been issued [756] against her by certain persons who were her creditors, and their rights, and those which King alleged he possessed, came into competition. The sheriff applied to the Court, under the Interpleader Act, and Lord Denman, sitting at chambers, on the 14th of March, 1842, directed a feigned issue under the 1 and 2 Wm. 4, c. 58, to be tried between the parties, the questions or issues in which were afterwards amended by an order of Mr. Justice Coleridge. The declaration in this feigned issue was in the following form:—

Middlesex to wit, George Gibson,† John Simmonds, etc., the plaintiffs in this suit, assignees of the estate and effects of Emily Ann Birch, a bankrupt, according to the statutes in force concerning bankrupts, by, etc., complain of William Henry King, the defendant in this suit, in pursuance of a certain order, made by the Right Honourable Thomas Lord Denman, on the 14th day of March, in the year of our Lord 1842, under and by virtue of the 2nd section of a certain act of Parliament in a certain cause wherein the now defendant was plaintiff, and the said Emily Ann Birch was defendant, whereby it was ordered, ‘That the sheriff do pay the proceeds of the execution therein into court in five days; that an issue be tried, in which the claimants or assignees, when chosen, should be plaintiffs, and the execution creditor defendant, and the question of costs was thereby reserved.’ And in pursuance of a certain other order made by the Hon. Mr. Justice Coleridge, in the said

\* 1 and 2 W. 4, c. 58. The preamble to which recites,—“Whereas, it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in Equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expence and delay.” The section then goes on to enact, that upon application by a defendant, “in any action of assumpsit, debt, detinue, or trover,” stating that the right in the subject matter is in a third party, the Court, or any judge thereof, may order such third party to appear and maintain or relinquish his claim, and in the meantime stay proceedings in such action, and finally, to direct a feigned issue, or, with the consent of the plaintiff and such third party, to dispose of the merits in a summary manner, and to make such rules and orders as to costs as may appear just and reasonable.

Sect. 2 declares “that the judgment in any such action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.”

The sixth section, reciting that difficulties sometimes arise in the execution of process by reason of claims by assignees, etc., “whereby sheriffs and other officers are exposed to the hazard and expence of actions, and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers,” enacts that it shall be lawful for the court to call before it the parties, and to make such rules as shall appear to be just, and the costs are to be in the discretion of the Court. (The 1 and 2 Vict., c. 45, s. 2, reciting this enactment, gives to “any Judge” of one of the Courts at Westminster, the same power that is here given to the Court.) The 7th section (1 and 2 W. 4, c. 58) directs, “That all rules, orders, matters, and decisions, to be made in pursuance of this act, etc., may be entered of record;” and “every such rule or other order so entered, shall have the force and effect of a judgment except only as to becoming a charge on lands, etc.;” and if the costs shall not be paid, a *fi. fa.* or *ca. sa.* may issue for them, and the sheriff shall be entitled to his fees thereon, “as upon any similar writ grounded upon a judgment of the Court.”

† Mr. Gibson died shortly afterwards, and all the proceedings were continued in the name of Mr. Simmonds and the other assignees.



cause, on the 14th day of July, in the year of our Lord 1842, whereby it was ordered, 'That the order made in the said cause by the Right Honourable Lord Denman, on the 14th day of March, 1842, be amended, by directing that the issue to be tried be as to the liability of the goods to be seized at the time of the levy, and as to the title of the assignees thereto. For that [757] whereas."—The record proceeded in the usual form, setting out the declaration, the issues, the *venire distringas*, etc., and alleging a promise by the defendant to pay £10 if the goods were liable to seizure, and a breach of that promise. King, by a plea in the usual form of a plea to an action, admitted the promise, but denied that the goods were liable to seizure. By a second plea he denied the title of the plaintiffs as assignees.

The trial of the issues thus directed came on before Mr. Justice Wightman, at Westminster, at the sitting after Hilary Term 1843. The facts that Emily Ann Birch was a lodging-housekeeper, and that she supplied food and wines to her lodgers, having been proved, the question was argued whether such a lodging-housekeeper was, under the 6 Geo. 4, c. 16, s. 2,\* liable to a fiat in bankruptcy. The learned Judge held the affirmative, and so directed the jury. The counsel for King, the plaintiff in error, tendered to that direction a bill of exceptions, which was duly received and sealed by the Judge. The verdict was then taken for the plaintiffs.

The *postea* set out the finding in the following terms: "And the jurors assess the damages of the said plaintiffs by reason of the not performing the within mentioned promises and undertakings, over and above their costs and charges by them about their suit in that behalf expended, to 1s., and for those costs and charges to 40s." There was then a prayer and an award of judgment in the usual form: "It is considered, etc., that the said John Simmonds, etc., do recover against the said W. H. King their damages, costs, and charges by the jurors aforesaid, in form aforesaid assessed."

Judgment on this finding was entered up by the Court of Queen's Bench, in May 1844, in accordance with the [758] learned Judge's direction; and King then brought a writ of error in the Exchequer Chamber. Before the case came on for argument upon the writ of error, the defendants in error obtained a rule (7 Q.B. Rep. 292 n) to quash the writ, upon the ground that in a proceeding under the 1 and 2 W. 4, c. 58, it was not competent to either party in such proceeding to tender a bill of exceptions to the Judge's charge, or to bring a writ of error on the judgment of the Court. In answer to this objection it was insisted on the part of King that the Court of Error could know nothing but what was disclosed on the face of the record, and that by the record, the proceeding appeared to be a regular action of assumpsit commenced by writ of summons. The Court of Exchequer Chamber enlarged the rule for the purpose of enabling an application to be made at chambers to Mr. Justice Wightman to amend the record conformably to the fact. This application was discussed at chambers, and his Lordship directed the amendment to be made "by striking out the recital of a writ of summons therein, and reciting instead thereof the Judge's orders directing the said issue to be tried; and that the plaintiffs be at liberty to amend the record accordingly, adding that the orders were made under and in pursuance of the statute." King then obtained in the full Court a rule to shew cause why this order should not be discharged, but, after argument, that rule was itself discharged, with costs, and the record was amended in the manner directed by the order. The rule which had, in the first instance, been obtained by the defendants in error to quash the writ of error, and which had stood enlarged during the discussion of these interlocutory orders in the Court of Queen's Bench, then came on to be heard in the Exchequer Chamber. The judgment of that Court was pronounced by Lord Chief Justice [759] Tindal, to the effect that no writ of error would lie on a proceeding by interpleader, and that the Court of Exchequer Chamber had authority to quash such writ if improperly brought (7 Q.B. 289-309).

The present writ of error was then brought against that decision.

Mr. Pashley for the plaintiff in error:

The substantial question on the record is whether, by implication to be collected from the act of Parliament, the common law right of the subject to a writ of error

\* Where, among the persons enumerated as liable to the bankrupt laws, are "keepers of inns, taverns, hotels, or coffee houses."

can in this case be taken away. The act on which this proceeding is founded is that of the 1 and 2 W. 4, c. 58; and the great reliance of the other side must be on the argument to be deduced from the phrase in the first section, which empowers the Court or a Judge to dispose of the claims of the parties, and "to determine the same in a summary manner." But this phrase is governed by the preceding words, "with the consent of the parties," and does not apply to the general provisions of the statute. The argument must therefore depend on the general principles of the law, and the case cannot be determined on the particular words of the statute alone.

The rule of law is, that the right to any common law benefit, where a new mode of proceeding is created in a Common Law Court, cannot be taken away but by express statutory provision. Such is the rule laid down by Lord Mansfield in *Hartley v. Hooker* (Cowp. 523). It was adopted in *The King v. Hube* (5 T. R. 543), and again in *The King v. Wadley* (4 M. and S. 508). In *Albin v. Pyke* (4 Man. and Gr. 421), notwithstanding the strong words of the act 5 and 6 W. 4, c. 23, it was held [760] that the jurisdiction of the Superior Courts was not taken away.

[Lord Campbell.—What is the meaning of the words, "final and conclusive" in the second section?]

Final and conclusive on the Court, and as to the Court which pronounced the judgment, but not final and conclusive on the matter, so as to prevent the party from bringing his writ of error.

[Lord Brougham.—But in all cases the judgment is binding on the Court which pronounced it.]

The words in this act are of the same import as like words in other acts, but they cannot be allowed by the mere force of implication to take away the right of the subject to appeal to a Superior Court. The principle of law is distinctly stated in *Groenvelt v. Burwell* (1 Salk. 263) by Lord Holt, who said, "whenever a new jurisdiction is erected by act of Parliament, and the Court or Judge that exercises this jurisdiction, acts as a Court or Judge of Record according to the course of the common law, a writ of error lies on the judgment."

It may therefore be assumed that the rule is that a writ of error will lie on any judgment of a Court of Record, and the question consequently comes to this, whether the judgment in this issue is an exception to that rule. Now that question is in some degree answered in the case of *Bullen v. Michell* (2 Price 399, 417 n). There the question was, whether a bill of exceptions would lie even in the case of an issue out of Chancery, and Mr. Baron Wood observed, "I own I think a feigned issue does not differ from any other action, and that when once it gets into a Court of Law, it is subject to all the rights and remedies that other actions are."

[Lord Brougham.—That certainly is not true; there [761] is no writ on which it is founded; you cannot move in the Court of Law for a new trial; there is nothing in common between an issue and an action except the mere form; you cannot demur in an issue.]

It must be admitted that in many respects there is a wide difference between an issue and an action, but the ultimate rights of the parties interested must be the same in both. The distinction between them is explained fully in *O'Connor v. Malone* (6 Clark and Finnelly, 572).

But even in the case of an issue from a Court of Equity, when a verdict is unsatisfactory, it may be set aside; *Tatham v. Wright* (2 Russ. and Myl. 1; 1 Ad. and El. 5, n. a.) That was done likewise in the case of *Giles v. Grover* (1 Clark and Finnelly, 72), where the proceeding was on a feigned issue. In *The King v. Giles* (8 Price, 293), there had been an information in the nature of an action for a false return to a writ of extent. A writ of error was brought on that judgment, but the Chief Justices before whom the case was to have been argued, having objected to the form of the proceeding, and on that ground having reversed the judgment, a feigned issue was framed, a special verdict was given, and an argument on that took place in the Exchequer Chamber on the verdict given on that issue (1 You. and J. 232). The case was afterwards brought to this House upon a writ of error (1 Clark and Finnelly, 72).

[Lord Campbell.—The proceeding there was specially directed for the purpose of putting the question on the record. Every thing that was done was by consent for that very purpose.]

[Lord Brougham.—Besides which, *The King v. Giles* was a common law case.]

The same course was pursued in *Snook v. Mattock* (5 Ad. and El. 239, 242), the issue was directed by a Court of Law, and the Court [762] of Exchequer Chamber having quashed the writ of error, the Court of King's Bench intimated an opinion that the Court of Exchequer Chamber was wrong. That point, however, was not finally decided, but it is remarkable that, in delivering the judgment in which the Court of Exchequer Chamber directed the writ of error to be quashed, Lord Lyndhurst, C. B., expressly speaks of (5 Ad. and El. 243) "a bill of exceptions on a feigned issue" as something which might properly be made the subject of a writ of error. And Mr. Baron Parke had before remarked that the Court had "previously entertained a bill of exceptions on a feigned issue."

[Lord Brougham.—That is impossible in a feigned issue from Chancery. The Court of Chancery knows nothing of a bill of exceptions. His Lordship, at a subsequent part of the argument, again referred to this point, and added: The case on which Mr. Baron Parke must have relied can be no other than that of *Armstrong v. Lewis* (2 Cr. and Mee. 274), but there it appears from the proceedings in Chancery that it was argued in the Exchequer Chamber by consent only; for the Master of the Rolls (See *Armstrong v. Armstrong*, and *Armstrong v. Lewis*, 3 Myl. and K. 45, 52) who had directed the issue "considered that no bill of exceptions would lie in such a case, and that an application ought to have been made to him for a new trial of the issues; but it being deemed expedient by both parties that the question of law should be brought before the Exchequer Chamber upon such bill of exceptions, the objection to its regularity was waived."]

But the rule as to issues from the Court of Chancery does not apply decisively here. It cannot be doubted that a bill of exceptions will lie as of right upon an issue directed by a Court of Law, under circumstances such as existed in *The Queen v. Marriott* (12 Ad. and El. 35 n (c)).

[763] The construction given to the statute of Westminster 2 (Stat. 13 Edw. 1, c. 31), on the subject of bills of exceptions, furnishes a good analogy for that which ought to be put upon this statute. It has been a liberal, not a restrictive construction. On the words of that statute, "If any one shall be impleaded before the Justices of either Bench," it has been held that the Court of Exchequer was included. That instance justifies the argument, which is further confirmed by Lord Coke's Commentary (2 Inst. 427), where it is said that error lies on all judgments of a Court of Record. In a case of this kind the proceeding has the form of an action, and a judgment is entered up.

In *Cooper v. The Lead Smelting Company* (9 Bing. 634), which was an issue directed by the Court under the Interpleader Act, the Court said that it had no jurisdiction to proceed without a judgment being signed on the feigned issue; and in *Strother v. Hutchinson* (4 Bing. N. C. 83), the Court of Common Pleas held that a bill of exceptions would lie upon a non-suit in a County Court. In delivering judgment in that case, Lord Chief Justice Tindal noticed that the words of the statute would appear to confine its provisions to the Court of Common Pleas alone, but that the Court must construe the act in the spirit of Lord Coke's Commentary, which had been uncontradicted to the present day, and that it was every day's practice to hold that the statute extended to the Queen's Bench and Exchequer; and he then decided that a Judge improperly directing a nonsuit, was one of those errors in judgment at a trial that fall within the provisions of the act. That principle of applying a liberal construction to the act was not for the first time adopted in that case; for the same rule had been applied in *Bulkeley v. Butler* (2 Barn. and Cr. 434, 445) by Mr. Justice [764] Best, who expressly stated that the statute having been passed to relieve parties from hardship, ought "to receive a liberal exposition."

There are only two instances in which it has been held that the statute of Westminster 2, does not apply. The first was Sir Harry Vanes's Case (1 Lev. 68; 1 Siderf. 84; 1 Kel. 15), where it was said not to apply to criminal proceedings.

[Lord Brougham.—But that is now given up. The question was fully considered in the *King v. Crevy* (M.S., and see 6 How. St. Tr. 132 n.), and the statute was distinctly held to apply to misdemeanors.]

The other instance was that of a summary proceeding before Justices at Quarter

Sessions; and it was held in *The King v. The Inhabitants of Preston-on-the-Hill* (Can. Temp. Hard., K. B. 249), that it would not lie to the Queen's Bench in such a case.

[Lord Campbell.—Here the question is not as to a bill of Exceptions, but to a writ of error.]

But the construction of the statute as to one, assists the argument as to the statute which applies to the other. A Judge at chambers cannot determine a course of proceeding which shall take away the right of coming here.

[Lord Campbell.—Is it not in the discretion of the Judge either to direct an action or an issue?]

It may be; but that fact is sufficient to shew that, in one as in the other, the same practice must exist, and the same rights be capable of exercise, otherwise the discretion would amount to a power, by the mere will of a Judge at chambers, to change the nature of a remedy.

[The Lord Chancellor.—There is a marked distinction between an issue in Chancery and an issue under this act, for in Chancery, the issue really does exist, and the proceeding by trial is merely a proceeding to inform the mind of the Court respecting it; but here the original proceed-[765]-ing, which is against a stakeholder, does not raise the same question, nor raise the question between the same parties as the feigned issue does. I do not well see how this could be brought under review, if the feigned issue is merely directed to let the Court know what is the verdict of a jury upon a particular set of facts.]

It was assumed by the Exchequer Chamber that an action was a proceeding by writ, and that an issue, not being founded on a writ, was not an action. But that argument cannot be maintained. In all its forms an issue is an action, throughout these proceedings it is called "a plaint;" and the record states that "Simmonds complains of King in this suit;" and the defendant pleads that "the plaintiff ought not further to have or maintain his aforesaid action thereof against the defendant."

[Lord Campbell.—But the record shews that all this was done under the direction of the Court.]

It does so, but it also shews that there was a plaint which brings it within the description of an action at law, and all the incidents of an action at law then attach upon it.

A feigned issue under a local act has been treated by the Court of Common Pleas like an action of assumpsit, for the purpose of the costs: *Earl Fitzwilliam v. Maxwell* (7 Taunt 31).

[Lord Brougham.—That has nothing to do with the matter. You cannot say that the costs here or in an issue from Chancery would be within the statute of Gloster.]

But that case shews that a feigned issue has been treated by a Court of law as falling, for one important purpose at least, within the general term, action. If so for one purpose, why not for another?

Then, as to the quashing the writ; the word "action," which the proceeding is called in the plea, is sufficiently [766] large to include every proceeding at law, whether of a criminal or a civil nature; and there is no variance here between the writ of error and the record which brings it up, for the word action is the same as plaint or as issue. It certainly includes them both. But if there had been any such variance, then it was the duty of the Court below to amend and not to quash the writ of error. The case of *Tolson v. Kaye* (6 Man. and Gr. 536-590), is not an authority the other way, for there, an issue of fact remaining undecided, the record was on the face of it, defective in matter of substance, and therefore the writ was properly treated as prematurely issued, and was quashed, because in fact, there was no final judgment on which it could operate. In *Metcalf's Case* (11 Rep. 38 a.), it was held that, in account, no writ of error lies upon a judgment *quod computet*, before final judgment; but in reporting the case, Lord Coke expressly, and with great formality, declares that "of such awards which tend *ad tali grave damnum* of the party, a writ of error lies, although the principal judgment was never given." And in Bacon's Abridgment (Bac. Abr. Error, A. 2) it is said that the writ lies on "an award in the nature of a judgment;" and this instance is given, "If a man is indicted for felony, and thereupon a *capias* and *exigent* are awarded, but he dies before any attainder, his administrators may have error upon this award of the

*exigent*, because by the award of the *exigent* his goods were forfeited, and this is *ad grave damnum*, though the principal judgment can never be given."

The course hitherto has been for the Courts to refuse to quash, on motion, proceedings which, if thus quashed, leave a party without any remedy. In *Saunders v. Fortescue* (1 Wils. 256), the Court refused to stay proceedings on a writ *de homine replegiando* brought against the defendant for detaining the plaintiff's wife, though after appearance, [767] and before plea, the wife had died. The principle on which the Courts proceed in that and similar cases, is stated by Lord Chief Justice Tindal, in giving the judgment of the Court in *Davies v. Lowndes* (13 Law J., C. P. 221; 2 Dowl. and L., 272), where he said, on a motion to quash a writ of right sued out after the 3 and 4. W. 4, c. 27, that a similar application had been made to the Lord Chancellor, but that "the Lord Chancellor (*Davies v. Lowndes*, 1 Phill. 328, 336, 341), after expressing an opinion, in terms which it is impossible to misunderstand, that the writ was not maintainable by law, upon the ground of the first objection, declined however to act upon that opinion by quashing or setting aside the writ, on the ground that the same objection might be raised upon the record in an ulterior stage of the proceedings." His Lordship added, "the same objections have been raised before us, and we have come to the same conclusion as that adopted by the Lord Chancellor, and for the same reason, namely, that we ought not, upon a summary application, from which there can be no appeal, to decide upon a question which involves the final determination of the rights of the parties, when the very same question may be raised on the record, and thereby, not only the judgment of this Court be obtained, but, if thought necessary, the judgment of the Court of ultimate appeal."

It is submitted, therefore, that on general principles of law, a writ of error will lie in this case; that the particular words of the statute do not deprive the party of the right to bring error, and that the supposed variance between the record and the writ does not affect the case, and if it did, that the writ ought to have been amended and not quashed.

The Lord Chancellor intimated the opinion of the House to be that if the writ of error did not lie, the Court below was right in ordering it to be quashed.

[768] Mr. Crompton for the defendant in error:

The record here declares that the action is brought on a feigned issue under the direction of a single Judge. That distinguishes the present case from *Snook v. Mattock* (5 Ad. and El. 239), where the hesitation of the Court to quash the writ arose plainly from the fact that the record did not disclose the objection to the maintenance of the writ. There is no necessity to go into the general doctrines of law or equity. The terms of the statute shew that the writ of error will not lie. The purpose of the act was to put a feigned issue arising on an interpleader under the statute, on the same footing as a feigned issue from the Court of Chancery. The preamble expressly refers to the bill of interpleader in Equity, and proceeds to provide against a third party being compelled to go into Equity, by providing that he shall, by the act of the Court, be relieved upon application to the Court. Throughout the act it is plain, that in the Common Law Courts, as in the Court of Chancery, the sole purpose of the proceeding was to inform the mind of the Court. The party to the issue does not recover a substantive verdict. The judgment to be entered up is, not that he shall recover the subject matter of any suit, but that he shall recover one shilling.

This writ of error cannot be maintained: first, because there are no writs of error allowed on like proceedings in Equity, and these proceedings in interpleader are assimilated to proceedings in Equity, and must follow the same rules, unless the Statute of Interpleader actually gives a writ of error, which it does not; secondly, because there is a variance between the record and the writ; and, lastly, it is submitted, that as no writ of error can lawfully be maintained, the Court of Exchequer Chamber did right in quashing the writ. The House has already relieved the defendant from the necessity of maintaining the last proposition.

[769] In feigned issues, directed by the Common Law Courts, as in feigned issues from Chancery, the form used to be that of a wager, but that form is now abandoned; and the record distinctly states that the Lord Chief Justice desires to be informed, etc. It is said, that notwithstanding this form, it is a rule of law that a writ of error

is maintainable on all judgments at law, and that the judgment in such an issue is not an exception to the rule. That statement is erroneous. There is no judgment, properly so called, in such a proceeding. The Judge merely desires to be informed of a certain fact, and his decision on that information merely affects a matter of costs. Now, no writ of error or appeal will lie to this house on a simple matter of costs. In case of *Giles v. Grover* (1 Young and Jervis, 232; 1 Clark and Fennelly, 72), which was an information, in the nature of an action for a false return to a writ of extent, the proceeding, by a feigned issue, was arranged by consent of the parties, and this question could not therefore arise, nor did it ever occur till the case of *Snook v. Mattock* (5 Ad. and El. 239). There the question came, for the first time, directly before the Court, and the Court of Exchequer Chamber quashed the writ. It is said that Mr. Justice Patteson afterwards expressed some doubt as to that course of proceeding; but his words are (*id.* 249)—“It is unnecessary to give any opinion on the power of the Court of Exchequer to quash the writ of error, as to which I entertain some doubt;” and these words apply not to the question of such a writ lying in such a case, but to that of the particular mode adopted by the Court of Exchequer to put an end to it. As to that, however, it is submitted that the Court of Exchequer Chamber was right.

It is admitted that a bill of exceptions will not lie on a feigned issue from the Court of Chancery. Then why should it lie on a feigned issue from any other Court? [770] Where is the distinction between the two cases? There is none. Other cases likewise furnish an analogy against the maintenance of a writ of error upon an issue under the Interpleader Act. In the instance of the Joint Stock Bank Act, there were questions as to the mode by which the members of a company could be made parties to the proceedings. The act says that execution may be sued out against the members, but the question was, how this was to be done; whether by *sci. fa.* or by suggestion entered on the roll. As to the latter, it was answered that that could not be done satisfactorily without an issue, and if there was an issue there would not be the means of trying the decision of that by a writ of error, and that was the reason why the Courts decided that the proper form of proceeding was by *scire facias*; *Cross v. Law* (6 Mee. and W. 217, 223). In that case Lord Abinger, in giving the judgment of the Court, thus explained the reason why the Court preferred the proceeding by *scire facias* to that by suggestion: “We think this case is of too much importance for us to put any construction on the act of Parliament by which parties who might wish to take the opinions of all the Judges would be prevented from doing so.”

In *Dickinson v. Eyre* (7 Dowl. P. C. 721), the Court of Queen’s Bench decided that a verdict on a feigned issue, under the Interpleader Act, must be entered up as the seventh section of that act directs, and therefore a judgment signed in the ordinary manner was set aside by the Court. That itself is a decision which shows that a writ of error will not lie on such a judgment, which is one of a peculiar and not of an ordinary kind, and it disposes of the case of *Cooper v. The Lead Smelting Company* (9 Bing. 634; 1 Dowl. P. C. 728; 3 Moore and S. 310), which, when properly examined, only appears to decide that something must be done which, in another case, would be equivalent to signing judgment.

[771] [The Lord Chancellor.—The cases of an issue directed by the Court of Chancery, and an issue directed by a Judge at chambers, have been assimilated to each other. But there is a great distinction between the one and the other. In Chancery the case would come back to the Judge who directed the issue, to be by him dealt with as justice might require, and if he is wrong, his decision may be set right by this House. But if the Judge at chambers has all the powers now contended for, and there are no means of bringing a writ of error, he cannot be set right at all.]

That certainly is so; but otherwise there might be a greater delay than by a suit in Chancery, and it was to avoid that consequence that the statute in question was passed. This is not the only case in which such a result would occur. It would occur in some cases of *certiorari*, and in cases of *habeas corpus*. In this case, when in the Exchequer Chamber (14 Law Journ. 248, 252; 7 Q.B. 303), Mr. Baron Alderson gave the true answer to the argument on the other side, when he said that “the issue was only on a collateral point.” •

Then as to quashing the writ, the writ was rightly quashed in this case, because,

as in *Tolson v. Kaye* (6 Man. and Gr. 536) there was nothing on which the jurisdiction of the Court of Error could attach. The want of jurisdiction is patent on the face of the writ, and where it is so, the writ, as in *Lord Saye and Sele v. Stephens* (Cro. Car. 142), ought not to be allowed. The variance between the record and the writ being clear, the Court of Error had no other course to adopt but that of quashing the writ. The Exchequer Chamber could not, on such a ground, send back the cause to the Court below, but was obliged to deal with it as presented to the Court of Error. The proceedings, shewing on the face of them, that there was nothing to found the jurisdiction of the Court, the [772] only proper course was to quash the writ, and neither to affirm nor reverse the judgment, over which, in truth, the Court of Error had no lawful jurisdiction.

Mr. Pashley replied.

Lord Brougham (Aug. 4).—In this case I have consulted with my noble and learned friend who holds the Great Seal, and he has given me his opinion, which is entirely the same as my own, upon the case; and he approves of the course which, with your Lordships' approbation, I now propose to take.

This was a feigned issue tried before Mr. Justice Wightman, and a bill of exceptions was tendered by one of the parties, the defendants in that feigned issue, to his Lordship's direction to the jury to find that a person of the name of Birch, whose assignees were the defendants in the action, was a trader within the bankrupt law.

I will state what formed the grounds of the decision of the Court of Queen's Bench, because that decision being brought before the Exchequer Chamber, gave rise to the question which is now before this House. It appeared that Mrs. Birch lived in Bedford-square, and kept there an extensive lodging-house, and that she had a very considerable number of lodgers in that house, who paid her not only for their lodging room, but also for their meat, drink, and entertainment in that house, and who took rooms, more or fewer, and for a greater or a less period of time—sometimes for a week—sometimes for a month, and sometimes even for a year. It was given in evidence: that she wrote to Messrs. Spencer, the wine merchants, to this effect:—"Mrs. Birch begs Messrs. Spencer will not be surprised at the magnitude of the order she is about to give them for wine, as she does not intend to drink it all herself." After observing which, she proceeds to give the order, thus:—"this she thinks but justice to herself to state, but she has those in her house who do drink [773] much, if it is good; and all who have tasted the sample Messrs. S. sent in, gave it as their opinion that it is very good; this, to say the least of it, is very satisfactory, therefore shall be obliged by their sending in twenty dozen of the same port, and twelve dozen of their brown sherry."

Now, upon this case, involving circumstances such as I have stated, Mr. Justice Wightman, who tried the cause, held, and so directed the jury, as I am sure I should have done if I had tried that cause, and so would my noble and learned friend near me, that she was a hotel keeper, though not by a sign: a sign is quite immaterial to any body. Instead of putting up the Red Dragon, or whatever sign this good lady might have chosen to hold out to the public, she chooses to have merely a house in which she takes sometimes three or four lodgers, besides having several of her own relations living there, all of whom, all paid her, the relations as well as the others; and all these persons she supplies with food and liquor as well as with lodging.

It appears to me that it is clear, that this was the trade of a hotel keeper, and that she was a trader within the bankrupt law. Not so thought the learned counsel, for they tendered a bill of exceptions to the learned Judge's direction, and that brought the matter, as your Lordships are aware, by writ of error before the Queen's Bench.

The Judges of that Court took the view of the case that we are disposed to take: they held that she was a trader, and therefore overruled the bill of exceptions, whereupon a writ of error was brought from their judgment into the Exchequer Chamber. A motion was made to amend the record, which had been inartificially framed, and to make it appear what the truth really was, that it was not an action, but a feigned issue, for it was a feigned issue which had been directed by Lord Denman, under a very beneficial act, commonly called the Interpleader Act.

So when it came before the Exchequer Chamber a [774] course was taken by the defendants in error against the plaintiff in error, which prevented the Exchequer

Chamber from ever pronouncing an opinion at all upon the merits of the case, as they had appeared before Mr. Justice Wightman, and before the Court of Queen's Bench, namely, upon the question, trader or no trader as hotel keeper, in the person of Mrs. Birch; for the defendants took the objection that a writ of error does not lie upon a feigned issue, and they moved to quash the writ of error upon that ground. They also moved to quash it upon another ground, or at least the Court of Exchequer Chamber held that there was competent reason to quash the writ of error upon another ground, and that too in whatever way the other and more important question, namely, writ of error or no upon a feigned issue under the Interpleader Act, might be decided (for there is no doubt that it is confined to the Interpleader Act entirely, though a doubt upon that was raised) that, independently of that, there was a fatal variance between the transcript of the record of the judgment sent from the Court of Queen's Bench, and the writ of error itself. That objection therefore, if decided for the defendant in error, would shut out of course all question of merits upon the writ of error, and therefore, whether the Queen's Bench was right or wrong became quite immaterial, if no writ of error could lie.

That therefore came on to be decided by the Court of Exchequer Chamber, and the judges took time to consider. It was admitted on all hands that no writ of error could lie on a feigned issue directed by a Court of Equity. It was admitted on all hands, as equally incontestable, that no feigned issue directed under the ordinary jurisdiction of the Court of Queen's Bench, Common Pleas, or Exchequer could give rise to a writ of error. But then it was said that, by the peculiar framing of the words used, respecting a judgment, in the Interpleader Act, the case at the bar was different from the common case of a feigned [775] issue, and that a writ of error would lie in a proceeding of this kind. Upon that there was a very able argument before the learned Judges below, and it was contended that a writ of error did lie, notwithstanding that it was a feigned issue, regard being had to the peculiar provisions of the Interpleader Act.

The court took time to consider, and Lord Chief Justice Tindal fully discussed that question in a very able and elaborate judgment, in which he gave the opinion of the whole Court of Exchequer Chamber, all the learned Judges concurring, those learned Judges being, my Lord Chief Justice himself, who presided, Mr. Baron Parke, Mr. Baron Alderson, Mr. Baron Rolfe, Mr. Baron Platt, Mr. Justice Cresawell, and Mr. Justice Coltman; I may be allowed to say a very full Bench, because the Queen's Bench being the Court from which the writ of error was brought, the Judges of that Court could not be there, so that those seven, and the five Queen's Bench Judges, making twelve, there were only three Judges who were not there who could possibly have taken part in the decision. Therefore it is a decision meriting the greatest respect and commanding the greatest attention. Nevertheless if your Lordships, upon more mature consideration, as the Court of last resort, should differ from those learned Judges, though they were unanimous in the judgment, and unanimous, I believe, after the fullest consideration, and after acknowledging the difficulty of the case, you are not bound, of course, by their judgment; in which case the question will arise, and not till then, whether the Court of Queen's Bench was right or wrong upon the question brought before it, by the bill of exceptions to Mr. Justice Wightman's ruling, namely, upon the question whether Mrs. Birch was a trader within the bankrupt laws or not. But at present that does not arise, if we are of opinion that the Court of Exchequer Chamber, upon either of those two grounds, was right, either upon the variance between the transcript of the [776] record, and the writ of error, or upon the point of a feigned issue under the Interpleader Act not giving rise to a writ of error; if upon either of those two points we are with the Judges in the Court of Exchequer Chamber, that question does not arise. If we are against them, that question does arise, and must be determined. We must either send it back to the Exchequer Chamber or we shall be at liberty to decide the case ourselves.

Now, my Lords, I am of opinion with my Lord Chief Justice Tindal and the Court of Exchequer Chamber, that they were right, at all events upon the point of variance, and my noble and learned friend who is not now present, agrees with me in thinking that it is better, not unnecessarily to decide the other point, as we have no doubt whatever upon the variance.



My Lords, the variance in my opinion, is quite fatal to the proceeding. That variance is neither more or less than this:—the record, of which a transcript was sent to a Court of Error, stated that in a certain cause wherein the now defendant was plaintiff, and Birch defendant, it was ordered, “that the sheriff pay the process of the execution therein into Court in five days, and that an issue be tried,” not a suit, but that an issue should be tried, “in which the claimant or assignees, when chosen, should be plaintiff, and the execution creditor defendant,” which is the mode of dealing by issues. Then an order is made as to the liability of the goods to be seised at the time of the levy, and as to the title of the assignees thereto. Therefore it was not an action upon promises. But what says the writ of error as to this matter. It must be observed that the writ of error is the only authority upon which the Court of Exchequer Chamber had to decide the cause, or to entertain the cause for a moment. Here comes the writ of error, and it goes on in these words:—“Forasmuch as in the record and process, and also in the giving of judgment in a plaint which was in our Court before us” [777] (it was a plaint no doubt arising upon execution) “between William Henry King, and John Simmonds, William Ayscough Wilkinson, and John Allsup, survivors of George Gibson, assignees of Emily Ann Birch, a bankrupt, in an action on promises.” This is the description of the proceeding given in the writ of error. But when you look at the record it is not an action on promises, or any thing like it, but is a feigned issue,—an action on a wager. That of itself appears to me to be perfectly sufficient to dispose of this question, as indeed Lord Chief Justice Tindal held in the latter part of his very able judgment. For after dealing with the first question upon the feigned issue, and coming to the opinion that a writ of error does not lie under the Interpleader Act, he says, “besides there is a variance in this particular instance; here the writ of error is to examine the errors in an alleged judgment in an action between the parties; the record produced is not a judgment in an action, and consequently, as the Court has no power by its commission to decide whether there is any error or not, the proper course is to annul or quash the writ as having nothing to operate upon, as being idle and useless.”

Now, my Lords, I think, and so does my noble and learned friend the Lord Chancellor (who is not now present, but who has written to me to state his concurrence in my opinion) that we should give judgment for the defendants in error upon the whole case. Of course we shall not specify in the judgment the grounds of it; the judgment therefore is for the defendants in error. At the same time I must say for myself that I entirely agree with the Court of Queen’s Bench upon the merits of the case originally, which never were argued in the Court of Error; and that I entirely agree with the Court of Exchequer Chamber, upon the fullest consideration of this Interpleader Act, upon the point of the feigned issue; and therefore it must be taken as a judgment upon the whole case. Judgment affirmed, with costs.

[778] THOMAS, LORD CAMOYS, and ELIZABETH TEMPEST,\* Widow,—*Appellants*; THOMAS WELD BLUNDELL and Others,—*Respondents* [June 28 and 29, 1847; July 27, 1848].

[*Mews’ Dig.* xv. 666, 860; S.C., below, *sub nom. Blundell v. Gladstone*, 11 Sim. 467; 1 Ph. 279; 12 L.J.Ch. 225; 5 Jur. 481; 7 Jur. 269. Applied in *Bernasconi v. Atkinson*, 1853, 10 Hare, 345; *In re Fry’s estate*, 1874, 31 L.T. 8; *Charter v. Charter*, 1874, L.R. 7 H.L. 381; *Garland v. Beverley*, 1878, 9 Ch. D. 217; and cf. *In re Waller*, 1899, 80 L.T. 701.]

*Will—Misnomer—Description—Construction.*

A testator devised his estates on trust for “the second son of Edward Weld, of Lulworth,” for life, with remainders to his sons successively in tail male, with like remainders to the third and other sons (except the eldest) of the said Edward Weld, and their sons; with remainders to the first and other sons of each brother (except the eldest brother) of the said Edward Weld successively in tail male; with like remainders to the second and other sons (except the eldest) of Lady Stourton, “one of the sisters of the said Edward Weld.”

\*Mrs. Tempest died before the appeal was heard; it was revived in the name of her real and personal representatives.

There was not, at the date of the will or death of the testator, any such person as Edward Weld of Lulworth, but it appeared from evidence as to the state of the Weld family that Joseph Weld was the then possessor of Lulworth, that he had an eldest brother living, that Lady Stourton was one of his sisters, and that he had an eldest son, named Edward Joseph, commonly called Edward, and a second son, named Thomas, both unmarried:—

Held, that the descriptions of the unnamed devisee, taken with the whole context of the will, and with the evidence of the state of the Weld family, clearly designated the second son of Joseph Weld, and that he was entitled as tenant for life in possession to the devised estates.

The question in this case arose upon the construction of the will of Charles Robert Blundell, dated the 24th of November, 1834, by which he devised his freehold and other estates to John Gladstone and others “upon trust to permit and suffer *the second son of Edward Weld, of [779] Lulworth*, in the county of Dorset, esq., to occupy and enjoy the same during his life, etc., and from and after his decease, then upon trust for the first and every other son of the said second son of the said Edward Weld severally, successively, and in remainder, etc., and the heirs male of their respective bodies; and for default of such issue, upon trust for the third and every other son and sons (except the eldest) of the said Edward Weld severally, successively, and in remainder, etc., and for the male issue of each such son in tail male, but in as strict settlement on each such son and his respective issue as the rules of law and equity will allow; and for default of such issue, upon trust for the first and every other son of each brother (except the *eldest brother*) of the said Edward Weld severally, successively, and in remainder, etc., and for the male issue of each such son in tail male, etc.; and for default of such issue, upon trust for the second and every other son and sons (except the eldest) of Lady Stourton, the wife of the Right Honourable William, Lord Stourton, and one of the sisters of the said Edward Weld, severally, successively, and in remainder, etc.; and for default of such issue, upon trust for the first and other son and sons of all the other sisters of the said Edward Weld severally, successively, and in remainder, etc., and for the male issue of each such son in tail male; and for default of such issue, upon trust for the first and other son and sons of the eldest and every other daughter and daughters in succession of the said Edward Weld, etc., and for the male issue of each such son, etc.; and for default of such issue, upon trust for Henry Mostyn,” etc.

The testator died in October 1837, leaving the appellants his co-heirs-at-law, Mrs. Tempest being his sister, and Lord Camoys the eldest son of his other sister, deceased.

[780] There was no person known “as Edward Weld of Lulworth,” at the date of the will, or death of the testator. The state of the Weld family was this: Thomas Weld, of Lulworth Castle, who died in the year 1810, had nine sons and six daughters. The second of those sons, named Edward, died in 1796, unmarried; and William and Francis, the fifth and youngest, also died young, in their father's life time. The six sons who survived him were, Thomas, the eldest, Joseph, who on Edward's death, became the second, John, the third, and Humphrey, James and George. John was a Catholic priest, and died in 1816. Of the six daughters, the eldest, the second, and the sixth, became nuns; the third married William Lord Stourton; the fourth married Mr. Bodenham, and the fifth, Mr. Vaughan, and each of these three had male issue. On the death of the father, in 1810, his eldest son, Thomas, became possessor of Lulworth Castle; and he, after the death of his wife, and marriage of his daughter, his only child, with Lord Clifford, became a Catholic priest, and, being created a Cardinal in the year 1829, he, by a previous family arrangement, made over Lulworth Castle and other estates to his then next brother Joseph, who from that time was the possessor of Lulworth. Joseph Weld had three sons and two daughters; the eldest son, named in baptism Edward Joseph, was commonly called Edward; the second's name was Thomas, and the third's Joseph. Those sons were living and unmarried at the date of the said will, and the eldest was personally known to the testator.

Soon after the testator's death, Thomas, the second son of Joseph Weld, assuming that he was the person designated by the descriptions in the will, as first devisee of an estate for life in the devised estates, took the name of Blundell in addition to

his own, in compliance with directions in the said will, and filed a bill in Chancery against the appellants, and the surviving trustees named in the [781] will, and other persons, respondents, in the appeal. The bill stated, among other things hereinbefore stated, that the plaintiff was the second son of Joseph Weld, who was the only Weld of Lulworth at the date of the said will, and that the name of Edward was used by the testator by mistake for Joseph; that the object of the testator was to give his estate to the second son of the possessor of Lulworth, and to create a second Weld family, and with that view he expressly excluded the eldest brother of Joseph Weld, as also the eldest brother of the plaintiff (the respondent). The bill prayed that the said will might be established, and that the trusts thereof might be carried into execution.

The appellants, in their answers to the bill, denied the competency of the testator to make a will, and denied that Joseph Weld, father of the respondent, was the person therein described as "Edward Weld, of Lulworth," and that the name of Edward was used by mistake for Joseph; but they submitted that, if the devise had not altogether failed for uncertainty, Edward Joseph, the first son of Joseph Weld, must be taken to be the person in the will described as Edward Weld of Lulworth, he being at the date of the will of full age, and residing at Lulworth, and commonly called Edward Weld of Lulworth, and known to the testator by that name.

On an issue, *devisavit vel non*, tried at Liverpool in 1840, the will was established, and on the hearing of the cause in March 1841, the Vice Chancellor decided upon the words of the will, coupled with the evidence of the state of the Weld family at the date of the will, that the respondent was entitled as tenant for life in possession to the real estates thereby devised (11 Simons, 467).

[782] The cause was twice reheard by Lord Lyndhurst, Chancellor—the second time, assisted by Justices Patteson and Maule. Two former wills, made by the testator, were received in evidence as exhibits, on the rehearing. The Lord Chancellor, concurring in the opinion of the two Judges, affirmed the decree, but without costs (1 Phillips, 274; 12 Law Journ. N. S. 225).

The appeal against that decree came on to be argued in 1847, before Lord Cottenham (Chancellor), Lord Lyndhurst, and Lord Campbell, in the presence of eleven Judges of the Common Law Courts, viz., Mr. Baron Parke, and Barons Alderson, Rolfe, and Platt, Mr. Justice Patteson, and Justices Coltman, Maule, Wightman, Cresswell, Erle, and Vaughan Williams.

Sir Fitzroy Kelly and Mr. Turner (with whom was Mr. Fleming), for the appellants, contended that the name and description of "Edward Weld, of Lulworth, in the county of Dorset, Esquire," applied to the eldest son of Joseph Weld. He, although baptized by the name of Edward Joseph, was universally called Edward, and, according to the evidence, was introduced to the testator and known to him by that name only. He resided with his father at Lulworth, and might be truly called and described Edward Weld of Lulworth. The words in the will being a sufficient legal description of Edward, the eldest son of Joseph Weld, the devise could not be construed in favour of any other than his, Edward's, second son. Although he had no son at the date of the will, two sons have been born to him since, the second being born after the decree was pronounced.\* If he is, as the appellants sub-[783]-mit, a person who, for the purposes of a devise of lands, sufficiently answers the description of "Edward Weld, of Lulworth," this devise to that person's second son cannot be construed a devise to the second son of another person of a different name, on the ground of mistake of name, or defect of description, shewn by extrinsic evidence; *Delmare v. Robello* (3 Bro. C. C. 446; S. C., 1 Ves., jun. 412), *Andrews v. Dobson* (1 Cox, 426), *Standen v. Standen* (2 Ves., jun. 589), *Holmes v. Custance* (12 Ves. 279), *Chambers v. Brailsford* (18 Ves. 368), *Doe v. Chichester* (4 Dow. 65), *Smith v. Campbell* (Cooper, 275-279), *Miller v. Travers* (8 Bing. 244), Statute of Frauds (29 Car. 2, c. 2, s. 5), Wigram on Extrinsic Evidence, *passim*.

It is not the name given in baptism, but that by which a person is generally known, that forms his legal description, as has been often decided on replications to pleas

\* A discussion took place between the Lord Chancellor and counsel on both sides, whether this second son ought not to be a party to the cause, but no decision was given on the point.

of abatement to declarations in actions at law and to indictments for misnomer; Rastall's Entries (pp. 108, 384), Sir Francis Gawdie's Case (Co. Litt. 3 a), *Holman v. Walden* (1 Salk. 6), *Bowen v. Shapcott* (1 East, 542), *Weleker v. Le Pelletier* (1 Campb. 479), Lord Pitaligo's Case (27 Lords' Journals for 1750, p. 486 a).

The respondent is himself an illustration of this, for although baptized and confirmed by the name of Thomas, now, since he assumed the surname of Blundell, his christian name is no longer Thomas, but Thomas Weld. There is no authority for saying that a person is not to take under a devise, unless the name by which he is described is his baptismal name.

It may be said here, as it was in the Court below, [784] that the further description in the devise to the issue of Lady Stourton, "one of the sisters of the said Edward Weld," cannot apply to this Edward Weld, as he is not the brother but nephew of that lady. Is it not more reasonable that the testator mistook the relation of the parties than the name? It is assumed for the respondent that Lady Stourton is accurately described as "one of the sisters of the said Edward Weld," but contended that the name Edward Weld is a mistake altogether for Joseph Weld. There is evidence that the testator knew and described Joseph Weld correctly on another occasion, and there is no ground to assume he knew the females of the family. But this at most is only an error in part of the description, which is rectified by the name, according to Lord Bacon's maxim, *veritas nominis tollit errorem demonstrationis*.

To sustain the decree in this case, the name of Edward Weld must be struck out of the will, and the name of Joseph inserted, and that upon parol evidence. There is no case, not even *Beaumont v. Fell* (2 P. Wms. 141)—which related to personal property—going to that extent, but the result of the cases of ambiguity of that sort is to declare the will void for uncertainty, and to these cases may be added that of *Doe v. Hiscocks* (5 Mee. and W. 363). The doctrine laid down in the judgment in that case, and in *Miller v. Travers*, and other cases therein cited, are applicable to this case. They cited, among other cases on this point, *Hunt v. Hort* (3 Bro. C. C. 311), *Doe v. Westlake* (4 Barn. and Ald. 57), *Thomas v. Thomas* (6 T. Rep. 671), *Daubeny v. Cochlan* (12 Sim. 507), *Foster v. Walter* (Cro. Eliz. 106).

Mr. Bethell, Mr. Hodgson, and Mr. Witham, appeared for the respondent, Thomas Weld Blundell. His eldest brother, Edward Weld, was not a party to the appeal.

[785] At the close of the argument for the appellants,—

The Lord Chancellor said, the learned Judges and the noble and learned Lords present, were all of opinion that it was not necessary to call on the counsel for the respondent. His Lordship then proposed this question to the Judges: "Whether, upon the true construction of the will of Charles Robert Blundell, dated 28th of November, 1834, regard being had to the proofs in the cause, Thomas Weld Blundell is entitled, as tenant for life in possession, to the real estates devised by such will to John Gladstone, Robert Gladstone, and Thomas Robinson, upon trust (except such as were specifically devised to any other person or persons, and all real estates held by him in trust), and entitled in reversion for his life to the houses and gardens by the said will devised to William Hall and James Massam respectively for the lives in the said will mentioned?"

The learned Judges, with the leave of the House, retired to consider their answer, and on their return soon after,

Mr. Baron Parke read the question, and the unanimous opinion of the Judges as follows:—"We have considered this question proposed by your Lordships, and being all agreed upon the answer to be returned to it, and the reasons for that answer, we think it unnecessary to hear any further argument.

It appears to us, upon reading the will, and looking only at the evidence of the state of the Weld family at the time the testator made his will, and without adverting to the other parol evidence received in the Court of Chancery, and, as we think, rightly received, that the meaning of the words used by the testator to designate the devisee are clear; that the devise is not void for uncertainty, and that the respondent Thomas Weld Blundell is entitled to the estates mentioned in the question put by your Lordships.

[786] The question is, who is the person whom the description of "devisee in the will," applied to the facts, properly fits?

In this case it is to be remarked, that he is designated not by name, but by description only; neither his christian nor his surname is mentioned, but he is described by his relation only to other individuals. The case, therefore, is not the same as if it had been a devise to Edward Weld himself, upon which supposition a good deal of the argument at your Lordships' bar has proceeded.

It may be conceded that, where a devisee is described by his christian and surname and some other distinctive circumstance, and no person answers both descriptions and there is nothing in the rest of the will or the admitted evidence to show who was meant, the name would prevail, and the descriptive circumstance would be rejected. But the maxim "*Veritas nominis tollit errorem demonstrationis*" (Bacon's Maxims, 25) is not inflexible, as has been explained by Lord Chief Justice Gibbs in the case of *Doe v. Huthwaite* (2 B. Moore 323). For if it be clear, upon the due construction of the will with reference to the evidence of the state of the family as known to the testator, that the meaning of the testator as expressed by the will was that the person described, and not the person named, was to take, the description will prevail over the name; for the rule in question has no other object than to assist in discovering the meaning of the will, and is not applicable where it leads to a construction contrary to the expressed meaning of the testator.

Here, then, the question would be, supposing even this were a devise for a person by name, whether the context and the evidence of the state of the family does not cause [787] the description to prevail over the designation by name? We think the context, coupled with that evidence, clearly denotes that the name of "Edward" is a mistake.

It may be admitted that the Christian name is not merely the name of baptism, but the name by which a person is commonly known, and that in this case the evidence shows that Edward Joseph, the eldest son of Joseph, was commonly known by the name of Edward, so as properly to be described and take by that name if the devise had been to him. Nor is it worth while to argue whether the description "of Lulworth" (though certainly more applicable, in ordinary parlance, to the possessor of the place) would not be applicable to him, though he only resided in Lulworth, and was not the possessor of the castle. Admitting that it did, and that, if there had been nothing more than a devise to Edward Weld of Lulworth, Edward Joseph, the eldest son, would have taken, we are of opinion that the other parts of the will, coupled with the evidence of the state of the family, do clearly point out that the devisee is the second son of Joseph Weld, the possessor of Lulworth Castle.

In the first place, the devise is clearly framed so as to show that the testator meant an existing person. The limitation to that son for life, with a devise over to his first and other sons in tail, is properly applicable to an existing person, as, if it were to one not *in esse*, the limitation over would be void. If it be said that the testator might not know the rule of law, the context shows that he did, for he provides in the next clause, which comprises future sons of Edward Weld, that the estate shall be in as strict settlement upon each son and his respective issue male as the rules of law or equity allow.

Secondly, on failure of the first taker, and the other [788] branches of Edward Weld's family, the next remainder is limited to the other brothers of Edward Weld, except his eldest brother, and the will, therefore, describes Edward Weld as having an eldest brother.

Thirdly, Edward Weld is described as the brother of Lady Stourton.

Taking all these descriptions together, and looking to the will alone, we have this as the description of the unnamed devisee; he is to be an existing person; the second son of an Edward Weld, and who certainly had an eldest brother, and was himself the brother of Lady Stourton.

Now, by the evidence, we have, at the time of the will made, Thomas Weld an existing person, the second son of a Joseph Weld, who had an eldest brother, and was the brother of Lady Stourton. And we have also a non-existing child, and a possible father for him in an Edward Joseph Weld, not having an eldest brother, but himself the eldest, and having no sister Lady Stourton at all. And there is no other possible person whom the testator could have meant, unless it be one of these two. Add to this, that the description of the person as being "of Lulworth" is

better adapted to one who is the possessor of that place, and not a mere resident there.

Under these circumstances, which was the devisee clearly meant by the description in the will? We entertain no doubt that Thomas Weld was that person.

It is to be observed that this construction is alone consistent with the obvious intention of the testator, that the remainder to the children of Lady Stourton should follow the remainders to the children of her brother, which would not be the case if the Edward Weld, whose second son was to take, be her nephew, and not her brother.

We have to add, that the other extrinsic evidence, on [789] which we have not relied, does not, taken altogether, lead us in the least to doubt the propriety of the conclusion to which we have come from the will and the extrinsic evidence to which we have referred as the ground of our opinion.

We, therefore, state our humble opinion to be, that the question proposed by your Lordships should be answered in the affirmative.

The Lord Chancellor (July 27).—My Lords, it appears to me, after an attentive consideration of the facts of this case, and of the arguments that have been addressed to your Lordships in support of the appeal, that, looking to the unanimous opinion expressed by the learned Judges who attended the hearing of this case, your Lordships will concur with me that the conclusion, which those learned Judges arrived at, was a right one. I will not unnecessarily occupy the time of your Lordships by going in detail into the grounds of that opinion.

There has scarcely ever been a case which has undergone such a careful examination as this. It was first argued before the Vice Chancellor of England, who expressed an opinion (11 Sim. 485), which was afterwards brought under review by an appeal to the noble and learned Judge who then held the Great Seal. It was argued before him, and it being in his opinion a case in which it was advisable to have the assistance of some of the learned Judges, Mr. Justice Patteson and Mr. Justice Maule were accordingly called into the Court of Chancery, and the case was argued before them. They expressed an opinion, in which my noble and learned friend (Lord Lyndhurst) concurred (1 Phillips, 279); and one of the parties, not being satisfied [790] with that opinion, in due course, as he had a clear right to do, brought the case by way of appeal before your Lordships' House.

When the appeal came before this House, it having been heard by my noble friend, he thought it ought to be heard by and decided with the assistance of the learned Judges of the Courts of Common Law. It was quite obvious indeed that this House would not think it right to dispose of the case without having the attendance and advice of the learned Judges. Accordingly they were called in to your Lordships' assistance.

The case for the appellants was very ably argued in the presence of those learned Judges, and they came to an unanimous opinion in support of the judgment pronounced in the Court below; an opinion that met with the concurrence of all the noble and learned members of this House who attended that hearing. Under these circumstances, and upon the further consideration of the case, I do most clearly and distinctly concur in the conclusion to which those learned Judges came. I therefore submit to your Lordships that this House ought to pronounce a judgment affirming the decree of the Court below.

Lord Brougham.—My Lords, I was unable to attend the hearing of this case in your Lordships' House, as I was then engaged in the Judicial Committee of the Privy Council. At the request of my noble and learned friend (the Lord Chancellor), who attended the argument, I have examined the case with the best lights I have; and after reading the opinion of the learned Judges, I certainly cannot entirely agree with it, when I look to the authority of other cases, particularly the case of *Doe v. Huthwaite* in the Common Pleas (2 B. Moore, 304), which is a remarkable case in many respects, and the case of *Thomas v. [791] Thomas* in the King's Bench (6 T. Rep. 671). Regard being had to those authorities, and to the circumstances of this case, I do not feel that I should be prepared, notwithstanding the profound respect I entertain for the opinions of those learned Judges, to coincide entirely in the opinion which they have expressed, and which opinion my noble and learned friend states also to be his.

I do not propose to offer, by way of argument in support of my opinion, any lengthened view of those cases as they have struck me. But I think it would not be consistent with the respect I owe to your Lordships and to the opinions of those learned Judges, nor would it be consistent with the feelings I have for the parties themselves (for it was owing to my doubts that this case was not disposed of before, and indeed it was rather intended that the case should have undergone another argument by one counsel on a side), if I allowed this case to be disposed of without offering some observations upon it.

It has always been a nice point, where there has been an instrument of any sort, be it a gift, or settlement, or bequest (but particularly in case of a bequest), and where the result appears to depend on one of two things, which things affect the subject matter of the gift, settlement, or bequest, in so far as it is necessary to affirm who the person is to take—it has always been a matter of great nicety to ascertain in what way you are to steer between these two points, namely, where there is a name given and a description given, and where the name may be right and the description may not apply to the person, or where, on the other hand, the description may apply and the name may not answer—that has always been a question of great nicety, and has often become one of great difficulty. For [792] instance, take the case of a gift to A. B. the eldest son of C. D., and there exists an A. B. a second son of C. D. to take, there apparently the name is right. But A. B. is the second son of C. D., and consequently he must take as A. B. if he take at all, and he cannot take as the eldest son of C. D., inasmuch as that *demonstratio personae*, or description, does not apply to him, he being the second son of C. D. That is quite clear. You are then left to choose between the two, and you are to satisfy yourself as a general rule in the best way you can, whether you will apply the one or the other of those tests to discover the meaning of the gift as regards the important point who shall take under it, namely, whether you will go by the description and not the name, or by the name and not the description, seeing that you must elect to abide by the one or the other. Properly speaking, independently of any rule laid down on the authority of text-writers (as, for example, the venerable authority of Lord Bacon), or by decided cases, one should say the object must be to get at the meaning of the testator in the best way you can.

However, from the tendency of men to create rules in cases to which it is not very easy to apply rules (for each case must mainly depend on its own peculiar circumstances), there has grown up a principle which I believe Lord Bacon was the first person who promulgated; but it is to be found in the law maxims, and is stated to be "*veritas nominis tollit errorem demonstrationis*." Whether that is a very useful guide, and leads us to a right conclusion in ascertaining who the party is, I will not stop to inquire. I admit its authority as a general principle; but still, so far from being an inflexible rule, I find the learned Judges have held that it is not inflexible. And that is the way in which it is put. No doubt if you really come to look at that maxim, "*veritas nominis tollit errorem demonstrationis*," it cannot be a very useful [793] guide, or a strictly or absolutely inflexible rule, when you consider that the question always is, where the error lies, whether in the name, or in the illustration or description. You cannot exactly say that the truth of the name takes away the error of the description, because it may be that the name is wrong and the description right. Here the learned Judges have held that it is clear that the name is wrong, Edward Weld, the person named, not being meant, but another person of another name, Joseph Weld.

The learned Judges say that there are several different tests by which you can ascertain that here the error lies in the name and not in the description; and the first circumstance which guides their opinion is, that it is evidently a limitation to an existing person. "In the first place," say the learned Judges, "the devise is clearly framed so as to show that the testator meant an existing person." Why? Because it is a "limitation to that son for life, with a devise over to his first and other sons in tail." That, say the learned Judges, as we all know, "is properly applicable to an existing person, because if it were to one not *in esse*, the limitation over would be void." "But it is very possible," it was said, "that the testator might not know the rule of law." Now, he might not know what learned Judges thought upon that subject, and he might not be aware of the import of a limitation over upon a devise in

the first instance to a non-existing person. The learned Judges meet that by saying, "If it be said that the testator might not know the rule of law, the context shows that he did." Now I am not able to see how the context does show that; "For," they say, "he provides, in the next clause, which comprises future sons of Edward Weld, that the estate shall be in as strict settlement upon each son and his respective issue male as the rules of law or equity allow." [794] It does appear to me that this is just saying he did not know anything about the rules of law or equity, because he did not know how far any "strict settlement upon each son and his issue male" could be made consistently with the rules of law or equity, that is to say, within those bounds which the rules of law and equity prescribe. Therefore I do not think, if it had rested upon the first test, you could have at all said this was a devise to a person *in case*, and not to a person *in posse*.

The learned Judges say, "Secondly, on failure of the first taker and the other branches of Edward Weld's family, the next remainder is limited to the other brothers of Edward Weld, except his eldest brother, and the will therefore describes Edward Weld as having an eldest brother." No doubt it does. Then the third point is stated by the learned Judges to be that "Edward Weld is described as the brother of Lady Stourton."

Upon these two grounds then we have it clearly that there is this discrepancy between the name Edward Weld, who is the person named, and the description; that the description does not apply to Edward Weld, but applies to another Weld, namely, one who is the brother of Lady Stourton, and who has an elder brother living. Therefore it does again come to this, that here you have a clearly defined name, Edward Weld, to whom the description does not apply, and you have not the name of Joseph Weld to whom the description does apply.

Well, then, my Lords, I will go back to the case of *Thomas v. Thomas* to which I have before referred. That was very like what I observed as to Edward Weld. The description there did not apply to Mary Thomas, as the description here does not apply to Edward Weld, Joseph Weld having an elder brother, and being the [795] brother of Lady Stourton, not Edward Weld. In *Thomas v. Thomas* the words were "I devise to my grand-daughter, Mary Thomas, of Llech-lloyd, in Merthyr parish." It turned out, on enquiry, that there was a person of the name of Mary Thomas, but she did not reside in that parish, therefore she was not "Mary Thomas, of Llech-lloyd, in Merthyr parish," which was the demonstration or description, and she was the great-grand-daughter, whereas the gift was to the grand-daughter; "My grand-daughter, Mary Thomas." Therefore she failed in two particulars, just as in this case Edward Weld fails in two particulars. One was her not being the grand-daughter but the great-grand-daughter, and the other was her not residing in Merthyr parish. But it turned out by extrinsic evidence that there was a grand-daughter of the name of Elinor Evans, not Mary Thomas, who actually resided in the parish of Merthyr.

Now, observe, my Lords, these cases so far are upon all fours, because, putting aside the one particular as to a devise to a non-existing person, for the reason I have given, and referring to the two particulars, which do not apply to Edward, but do apply to Joseph; there are also two particulars there in which the description did not apply to the person named, namely, Mary Thomas, Mary Thomas was named just as Edward Weld here is named. The two particulars of the demonstration or description, namely, the being the grand-daughter and residing in Merthyr parish, did not apply to the person named, Mary Thomas, just as the two particulars of having an elder brother, and being the brother of Lady Stourton, do not apply to the party named here, "Edward." So far they are alike. But there was another person, Elinor Evans, to whom the whole description did apply. She was the grand-daughter, not the great-grand-daughter, and she actually resided in Merthyr parish, so that there the description applied, just as here the two particulars apply, not to the person named, but to another person not named. Therefore so far the circumstances agree.

I ought to mention that this is the sole ground upon which I hold any difference; and as I am bound to bow to the weight of authority against me, I give up that ground. These cases appear to me to be so perfectly alike that I do not see the possibility of distinguishing the one from the other.



Now, what was the result of the case of *Thomas v. Thomas*? Not that the Court gave the estate to Elinor Evans because the description applied to Elinor Evans, not to Mary Thomas. No such thing. The Court said it was involved in so much uncertainty that they could not disinherit the heir-at-law in consequence of a will so worded.

The other point, it is not necessary to mention, that is, as to the propriety of admitting parol evidence.

One word as to the case of *Doe v. Huthwaite*. It occurred to me, at the time of *Doe v. Huthwaite* being mentioned, that it was a case which had very much been observed upon in Westminster Hall, and that what Lord Chief Justice Gibbs said upon that case had also been very much criticised in Westminster Hall. But this happened in *Doe v. Huthwaite*. It was an ejectment originally, and there was a special case for the opinion of the Court; and the parties not being satisfied with the opinion of the Court, it was turned into a special verdict. Then it was carried into the Court of King's Bench (3 Barn. and Ald. 632), where it was disposed of thus: A new trial was ordered for the purpose of having the opinion of another jury upon the question, whether there was sufficient ground, in fact, to [797] abide by the conclusion which, in the result, the Court of Common Pleas had arrived at, that is to say, whether upon the whole the person was to take by the description, the demonstration, or by the nomination, the designation by name. That was one question. Then that was not the end of the case, because that judgment awarding a *venire de novo* was the subject of great comment, just as the decision in the Court of Common Pleas had been. And so little were the parties satisfied with the award of a *venire de novo*, that from the judgment of the King's Bench awarding a *venire de novo* there was a writ of error brought. I forget whether it was a writ of error to this House, but my impression is that it was to this House, and not to the Exchequer Chamber; but upon that I have no very distinct recollection. But, at all events, the result was that an arrangement was come to between the parties, as I understood, so that ultimately it was left in those very peculiar circumstances, for which reason it never did receive any final decision, and never came within your Lordships' jurisdiction, the compromise having put an end to it.

I have said that I do not feel sufficiently strong in my doubt to make any difference of opinion among your Lordships, when I find I stand alone; above all when I look at the unanimous opinion and joint authority of the learned Judges in the peculiar circumstances of the case; when I say peculiar circumstances, I mean that not only does their united opinion deserve the greatest attention, and would be and ought to be treated with the most profound respect by your Lordships, even if it had been obtained in the ordinary way; but this was not the first time it was before one of the members of this House and some of those learned persons, because my noble and learned friend (Lord Lyndhurst), swayed by the importance of the case, and the somewhat conflicting authorities upon [798] the subject, took the step (certainly the proper step in such cases), of calling for the assistance of two most learned Judges, Mr. Justice Patteson and Mr. Justice Maule, who gave him their assistance, and, I understand, that they came to the same opinion below. Certainly they coincided in opinion with the other learned Judges, because both those learned Judges attended the hearing, and the judgment being unanimous they must have the same opinion that they came to below. Therefore in these peculiar circumstances—

Lord Lyndhurst.—Mr. Justice Patteson read the written opinion of the two learned Judges in the Court below.

Lord Brougham.—And of course we understand that they had not altered their opinion:—that it was rather confirmed than otherwise. Therefore the case deserves the description given of it, by my noble and learned friend on the woolsack, that it has undergone a more full discussion than most cases which came under your Lordships' consideration.

For these reasons I shall not oppose the unanimous judgment of your Lordships, but hope your Lordships will excuse me for taking this opportunity of stating in justice to myself and to the parties, what the grounds are upon which I had doubts, and upon which I should have come to a very different conclusion, if my doubts had been less shaken than they have been by the opinion of the learned Judges, and the consideration of the authorities. I have also had an opportunity of considering the

very learned argument of Mr. Serjeant Williams, and others in the Court of King's Bench in *Thomas v. Thomas*, and the result of the whole is that I have not considered it necessary to oppose the motion of my learned friend on the Woolsack, it being with the very object of considering that question intermediately that the delay took place.

Lord Lyndhurst.—I have already expressed my [799] opinion (1 Phillips, 289), on the construction of this will, and I do not think it necessary to trouble your Lordships further upon the subject. But with reference to the argument of my noble and learned friend, and the authority he has cited of *Thomas v. Thomas*, I beg leave to call the attention of my noble and learned friend to a passage in the opinion of the learned Judges. "In this case," they say (*supra*, p. 786), "it is to be remarked that he is designated not by name, but by description only, neither his Christian nor his surname is mentioned; but he is described by his relation only to other individuals. The case therefore is not the same as if it had been a devise to Edward Weld himself, upon which supposition a good deal of the argument at your Lordships' bar has proceeded." So that it was a question of description, and one part of the description being inconsistent with the rest of the description, the question was, which part of that description, taking the whole together, ought to prevail. Upon that ground the Judges have decided, and upon that ground my opinion is in conformity with the opinion which they have expressed.

Lord Brougham.—My noble and learned friend is quite right. It is not in the name of the devisee; the mistake is in the name of Edward, which is mentioned as part of the description. I recollect the name of Edward is given, not as the devisee, but as part of the description.

Lord Lyndhurst.—Yes; therefore the question was what part of the description ought to prevail. We were bound by the evidence as it appeared to us; and upon the evidence we were of opinion that the description, which is in conformity with the conclusion to which the learned Judges have come, ought to prevail, having no doubt of what the testator's intention was.

[800] Lord Campbell.—I think it right to say that I entirely concur with my noble and learned friends. The case has been so fully discussed that it is unnecessary to state the grounds upon which the judgment below is supported. I will merely say that, looking at the authorities, and at the state of facts, upon which there can be no doubt whatever upon the evidence, I have not the slightest doubt as to the intention of the testator; and that being so, I think the reasoning of the learned Judges upon that, concurring with the opinion of my noble and learned friends, is entirely satisfactory.

The decree was then affirmed, with costs.

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The PRINCIPAL, PROFESSORS, and CHIEF OFFICERS of GLASGOW COLLEGE,  
—*Appellants*; The ATTORNEY GENERAL (at the relation of LORD MED-  
WYN and JAMES ROBERT HOPE, Esq.) and the MASTER and FELLOWS  
of BALIOL COLLEGE, OXFORD,—*Respondents* [July 20, 24, 25, and 27,  
1848].

[Mews' Dig. iii. 353; v. 1196. S.C. 10 Jur. 676; 2 Coll. 665. Cf. *A.-G. v. Calvert*, 1857, 23 Beav. 248; *In re Richardson's Will*, 1888, 58 L.T. 45; *In re Perry Alm-houses* (1898), 1 Ch. 391; (1899) 1 Ch. 21.]

*Charity—Administration, cy près—Proposed Alteration Disallowed.*

A testator, born in Scotland, and educated at Glasgow College, by his will, dated in 1677, when he was resident in England, where he died in 1679, gave the residue of his estate to trustees for the maintenance and education, at the University of Oxford, of scholars born and educated in Scotland, who should have spent a certain time as students at Glasgow College; and he declared it to be his will that every such scholar, should upon his admission at Oxford,

execute a bond conditioned for payment of £500 to the college if he should not enter into holy orders, and if he should accept any spiritual promotion, benefice or other preferment in England or Wales, it being the testator's will that every such scholar should return to Scotland, there to be preferred and advanced as his capacity should deserve, but in no case to come back into England, nor to go into any other place, but only into Scotland, for his preferment.

Glasgow College was Presbyterian, while the testator was a student there; but Episcopalian at the dates of his will and of his [801] death; soon after which, Presbyterianism became by law the established form of church government in Scotland, and has so continued, the Protestant Episcopal Church being always tolerated, and recently recognised by law, but not endowed.

In 1693, a decree was made establishing this charity, and thereby it was declared that Baliol College should receive the testator's exhibitioners, according to the condition of his will; and directions were given as to the number of students, and their stipends, etc., but no scheme was directed. This decree was adopted by Lord Hardwicke in 1744, and a decree was then made directing a scheme for the administration of the charity, *cy près*, it being impossible to carry the testator's intentions strictly into effect. The scheme was confirmed by a decree of Lord Henley, in 1759, with certain variations as to increasing the number of exhibitioners, and their stipends. Under these decrees, students had been admitted for many years at Baliol College from Glasgow College, without regard to their destination for holy orders or their return to Scotland.

Upon an information, filed in 1845, at the relation of members of the Protestant Episcopal Church in Scotland, a decree was made directing the Master to inquire whether the scheme sanctioned by the former decrees, and according to which the charity had been administered, could be varied so as to make it more effectually conducive to the supply of the present Protestant Episcopal Church in Scotland with competent clergymen, being natives of Scotland, and educated at Glasgow and Oxford; and in making such inquiry, the Master was to have regard to the said will, and to the circumstance that at its date the established Church of Scotland was Episcopal, and is now Presbyterian:

Held, that the proposed inquiry contemplated a new scheme, inconsistent with that, under which the charity had been administered for more than a century as near to the testator's intentions as was practicable, and that the proposed alteration of it was not warranted by any alteration in the state of the law and Church in Scotland.

This was an appeal against a decree of Vice-Chancellor Knight Bruce, directing inquiries before the master with [802] a view to the remodelling of a scheme under which a charity had been long managed, and administering it more conformably to the will of the founder, 2 Collyer 665.

John Snell, by his will, dated December 1677, republished in 1679, gave his manor and lands of Uffeton, in the county of Warwick, to his wife and four other persons therein named (whom he appointed his executors), their heirs and assigns, upon trust, after payment of his debts and legacies (including one of £50 to the parish church of Uffeton) and annuities charged thereon, to convey and settle the residue upon five or more persons, such as the Vice Chancellor of the University of Oxford, the Provost of Queen's College, the Master of Baliol College, and the President of St. John's College, in the same University, for the time being, or any three of them, should nominate, and their heirs;

"Upon trust, that the profits and products thereof may be employed and disposed of, for the maintenance and education—in some College or Hall in that University, to be appointed by the said Vice Chancellor, Provost, Master, and President, for the time being, or any three of them, and in such proportion, and with such allowances, and in such manner, as they, or any three of them, shall elect, think fit, and appoint—of such and so many scholars, born and educated in Scotland; who shall each of them have spent three years, and two at the least, at the College of Glasgow, in that kingdom, or one year there, and two at the least in some other

College in that kingdom ; as the said Vice Chancellor, Provost, Master, and President, for the time being, or any three of them, shall think fit, not exceeding the number of twelve, nor being under the number of five, at any one time, unless the revenue and profits of my estate, for the purposes aforesaid devised, by the discreet and prudent management of my executors and trustees, shall increase to such a condition as may bear an allowance competent to maintain a greater number.

[803] " And my further will and mind is, that every such scholar and scholars, upon each of their admission to such College or Hall as aforesaid, shall be bound and obliged by such security as the said Vice Chancellor, Provost, Master, and President, for the time being, or any three of them shall think fit, to some person or persons, to be by them, or any three of them thereunto appointed, that the said scholar and scholars shall respectively forfeit and pay to that College or Hall, whereof or wherein he or they shall be respectively admitted, the sum of £500 a-piece, of lawful money of England, if he shall not enter into holy orders, and if he or they shall, at any time after such his or their entering and admission, take or accept of any spiritual promotion, benefice, or other preferment whatsoever within the kingdom of England or dominion of Wales, it being my will and desire that every such scholar so to be admitted, shall return into Scotland, there to be preferred or advanced, as his or their capacity and parts shall deserve, but in no case to come back into England, nor to go into any other place, but only into the kingdom of Scotland for his or their preferment. And my will also is, that none of the scholars to be elected and admitted as aforesaid, shall take any benefit of this my bequest, above the space of ten years, or eleven at the most ; for after that time they are, and it is my express will and desire, that they shall and may be removed into Scotland as aforesaid."

The testator gave directions for filling up the vacancies occasioned by the death or removal of the scholars, and that all such scholars should, before admittance, be recommended by the Principal of Glasgow College, the Professors of Divinity and other officers of that college, and each should come as probationer to such college or hall whereto he should be appointed, and should there continue at his own charge for six months, to give evidence of his behaviour, learning, and abilities before his [804] admittance to the benefits of the bequest, and that after the six months he should be admitted or not, according to the discretion of the persons appointed for that purpose. And to every such scholar he appointed £20 a-year for the first three years, and £30 a-year and more after that time, if his estate would bear it.

The testator was a native of Scotland, and studied in the University of Glasgow in 1643, at which time the church of Scotland was Presbyterian. He was residing in England at the time of making and re-publishing his will, and of his death, at which periods the Church of Scotland was Episcopal. On an information filed in 1690 by the Attorney General, at the relation of the then Vice President and other heads of Colleges in the University of Oxford, mentioned in the will, against the testator's heiress-at-law—suggesting a pretence by her, that as Episcopacy had ceased in Scotland, and the Presbyterian form of worship was established in its place, the testator's intentions could not be carried into effect, and the devise having become void, the estate reverted to her—a decree was made by the Lords Commissioners in 1692, establishing the will against the heiress-at-law, and directing the usual accounts of the testator's real and personal estate, reserving, until the accounts should be taken, all directions touching the establishment of the charity (*Attorney General v. Guise*, 2 Vern. 266).

The Master having made his report, the cause came to be heard thereon and for further directions before Lord Keeper Somers in 1693. By the decree then made, it was ordered that the executors in trust should convey all the estate to the six senior Fellows of Baliol College, and various directions were given to the latter for managing and letting the estate, clearing off debts and incumbrances, and applying the surplus rents towards [805] establishing the charity (the decree is set out in 2 Coll. 670), subject to such alteration and disposition as the Court should from time to time make, upon due application by any person concerned, for the better execution of the trust, and as near as could be to the testator's will and intentions. The manor of Uffeton and the lands devised therewith were, in pursuance of this decree, con-

veyed to the then six senior Fellows of Baliol College, upon the trusts thereby declared.

The charity was managed under a scheme settled by the said decree until the year 1738, when an information was filed in Chancery by the then Principal and Professors of Glasgow College against the Master and scholars of Baliol College and the then six senior Fellows thereof, the Vice Chancellor of the University of Oxford, and others, which, after stating that the relators were not parties to the former suit, that the decree therein made gave benefits to Baliol College not warranted by the will, and that the charity estate was improperly leased at an undervalue, prayed that accounts of the property and of its management might be taken, and that the said decree having been obtained by misrepresentation, and being detrimental to the charity, might be altered, and the said lease set aside, etc.

By the decree made in that cause by Lord Hardwicke in 1744 (*Attorney General v. Baliol College*, 9 Mod. 407), the relators and the defendants were ordered to lay before the Master a scheme or schemes for the better establishment and regulation of the charity, as near to the will and intention of the testator as the alteration of circumstances since the making of the will would admit, and for the making of leases of the charity estates for the future.

Three schemes were laid before the Master, one by the relator, another by the defendants, the Master and scholars of Baliol College, and the third by the defendants, the Vice Chancellor of the University of Oxford, the Provost of Queen's, the President of St. John's, and Master of Baliol, which last submitted that every scholar having an exhibition from the charity should conform to the doctrine and discipline of the Church of England, and enter into holy orders when capable thereof, or forfeit his exhibition. None of the proposed schemes contained any provision for the return of the exhibitioners into Scotland.

The Master, after setting out in his report the accounts directed to be taken, stated that the said several schemes were laid before him—which he set out in the fifth schedule to his report—added that, none of them appearing to him to be proper, he formed from these one general scheme—set forth in the sixth schedule to the report—which he conceived best answered the purposes of the charity, and came nearest to the will and intentions of the testator. This scheme did not impose any condition as to the taking of holy orders by the exhibitioners.

To this report the Vice Chancellor of the University of Oxford and the other propounders of the third scheme, took exceptions, which were overruled so far as they objected to the said scheme.

The cause was heard, on further directions, by Lord Keeper Henley, in 1759, and by the decree then made, after reciting that the Court did not approve of any of the said schemes, it was ordered that the surviving trustees of the charity estate should convey the same to new trustees, named by the Vice Chancellor of the University of Oxford, the Provost of Queen's, Master of Baliol, and President of St. John's College in the said University, or any three of them. And after providing for the letting of the estates, and appointment of a steward with a salary, to collect the rents, it was further ordered, that such steward should annually transmit to Glasgow College a [807] rental of the estates, and an account of his receipts and disbursements, and after payment of certain specified sums (they are stated in 2 Coll. 672) he should pay the remainder of the rents to the Master and Scholars of Baliol College, to be applied by them for the education and maintenance of scholars, at £70 a-year each to five of the ablest of them, and £65 a-year to others, so far as such rents would extend; the surplus, if any, to be preserved for the benefit of the charity, etc., with liberty for any of the parties to apply to the Court for directions to have a nomination of exhibitioners when there should be sufficient fund for the purpose, such exhibitioners for the future to be allowed their exhibitions without deduction on account of absence, when leave of absence should be obtained from the Master of the said College. And it was ordered, that notice of any vacancy of the scholars should be given to Glasgow College, and if they should neglect to nominate to such vacancy within six months after notice thereof, the right to elect thereto was to be exercised according to the former decree, which was to be observed in all matters wherein it was not varied by this decree.

Various orders were subsequently from time to time made in the said cause (*The*

*Attorney General v. Baliol College*) as the revenue of the charity increased. By one of them, dated in 1777, it was ordered that Glasgow College should be at liberty to send two more scholars (there being then six), qualified according to the establishment of the charity, to be exhibitioners in Baliol College at £70 a-year for each, and that the exhibition of the then sixth scholar, who had only £65, should be raised to £70 a-year. By another, dated 1795, it was ordered that two more scholars should be added, at exhibitions of £70 a-year for each, and all exhibitioners thereafter to be elected should enjoy their exhibitions no longer [808] than ten years, and that their places should become void by marriage or acceptance of any ecclesiastical preferment in England or Wales, or of any place or office in the army or navy; and any who should be rusticated should forfeit his proportion of exhibition money during the period of his rustication, to be distributed among the rest of the exhibitioners. By another order, dated 1810, it was among other things ordered, that the exhibitions of each of the ten exhibitioners then in Baliol on the foundation of this charity, should be increased from £70 to £133 6s. 8d.; and this order repeated that of 1795 as to the duration of the exhibitions, and the forfeiture of them by marriage or acceptance of ecclesiastical preferment, or place in the army or navy, etc.: and by another order, dated 1829, new trustees of the charity were appointed.

All these orders were made on the petitions of the relators in the cause of *The Attorney General v. Baliol College*, and under the several decrees and orders in that and in the former cause of *The Attorney General v. Guise*, the charity has been administered from the year 1693. There was no decree, nor order, requiring the exhibitioners to give any bond, or in any way to bind themselves to enter into holy orders, or to return to Scotland, as required by the founder's will.

The information, on which this appeal arose, was filed in 1844—amended in 1845—at the relation of the respondents, the Honourable John Hay Forbes, commonly called Lord Medwyn, one of the Masters of the College of Justice in Scotland, and James Robert Hope, of Lincoln's Inn, Barrister—both members of the Protestant Episcopal Church of Scotland—against the appellants and against the Master and Fellows of Baliol College, who are named respondents on the record, but are not otherwise parties to the appeal. The information, after stating [809] to the effect hereinbefore stated, alleged that the object of the founder of the charity, as expressed in or to be collected from his will, was to provide, by means thereof, a supply of clergymen educated at Oxford, and canonically ordained, and being in communion with the Church of England, to officiate in Scotland; and in so providing for the education of such clergymen at Oxford, where they would necessarily be brought up in the doctrine and discipline of the Church of England, he manifested an intention to promote the dissemination of such doctrine and discipline in Scotland, and to favour the predominance of those principles by which the Episcopal church there was distinguished from the Presbyterian. The information charged that at the respective dates of the decrees of 1693 and 1759, it was from the circumstances of the times and state of the law impossible fully to perform the trusts of the said will according to the intention of the testator, but that in consequence of the repeal of the act 19 G. 2, c. 38, and other acts—which imposed penalties on persons resorting to or officiating in Episcopal chapels in Scotland—by the acts 32 G. 3, c. 63, and 4 Vict., c. 33, the Protestant Episcopal Church of Scotland, which existed ever since the date of the will, was fully recognized by the State, and the will and intention of the testator were more capable of being effectuated than they were at the dates of the said decrees; and many persons in Scotland were educated for the ministry of the Episcopal church there, and would be candidates for exhibitions upon this charity, if it were applied for the purpose of their education.

The information prayed a reference to the Master to settle and approve of a scheme (without prejudice to the present exhibitioners) for the better management of the charity, and more effectual execution of the trust of the will as nearly in accordance with the testator's intentions as the alteration of circumstances since the date of the [810] will, and the present state of the Protestant Episcopal Church in Scotland, would permit, and for consequential directions.

The appellants in their answer \* stated the various changes in the established

\* This answer, as well as the statements and charges in the information, are largely set forth in 2 Coll. pp. 764-86.

church of Scotland, and insisted that the testator's primary intention was to promote the advancement of learning generally in Scotland, his native country, especially in connection with Glasgow College, where he had been educated, and not to favour any particular views of religious doctrine or discipline; that important differences existed between the present doctrine and discipline of the Protestant Episcopal Church in Scotland and the doctrine and discipline of the church established there at the date of the testator's will; and that the decree and orders made in the causes of *The Attorney General v. Guise* and *The Attorney General v. Baliol College* had settled in a final manner the general scheme for the administration of the charity, so as to exclude the alterations sought by the relators.

Answers were also put in by the other defendants to the information, viz., the Masters and Fellows of Baliol College, to the effect that they were satisfied with the present administration of the charity, but desirous to submit to the judgment of the Court; and by the trustees of the charity estates, stating that, except as trustees, they had no interest in the matter, and submitting whether they were necessary parties.

The cause was heard, upon the pleadings and certain admissions, before Vice Chancellor Knight Bruce, in July 1846, when his Honour made the decree now appealed from, whereby it was referred to the Master "to inquire whether, consistently with the law of Scotland, the [811] scheme, according to which—under the decree of 1759, and the subsequent orders of 1777, 1795, and 1810—the charity founded by the testator's will was administered could be modified or varied, so as to make such charity more effectually conducive to the supply of the Protestant Episcopal Church in Scotland with fit and competent clergymen, who, having been born in Scotland, and educated wholly or in part at Glasgow and Oxford, should exercise their clerical functions in Scotland; and if the Master should be of opinion in the affirmative, he was to approve of a scheme for such purpose. But the Master, in making such inquiry, and considering and approving of a scheme, if any, was to have regard to the said will, and to the circumstance that the established church of Scotland was, in 1677 and 1679, Episcopal, and was, at the date of this decree, Presbyterian; and the Master was to proceed on the basis of the said first-mentioned scheme, and not to depart therefrom to any unnecessary extent, and was not to approve of any scheme that should disturb or interfere with any exhibitioner who was then, or before or at the date of his report should be, an exhibitioner on the said foundation. And for the present, and until further order, it was ordered that the charity should be administered conformably to the decree of 1759, and the orders of 1777, 1795, and 1810. And the Court declared its opinion that the Principal, Professors, Regents, and officers of Glasgow College, in so administering the said charity, ought to have regard, as far as conveniently might be in the present state of the Protestant Episcopal Church in Scotland, to the circumstance that the testator was to be considered as having been a member of the established Church of England, or of the then established Church of Scotland, and therefore an episcopalian Protestant, and as having by the expression, 'holy orders,' meant holy orders by Episcopal ordination."

[812] The decree contained the usual directions for production of books and papers, and examination of parties before the Master, who was at liberty to state special circumstances. Further directions and costs were reserved, and liberty given to apply, etc.

Mr. Russell and Mr. Rolt (Mr. W. Buller was with them) for the appellants, after stating the foundation and administration of the charity under the decrees and orders made in the causes of *The Attorney General v. Guise* (2 Vern. 266) and *The Attorney General v. Baliol College* (9 Mod. 407), contended that the decree of the Vice Chancellor was inconsistent with them, although there had not been, since the date of the decree of 1759, any change of circumstances which would justify such a departure from the scheme of administration then established. Upon the legitimate interpretation of the will, aided by reference to the position of the testator, and the history of the Church of Scotland, his primary and paramount intention appeared to have been not, as suggested in the Vice-Chancellor's decree, to supply the Episcopal Church of Scotland with ministers educated at Oxford, but to benefit Glasgow College, and thereby to advance the causes of learning and morals in Scotland generally. To these

main objects, the plan and scope of the testator's charity, so far as they involved a connection of the persons to be thereby benefitted with any religious community, were subservient, and had no special reference to the Episcopal Church in Scotland, except while it should be the established church. There was nothing in the state of the law relating to the Scotch Episcopal Church at the date of the decree of 1759, that could prevent the Lord Keeper, who made it, from making a decree in the terms of the present decree, if he thought such a decree [813] would be right. There being no report of the arguments before Lord Keeper Henley, or of his judgment, the grounds of it must be collected from the decree itself (*supra*, p. 807), and from the judgment of Lord Hardwicke in pronouncing the decree of 1744 (9 Mod. p. 408, *et seq.*). It was always admitted that the terms "holy orders" in the will, meant orders by the ordination of a bishop, as in the Church of England; yet, in the scheme laid before the Master in 1758 by the Vice Chancellor of the University of Oxford, Provost of Queen's, President of St. John's, and Master of Baliol, for the regulation of the charity, though it was specially urged that every scholar on the foundation should conform to the doctrine and discipline of the Church of England, and enter into holy orders, the Lord Keeper, upon overruling their exceptions to the Master's report, must have decided that the exhibitioners were not obliged to enter into such orders, and the obligation prescribed by the will having never been enforced, must be considered as expressly dispensed with in that decree, and in all the subsequent orders down to 1810.

[The Lord Chancellor, and also Lord Campbell, asked if there was any objection taken to the Vice-Chancellor's jurisdiction to alter decrees made by Lords Chancellors and Lords Keepers.]

Every possible objection was taken. By section 22 of the act 5 Vict., c. 5, which created the Vice-Chancellors' Courts, their jurisdiction was defined, and it was provided that no such Vice-Chancellor should have power or authority to discharge, reverse, or alter any decree or order made by any other Vice-Chancellor except his predecessor in office, nor any decree or order made by any Lord Chancellor, unless authorised by the Lord Chancellor.

[Lord Campbell.—Suppose that, after the decree of 1759, Presbyterian Church Government in Scotland was [814] abolished by act of Parliament, and Episcopacy restored, would it not be necessary to alter the scheme?]

There might be a new scheme. Liberty was reserved in the former decrees for any party interested to apply to the Court. In the existing state of the Church of Scotland, the Court of Chancery or this House, if called on for the first time to sanction a scheme for the administration of this charity, could not sanction any practicable one more in accordance with the testator's intentions than that which was established by the decree of Lord Northington. The inferences in favor of the Episcopal Church, drawn from the testator's use of the terms "holy orders," "preferment," and "preferred," and from his gift of £50 to the parish church of Uffeton, may be admitted; that was then the established Church; and it was the established Church of Scotland, whether Episcopal or Presbyterian, that the testator had in his mind. He was of Catholic or Latitudinarian principles, and his main object was the promotion of the cause of education and religion generally in Scotland, especially in Glasgow University. In his letter in 1661, presenting his polyglot bible to the university, he commends that, the place of his education, for "religion," not any particular religion, but religion generally, "and great learning;" and the Principal to whom he wrote, and the Professors at that time, were eminent Presbyterians, and that was the national religion until the end of the year, when it was replaced by Episcopacy. But if the education of ministers for the Episcopal Church of Scotland, as established at the date of the will, was the object of his charity, that object could not be effected now, as that Episcopal Church differed essentially in doctrine and constitution from the present Episcopal communion tolerated in Scotland, so that at the present time, whatever might have been done at the date of the will, the testator's intention cannot be carried into effect except by an approximation *cy prés*, as was done in the *Mico Charity* and *Betton's Charities*. *The* [815] *Attorney General v. The Ironmongers' Company* (2 Myl. and K. 576; 2 Beav. 313 (see p. 317); *Craig and Phil.* 208. and 10 Clark and F. 908), *Attorney General v. Earl of Stamford* (1 Phill. 737).

In any view of this case, the Vice Chancellor's decree could not be sustained, and



the proper order for the House to make, would be to order the information to be dismissed.

Mr. L. Wigram and Mr. R. Palmer for the respondents (the relators), submitted that the Vice Chancellor's decree was not inconsistent with the former decrees for the administration of the charity. The object of his Honour was not to disturb them, but to carry them out, and to effectuate fully the will of the testator. In that sense, the scheme settled under the former decrees was varied and extended by the subsequent orders of 1795 and 1810, so that Lord Northington's decree in 1759, on which the appellants relied as final and conclusive, did not preclude the Court from interfering with the scheme of administration then established. In *The Attorney General v. Bovill* (id. 766), Lord Cottenham said, "I cannot concur in the opinion that I am precluded by the decree of 1816 from doing any thing that may now be proper to be done for the regulation of this charity." The former decrees and orders approved of such schemes as were practicable at their respective dates; new circumstances having since occurred, the Court was justified in interfering; *Attorney General v. Scott* (1 Ves., sen. 417), *Moggridge v. Thackwell* (7 Ves. 36), *Mills v. Farmer* (id. 486-7).

It was suggested in the argument for the appellants, that the Vice-Chancellor had not, as Vice-Chancellor, jurisdiction, without authority from the Lord Chancellor, to alter the decrees and orders of Lord Somers, Lord Hardwicke, and Lord Northington. No effect should be given to that objection, as the only result would be the delay and [816] expence of sending the case back to the Vice-Chancellor with the Lord Chancellor's direction to rehear the cause.

[The Lord Chancellor and Lord Brougham said, the decree under appeal was the Lord Chancellor's, being signed by him, and they set no stress on the objection.]

The difficulties which formerly opposed themselves to the execution of this testator's intentions have ceased to exist. Episcopacy was all but forbidden in Scotland in 1693, as appeared from the case of Greenshields (see 19 Lords' Jour. 240), who was prosecuted for preaching Episcopalianism. That gave occasion to the act of 10 Anne, c. 7, by which, and by subsequent Acts, Episcopacy was fully recognised in Scotland. There were ever since Episcopal students enough in Glasgow college, candidates for this charity.

[The Lord Chancellor.—Episcopacy was tolerated in Scotland in 1744, yet the decree, then made, directed the administration of this charity *cy pres*. Can that decree stand with the Vice-Chancellor's, which directs the contrary?]

The alterations in the law and other circumstances that have occurred since Lord Hardwicke's decree, made it desirable to have a new scheme which would do justice to all parties without overturning that decree. The terms of it were, that schemes be laid before the Master. It is evident, from the report of the case of *The Attorney General v. Balliol College* (9 Mod. 407), that Lord Hardwicke was not aware of the act 10 Anne, c. 7, and other acts that had been passed for relieving Episcopacy in Scotland, because he noticed only the acts passed before Lord Somers' decree. Both these decrees, from the state of the law in Scotland and the necessity of the case, proceeded on the *cy pres* principle. The decree of 1693, having left it open to any of the parties to apply, the application to Lord Hardwicke, was in the terms of the reservation, and did not seek or [817] suggest any change in the regulation of the charity, and it would be a very unusual thing for the Judge himself, in his view of the will, to suggest an extension of the scheme.

The testator's principal object was not, as alleged by the appellants, to favor Glasgow College or promote learning in Scotland, but to prepare young men from that country to receive their religious education in the doctrines and discipline of the Church of England, to receive holy orders there, and then return to Scotland to perform clerical duties. Their return to Scotland was to be compulsory, through the machinery of bonds and penalties. The pupils were required to spend two or three years only in Glasgow or some other Scotch College, but they were to remain in an Oxford College ten years. There was no doubt that the testator's design was to supply the Protestant Episcopal Church in Scotland with native clergymen episcopally ordained who should have, previously to ordination, received an English university education. These purposes were perfectly lawful at the date of the will (see Acts (Scotch), Car. 2 1662, Parl. 1, sess. 2, cap. 1 and 4; 1663, Parl. 1, sess. 3, cap. 5; 1669, Parl. 2, sess. 1, cap. 1; 1672, Parl. 2, sess. 3, cap. 9; and 1681, Parl. 3, cap. 6);

the temporary causes, arising from changes in the law (see acts of the Estates (Scotland), 1689, cap. 13, 18, 21, and 30; Acts of Parliament (Scotch), 1689, sess. 1, cap. 3; 1690, sess. 2, cap. 2, 5, 17, and 27, and 1693, cap. 22), which prevented their execution at first, were gradually removed (see act of Scotch Parl., 1695, sess. 5, c. 27; and 2 Russ. Hist. of the Church of Scotland, *passim*), and have now entirely ceased to exist (see Skinner's Annals of Scottish Episcopacy, *passim*). The Protestant Episcopal Church of Scotland, partly relieved from disabilities by the acts of 10 Anne, c. 7, and 32 G. 3, c. 63, has been fully recognised by the act of 3 and 4 Vict., c. 33; it is the same Church which was by law established at the date of the will, and is now, as it was then, in full [818] communion with the Church of England, retaining the same principles of religious doctrine and discipline (see Skinner's Ann. *passim*; Canons of Scotch Episcopal Church, 1 to 30, 1838; Lawson's His. Scotch Episcopal Church, 1843, and stat. of University of Oxford, 1768).

The decrees of 1693, by Lord Somers, and of 1759, by Lord Northington, were not intended, and did not profess to provide for the perpetual administration of the charity. The first was expressed to be made subject to alteration "upon the application of any person concerned, for the better and more effectual execution of the trust, as near as could be to the testator's will and intentions," a complete execution of them having been rendered impossible by the then recent changes in Church and laws. The power of alteration so given was not exhausted by the scheme of administration contained in Lord Northington's decree, and accordingly that scheme was varied most materially, and extended by the orders of 1795 and 1810. No provision has been made by any decree or order for making the charity subservient to the religious purposes intended by the testator. The omission must be attributed to the circumstance that at the respective dates of the decrees those purposes were incapable of being carried into effect consistently with law. The scheme, therefore, adopted under such circumstances, for administration of the charity ought not to be held final now when a complete fulfilment of the founder's will is perfectly consistent with the policy and letter of the law, and the alteration is properly asked by a new information, regularly filed in the name of the Attorney General. It must also be observed that the Scotch Episcopal Church, on whose behalf the information is filed, was not represented in the former suits relating to the charity, and it is not according to the practice of the Court to hold decrees or orders, settling a scheme for the administration of a cha-[819]-rity, conclusively binding on parties who had no opportunity of opposing it, especially when the scheme is manifestly insufficient for effectuating the founder's intention in their favour.

Mr. Russell replied.

The Lord Chancellor (July 27).—This case came before your Lordships upon an appeal from the Court of Chancery, respecting a gift under the will of John Snell, dated December 1677, by which certain property was disposed of for the purpose of educating certain young men, who were first to be educated at Glasgow, and from thence they were to go to Baliol College, in Oxford.

The part of the will that raises the present question is in these words: "and my further will and mind is, that every such scholar and scholars, upon each of their admissions to such College or Hall as aforesaid, shall be bound and obliged to submit and conform to the doctrine and discipline of the Church of England, and to enter into holy orders as soon as he or they shall be respectively capable, by the Canons of the Church of England, and shall also be respectively bound and obliged by such security as the said Vice Chancellor, Provost, Master, and President, for the time being, or any three of them, shall think fit, to some person or persons to be by them, or any three of them, thereunto appointed, that the said scholar or scholars shall respectively forfeit and pay to that College or Hall, whereof or wherein he or they shall be respectively admitted, the sum of £100 of lawful money of England, if he or they shall at any time after such his or their admission take or accept of any spiritual promotion, benefice, or other preferment whatsoever within the kingdom of England or dominion of Wales, it being my will and desire that every such scholar so to be [820] admitted shall return into Scotland, and there be preferred and advanced as his or their capacity and parts shall deserve, but in no case to go back into England, nor to go into any other place, but only into the kingdom of Scotland, for his or their preferment."

Now, my Lords, it must be borne in mind, that at the time of the date of this will, Episcopacy was the form of church government in Scotland, and that Episcopacy is

not now the form of church government in Scotland. I shall have occasion to refer to various proceedings which have at different intervals taken place upon the subject of this bequest, the result of all which, I think your Lordships will be of opinion, has been to establish this fact, that in consequence of Episcopacy ceasing to be the form of church government in Scotland, and the Presbyterian form of church government being substituted in its place, the provisions made by the testator in his will could not be carried into effect; and as they could not be carried into effect, it was necessary to come to some conclusion as to what was to be done with this property.

It was at one time contended that the direct object of the testator having failed, the gift itself had become void, and that it had become the property of the heir-at-law. That contention, however, was overruled by the judgment of the Court of Chancery (see *Attorney General v. Guise*, 2 Vern. 266). But still it was, in that case, as in all the subsequent proceedings, assumed as a fact, and as a necessary conclusion of the circumstances that had taken place, that the terms of the will could not be carried into effect, and that it was necessary therefore to come to some arrangement, or to some scheme, by which so much of the testator's intention as could be [821] carried into effect should be enforced, leaving out that part, which, by the course of events, had become impossible.

The decree now under appeal takes a very different view of the consequences of what has taken place in Scotland: By the decree now appealed from, it is referred to the Master (2 Coll. 713-14) "to inquire whether the scheme can be modified or varied so as to make such charity more effectually conducive to the supply of the Protestant Episcopal church in Scotland with fit and competent clergymen, who, having been born in Scotland, and educated wholly or in part at Glasgow and Oxford, shall exercise their clerical functions in Scotland; and if the said Master shall be of opinion in the affirmative, he is to approve of a scheme for such purpose. But the Master, in making such inquiry, and considering and approving of a scheme, if any, is to have regard to the said will, and to the circumstance that the established church of Scotland was in the years 1677 and 1679 Episcopal, and is now Presbyterian." And the Court declared its opinion, "that the Principal, Professors, Regents, and chief officers of Glasgow College, in so administering the said charity, ought to have regard, as far as conveniently may be, in the present state of the Protestant Episcopal church in Scotland, to the circumstance that the said testator is to be considered as having been, when he made and when he republished his said will, a member of the then established Church of England, or of the then established Church of Scotland, and therefore an Episcopalian Protestant, and as having by the expression, 'holy orders,' meant holy orders by Episcopal ordination."

Now, my Lords, it is quite clear that, according to the present state of the law, it is possible and legal to apply [822] any income for the better provision of the Protestant Episcopal church of Scotland. The master has by this decree received direction that he is to adopt a scheme, the effect of which will be to employ the income arising from this property in favour of the Protestant Episcopal Church of Scotland. The Court has declared that to be the view which it takes, and the master is directed to inquire how a scheme can be arranged, which shall be more effectually conducive to the supply of ministers to the Episcopal church in Scotland. The master, therefore, had no discretion at all upon the subject.

It was argued at the bar, that the effect of this decree was merely to refer it to the master to say whether the present scheme is one that ought to be continued. The decree leaves no discretion in the master on that subject, but gives him a rule by which he is to act; he is not to approve of a scheme generally, but the decree gives him directions by which he is to be guided; it declares, that in the opinion of the Court, the master is only to approve of a scheme for the purpose of carrying the view of the Court into operation.

Before I refer to what has been decided in this case for a century and a half, I shall call your Lordships' attention to what would naturally be, according to the view I take of the case, the result of the testator's gift, coupled with the transactions that have taken place. At the time he made his will, Episcopacy was the form of church government in Scotland, and (which is not immaterial) I assume he was of that persuasion, and approved of that form of church government himself. It is quite obvious therefore that that being the rule of church government in Scotland, and certainly the rule of church government in Oxford, he very naturally provided

means by which young Scotchmen, after having commenced their education in Scotland, should finish their education in Oxford—and [823] he says, by the terms of his will—in order to supply the church in Scotland with well educated ministers, and he directs that they should take holy orders. And I think there is no doubt that what he meant by holy orders was something that was consistent with the state of Scotland and the state of England at that time, and that by the expression, “holy orders,” he meant holy orders according to the understanding of the Episcopal form of church government. The young men were to take holy orders, and then they were to come “into Scotland, and there be preferred and advanced as his or their capacity and parts shall deserve, but in no case to come back into England, nor to go into any other place, but only into the kingdom of Scotland for his or their preferment.” His object, therefore, beyond all question, was to have young men educated who should be competent to carry on the duties of the clergy according to the then established form of church government in Scotland, and—whether receiving their ordination in England or Scotland is quite immaterial—they were to have ordination according to the forms of the Episcopal church, and having received them, they were to come into Scotland, and there to seek their preferment—being prohibited from obtaining their preferment elsewhere, they were to go back into Scotland. And, consequently, it was his object to supply Scotland with able and well educated ministers, who were there to derive the benefit of the establishment as it then existed.

This was the state of Scotland at the time the will was made; and that form of church government having ceased to be the form of church government in Scotland, and the Presbyterian form of church government having been substituted in its place, the testator's heir-at-law said, “Here is a gift intended for the benefit of a charity, but which [824] cannot now be carried into effect, and therefore the property would devolve upon me as heir-at-law” (2 Vern. 266).

Now, although it does not appear upon the face of Lord Somers's decree that the doctrine of *cy pres* was discussed before him, yet it must have been discussed before him, and it appears to me to have been so discussed by the report in Vernon; because the whole question turned upon whether there was a failure of the object of the testator, so that the heir-at-law would come in; or whether it was within the province of a Court of Equity to administer the trust upon the principle of *cy pres*, it not being contended by anybody or thought of, that in the circumstances, as they then existed, the trust could be carried into effect according to the terms of the gift. Lord Somers was of opinion that the heir-at-law was not entitled, and he so declared. But there is no declaration as to the form of a scheme by which the trust should afterwards be carried into effect, though it appears from the report in Vernon that the matter was discussed, and that the principle of the application of the trust *cy pres* was that which was contended for by those who objected to the title of the heir.

That decree, no doubt, was not a decree which, according to the present form of the Court, would have been pronounced. It left the matter much too vague; and it is obvious, that according to our present form of proceedings, it having been decided that it was clear that the trust could not be carried into effect according to the terms used in the will, and yet that the heir-at-law was not entitled, the Court would take measures for the purpose of ascertaining in what way it ought to be administered for the benefit of those to whom the income ought to be applied. That was not, however, done by that decree, but it came again before the Court in the year 1744 (8 Mod. 407), and [825] what had been omitted in the decree of Lord Somers, was supplied by the decree of Lord Hardwicke; for there he declares that the master should approve of a scheme “for the better establishment and regulation of the charity, and carrying the same into effect for the future as near to the will and intention of the testator as the alteration of circumstances since the making of the will would admit.” Assuming, therefore, that this alteration of circumstances did prevent the execution of the trust, according to the law as it was then in force, seeing that Lord Somers had decided against the heir, and that the trust was to be carried into operation, Lord Hardwicke adopted that course which was the most regular course. In my opinion, under the original decree of Lord Somers of referring it to the master to approve of a scheme.

Accordingly, my Lords, certain schemes were carried in before the master, and it is sufficient for the present purpose to call your Lordships' attention to what is

stated in the master's report in the schedule thereto, containing an account of a scheme laid before him by the then Vice Chancellor and other officers of the University of Oxford. By the fifth of those exceptions, it was suggested "that every such scholar should be obliged to submit and conform to the doctrine and discipline of the church of England, and enter into holy orders, when capable thereof by the Canons of the church of England;" that was the proposition then made by the university of Oxford, raising directly the point. Perhaps it would be an answer to that, that the decree had disposed of it; that the decree, by directing the master to approve of a scheme *cy pres*, had decided that the very scheme intended by the testator could not be carried into effect. However the parties were not excluded. If they were desirous of a more speedy termination of that point, no doubt the way to do it was, by bringing the proposition directly by way of exception before the Court. How did the Court deal with that? [826] The parties came before Lord Northington, and Lord Northington's order was, "that the defendant's second exception to the said report should be allowed as to the sum of £50 therein mentioned, and all the said other exceptions were overruled."

Then, here we have the decision of Lord Somers, excluding the heir; we have the decree of Lord Hardwicke, directing a scheme to operate *cy pres*, and we have a decision directly upon the exceptions raised to the report by Lord Northington, overruling those exceptions, and therefore determining that it ought not to form part of the scheme, that the scholars sent from Glasgow to Oxford should be required to enter into holy orders. Then, that having been so decided, the Court, disapproving of all the schemes that had been suggested, gave some directions; having overruled the exceptions, it is quite unnecessary to make any further declaration of the opinion of the Court upon that subject, because it was distinctly decided; it was brought before the Court, and received the deliberate judgment of the Court—that the scholars should not be required to enter into any such obligation.

The result of all that is, that, commencing with Lord Somers's decree, which does not in terms decide the point, but taking it up from Lord Hardwicke's decree of 1744, followed by Lord Northington's in 1759, we find that above a century has elapsed since this charity had been declared to be administered, not according to the terms of the testator's will (that having become impossible), but according to a scheme omitting that part of the direction which required the scholars to enter into holy orders. It having become impossible, owing to the change of circumstances in Scotland, to comply with that direction, it was for the Court to decide what was the best course to be adopted. To direct the scholars to be educated according to the Presbyterian form of church government would have been [827] certainly that which the testator did not approve of, for he evidently looked to a totally different form of church government as that which he considered the scholars ought to be devoted to. To educate them in the Episcopal form of church government, was equally inconsistent with his intention, because then they could not take part in the established religion of Scotland, if they were no longer able to be sent to Scotland, there to be ordained, and after ordination, to obtain preferment there. There was, in fact, no preferment to be had in Scotland for those who were attached to the Episcopalian form of church government. His object, therefore, could neither be obtained by educating them according to the Episcopalian, nor according to the Presbyterian, form of church government, and the course which the Court therefore adopted obviously was, as neither by the one nor the other could the direct object of the testator be obtained, to leave the parties who were still to receive the benefit of a good education, to adopt the one or the other according as their own views of propriety dictated. It struck out that which had become impossible, and left that which was the purpose of the will, the education, still remaining open to the benefit of those young men who might go to Glasgow and come from Glasgow for the purpose of being educated at Oxford.

My Lords, such was the decision of Lord Somers; I must assume that it was the opinion of Lord Somers; I know it was the opinion of Lord Hardwicke and Lord Northington, because we have in terms their decision upon the subject, and if there had been still more doubt than it appears to me there is, as to that being the proper course to be adopted under the circumstances that existed at the time those decrees were made, I should have thought that above a century of decision, not on a scheme

which might or might not be a subject of variation, but [828] upon the construction of the testator's will, connected with the change of circumstances which had taken place, would have been sufficient to give a title to those that are claiming the benefit of the charity in a given form, which ought not easily to be dispensed with.

We, however, have a decree before us, which in terms repudiates the provisions which were made by the former decrees, and which directs a course to be adopted, which the decrees of those very eminent Judges, by whom they were pronounced, hold to be practically inapplicable to the circumstances of the testator's will.

Now it is said (and it is the only ground on which that could be justified) that, although those decrees might be proper at the time when they were pronounced, yet, that circumstances have entirely altered, and there is now no difficulty in carrying into effect the provisions contained in the testator's will. My Lords, I find no change of circumstances such as to lead to any such conclusion. At the time Lord Hardwicke pronounced his decree, and at the time Lord Somers and Lord Northington pronounced their opinions on the subject, the circumstances were exactly the same as now. There was no prohibition of persons following the Episcopalian form of church government in Scotland. There were certain rules and regulations prescribed from time to time in order to secure the loyalty of those persons, and oaths were taken from those who professed that form of worship. But that form of worship was not illegal. It was tolerated, in every sense, because the parties might follow that form of worship, without subjecting themselves to any penal consequence. But the ground on which the case was decided was, that it had ceased to be the established religion of the country. It had ceased to be the religion of the country in that form in which these young men could find occupation and preferment, and therefore [829] the Court said, "some other course must be adopted, and if we cannot carry into effect the whole of the testator's intention, we must carry it into effect so far as we can according to existing circumstances."

Are not the circumstances the same now as then? Is not the Episcopal form of church government now confined to what are called dissenting interests in Scotland? Is not the Presbyterian form of church government still the established church government of Scotland? And whether the Episcopalians there have more or less tolerance than they had at a particular time, and whether they have been relieved from more or less of the difficulty that surrounded them at different periods, is quite immaterial, and falls short of the main point, the main point being, What is the established form of church government in Scotland? That which existed at the time those decrees were pronounced exists at the present moment. I think there was quite sufficient reason for what the Court did at those periods, and if the reason existed then, I think the reason ought to operate at the present moment as it did then, and that if the form of gift, which the testator intended, cannot be enjoyed in the shape and form in which we find it proposed by the testator's will, and the only mode in which it can be applied to the benefit of those parties intended to be benefitted, is by that form which was presented by those decisions; nothing has taken place since those decisions were pronounced which would justify a Court of Equity in departing from them, and again resorting to an attempt to carry into effect the gift in the terms in which we find it prescribed by the testator.

My Lords, under these circumstances I submit to your Lordships that the decree of the Vice-Chancellor ought to be reversed, and I am not aware that there is anything else in the decree to prevent the dismissal of the suit. [830] There is no other claim made; the object of the information was to obtain that decision which was pronounced by the Court below, and therefore that being the only object (for the object of the information is to overturn that which has been so long decided, the reasons for which decision remain at this day the same as they did at the time they were pronounced) I submit that the decree ought to be reversed, and that the information should be dismissed, with the costs in the Court below.

Lord Brougham.—I agree with my noble and learned friend; I never had any doubt, from the beginning to the end of this case, that what was wanting in the decree of Lord Somers, was supplied by the decree of Lord Hardwicke in 1744, and afterwards by that of Lord Northington, which decrees were wholly inconsistent with this decree, and proceeded upon a principle in every respect inconsistent with the view taken in the decree now under appeal. It is clear that no difference what-

ever has taken place in the circumstances since those decrees were pronounced, to justify that contrary proceeding; for it is rather a contrary proceeding than a departure from what was done so many years ago. I will not go into the case, as my noble and learned friend has gone into it at great length. But I entirely agree with him, that this decree must be reversed, and that the information must be dismissed, with costs.

Lord Campbell.—My Lords, I have no hesitation in saying that I should have very much lamented if the decree of his honour the Vice Chancellor had stood. Of course it would be allowed to stand, if found to rest upon sufficient reason, but it certainly would, in my humble opinion, have much impaired the beneficial effect of a most excellent charity. I find that the Principal and Professors of the College of Glasgow, in their answer, say that the scheme that has been so long acted [831] on, is a “highly convenient and beneficial scheme, and practically works extremely well, both as respects the patronage or right of nomination vested in these defendants, and the class and qualification of the scholars, out of whom the said exhibitioners are to be selected; and that it has given the utmost satisfaction, not only in the said College of Glasgow, and among the students thereof, by whom the said exhibitions are regarded as the highest and most honourable reward of merit, but also, as these defendants believe, to Baliol College aforesaid, where the studies of the said exhibitioners are carried on and completed. And these defendants further say, that the manner in which the said charity has been so as aforesaid conducted and administered in pursuance of the said scheme, has been very beneficial and of great advantage to the kingdom of Scotland generally, more especially because it has been the means of bringing forward and maintaining and educating at the University of Oxford many young men, natives of Scotland, who through their talents and attainments, and the advantages afforded them by the said charity, have in after life attained high distinction in different departments of literature and science, and have risen to stations of eminence both in the church and state.”

There can be no doubt that this representation is perfectly just, and that the beneficial effects which Scotland has derived from this charity would not have been derived to the same extent if it had been required that all who were to have the benefit of these exhibitions should enter into an engagement that they should take holy orders in the Episcopal church of Scotland, and should be confined to that church.

My Lords, Dr. Adam Smith was one of the exhibitioners, and I believe the high education he received at Baliol College laid the foundation of his great eminence in literature and philosophy. There has been a long succession of most distinguished men who have reflected [832] honour upon the place where they were educated, and who have been of great service to their country; and not only has that been the case where the exhibitioners have continued to be laymen, but exhibitioners educated first at Glasgow and then at Baliol College, who have taken orders, have gained the greatest distinction, first, in the church of England, and afterwards in the Episcopal church of Scotland, and I feel that the Episcopal church of Scotland would not, if its interests were properly considered, derive that benefit from the exclusive monopoly of this charity, which seems to be expected.

But whatever the effect of the decree may be, what we have to consider, is, whether it stands upon sound principles or not, and I entirely concur with my noble and learned friends who have preceded me, that it ought to be reversed.

It is admitted by his honour the Vice-Chancellor, and it was admitted by the learned counsel for the respondent, that the decrees of Lord Somers, Lord Hardwicke, and Lord Northington, are to be taken to have been right. Of course, we are not to suppose that if the testator had considered that the Episcopalian was to cease to be the established Church of Scotland, and that there was to be no provision whatsoever for the Episcopal church—we are not to suppose that if he had considered there was to be another form of religion established, and that Episcopacy was to become a sect, instead of the only religion that was established in Scotland, he would have insisted as a condition, that all who were to take the benefit of his exhibitions should enter into a conclusive engagement to take orders exclusively in that persuasion, when it was to be merely a religious sect and wholly unendowed.

Then, my Lords, that being so, and these decrees being admitted to be right,

what change of circumstances is there now that there should be an entire reversal of the [833] schemes, because the substance of the decree pronounced by his honour the Vice-Chancellor was this, that these exhibitioners should hereafter belong to the Episcopal church of Scotland, and to that alone, and that none should claim the benefit of this charity except such as were to be exclusively educated for the Episcopal church of Scotland? I cannot find any variation of the circumstances at all to authorise such a change from the principle on which the charity is conducted.

What was the situation of the Episcopal church of Scotland in 1744, when Lord Hardwicke pronounced that decree? It was a persuasion that was tolerated, but not endowed. It was a church for which the state made no provision, there being at the same time another religious persuasion that was established and endowed by the state, and which was favourably regarded by the state. The first act of the sovereign of this country upon coming to the throne is to sign a declaration that the Presbyterian church of Scotland shall be maintained. That was the state of things when Lord Hardwicke pronounced his decree. What is the state of things now? The Episcopal religion is still only tolerated in Scotland; it is not the established religion of the country; there is no endowment made for it by the state, and therefore it remains exactly as it was. There have been some further indulgences; as the clergy in Scotland are no longer jacobites, as they do not object to take the oaths of allegiance, and do not hesitate to pray for the Royal Family, those cautions that were resorted to in former days to preserve the Royal Family on the Throne, have ceased to be put in force now. Indeed there is a courtesy shown them; for the clergy who are ordained by Scottish Bishops, may, to a limited degree, be permitted to officiate in our churches in England. But that does not alter or affect the situation of the Episcopal church in Scotland. It is merely a persuasion that is tolerated, there being another religious establishment that is endowed. There is no change of [834] circumstances, and there being no change of circumstances, and the decrees of Lord Somers, Lord Hardwicke, and Lord Northington being allowed to be right, another decree which substantially overturns those decrees, must be wrong.

I agree therefore in the motion that the decree be reversed, and the information be dismissed, and with costs, as proposed.

Mr. Russell suggested that their Lordships' order should contain a direction that the costs of the appeal should be paid out of the charity fund; for there was a large accumulation of surplus rents in the suit of *The Attorney General v. Baliol College*. The Court below might find a difficulty in dealing with them—

The Lord Chancellor.—No order is necessary for that purpose; they are costs necessarily incurred in the execution of the trusts.

Mr. Rolt.—We understand that the information is dismissed, with costs against all the defendants. The Fellows of Baliol College, having been made defendants, will therefore have costs.

Mr. R. Palmer.—Your Lordships understand that the Fellows of Baliol College have not appealed, nor do they appear on the appeal; which was brought by the principal and professors of Glasgow College alone. Your Lordships simply dismiss the information, with costs.

The Lord Chancellor.—We reverse the decree, and substitute for it the dismissal of the information, with costs.

[It was ordered, That the decree of the 24th of July 1846, be reversed, and that the information be dismissed with costs, and that the cause be remitted back to the Court of Chancery to do therein as should be consistent with this judgment.]



# REPORTS OF CASES heard in the House of Lords, and decided during the Sessions 1848-50. By C. CLARK and W. FINNELLY, Barristers-at-Law. Vol. II.

CHARLES FREDERICK AUGUSTUS WILLIAM, Duke of BRUNSWICK,—*Appellant*; ERNEST AUGUSTUS, King of HANOVER, Duke of CUMBERLAND and TEVIOTDALE, in GREAT BRITAIN, and Earl of ARMAGH, in IRELAND,—*Respondent* [July 25, 27, 31, 1848].

[*Mews'* Dig. viii. 179, 180, 181, 182, 186, 294. S.C., below, 6 Beav. 1; 13 L.J. Ch. 107; 8 Jur. 253. Discussed in the *Parliament Belge*, 1880, 5 P.D. 207, and *Mighell v. Sultan of Johore* (1894), 1 Q.B. 149; and see *London (Mayor of) v. Coz*, 1867, L.R. 2 H.L. 262; *Smith v. Weguelin*, 1869, L.R. 8 Eq. 214; *Hettihewage Siman Appu v. Queen's Advocate*, 1884, 9 A.C. 588.]

## *Foreign Sovereigns—Affairs of State—Jurisdiction.*

A foreign sovereign, coming to England, cannot be made responsible in the courts there for acts done by him, in his sovereign character, in his own country :

**Held**, therefore, that the King of Hanover, who was also a British subject, and was in England exercising his rights as such subject, could not be made to account in the Court of Chancery for acts of state done by him in Hanover and elsewhere abroad, in virtue of his authority as a sovereign, and not as a British subject.

This was an appeal against an order of the Master of the Rolls, allowing a demurrer to the appellant's bill for want of equity, and also for want of jurisdiction (6 Beavan, 1; 13 Law J., N.S. 107).

[2] The bill, filed in August 1843, stated that in 1830 the appellant was the reigning duke of Brunswick, and was, in his private capacity, seised and possessed of real and personal estates of considerable value in Brunswick, England, Hanover, France, and elsewhere; but that on the 6th of September, 1830, during his absence from Brunswick, a revolutionary movement took place there, in the course of which the government was overthrown, and he was prevented from returning to resume his authority as reigning Duke; that pending the said movement, a decree of the Germanic Diet of Confederation was passed, dated the 2nd of December, 1830, whereby the appellant's brother, William, Duke of Brunswick, was invited to take upon himself, provisionally, the government of the Duchy, and the Diet left it to the legitimate *agnati* of the appellant to provide for the future government thereof: that his late Majesty William the Fourth, as King of Hanover, was a member of the said Diet, and as such King, he or his Viceroy, the Duke of Cambridge, voted in support of the said decree: that in February 1831, his said late Majesty, and the said William, Duke of Brunswick, claiming to be the legitimate *agnati* of the appellant, caused to be published a declaration, purporting to depose him from the throne of the said Duchy, and declaring that the same had passed to William, Duke of Brunswick, who, in pursuance of such declaration, had ever since exercised the rights and authorities of Sovereign Duke of Brunswick.

The bill further stated that in 1833 an instrument in writing, signed by his Majesty William [3] the Fourth, and William, Duke of Brunswick, and dated at St. James's the 6th of February, and at Brunswick the 14th of March, 1833, was promul-

gated by them in the German language, which, being translated, was as follows:—  
 "We, William the Fourth, King of, etc., and of Hanover, Duke of Brunswick and of Lunebourg, and we, William, Duke of Brunswick and of Lunebourg, moved by the interests of our house, whose well-being is confided to us, and yielding to a painful but inevitable necessity, have thought it necessary to consider what measures the interests of his Highness Charles, Duke of Brunswick, the preservation of the fortune now in his hands, the dangers and illegality of the enterprizes pursued by him, and lastly, the honour and dignity of our house, may require; and after having heard the advice of a commission charged by us with the examination into this affair, and after having weighed and exactly balanced all points of fact and law; and whereas, after the dissolution of the German empire, the powers of supreme guardianship over the Princes of the empire, which up to that period had appertained to the Emperor, devolved to the heads of sovereign states; we, taking into consideration the laws and customs, and by virtue of the rights unto us belonging, in quality of heads of the two branches of our House, have decreed as follows:

"Article the first.—Certain facts, either notorious or sufficiently proved, have caused us to arrive at the conviction that his Highness Duke Charles is at this time wasting the fortune which he possesses in enterprizes alike impossible and dangerous to [4] himself and other persons, and is seeking to damage the just claims which certain persons interested now or hereafter may legally have in his property, we have consequently considered that the only method of preserving the fortune of his Highness Duke Charles from total ruin, is to appoint a guardian over him.

"Article the second.—In consequence of this conviction, we decree that Charles, Duke of Brunswick, shall be deprived of the management and administration of his fortune; a guardian shall be appointed whom we shall choose by mutual consent from amongst the noble scions of our house, although the right of choice belongs to the legitimate sovereign of the Duchy of Brunswick in virtue of his title alone."

By the third, fourth, and fifth articles, the guardianship was confided to the Duke of Cambridge, then Viceroy of Hanover, and he was authorized to appoint sub-guardians for the management of the property, who should make an inventory thereof, and take measures for the preservation and administration of the fortune placed under the guardianship of his Royal Highness, to whom they should render an annual account of their management, to be by him transmitted to William the Fourth and the Duke of Brunswick for settlement and approval.

By article the sixth the guardianship was to be "considered as legally established at Brunswick, where it was to have its locality." And by article the seventh the decree was to be published in the bulletins of the laws of the kingdom in the usual form, etc.

At the foot of this instrument was added a note, signed by the respondent, then Duke of Cumberland, [5] and by the Dukes of Sussex and Cambridge, approving of the arrangement.

The bill then stated that the said instrument was void, but nevertheless the Duke of Cambridge accepted the appointment of supreme guardian of the appellant's property, and entered into possession thereof to a very considerable amount; and after several payments, properly made, there remained in his hands a large surplus for which he never accounted to the appellant: that on the death of William the Fourth, in June 1837, the respondent became King of Hanover, and thereupon by some instrument in writing, the particulars of which he refused to disclose, but which was signed by him and William, Duke of Brunswick, the respondent was purported to be appointed guardian of the appellant in place of the Duke of Cambridge, under the instrument of the 6th of February and 14th of March, 1833, and with all the powers and authorities thereby purported to be conferred on the Duke of Cambridge: that shortly after such appointment, the Duke of Cambridge accounted to the respondent for all the real and personal estates of the appellant, possessed by him or his agents, and paid the balance due from him in respect thereof to the officers of the treasury of Hanover, whereby the same came to the hands of the respondent, and he, upon his appointment as guardian, entered into, and ever since continued, by himself or his agents, in the possession or receipt of the rents and profits of the real estates belonging to the appellant in his private capacity at Brunswick, and also from time to time took possession of further parts of the appellant's personal property in Brunswick and elsewhere, and sold and converted into money parts

thereof, which did not consist of money, and possessed himself of the produce of such sale, and from time to time made divers payments on account of the appellant and of the expenses incurred in the management of his property; but after allowing for such payments, there remained a large balance, to the amount of several hundred thousand pounds, due from the respondent, and he never rendered to the appellant any account of the property so possessed by him.

The bill further stated that the respondent, until within a few weeks, had been residing in Hanover, out of the jurisdiction; that the appellant had by himself and agents applied to him to account for the rents and profits of the real estates, and for the personal estate and effects, and produce of the sale thereof, etc., with which applications the respondent refused to comply on various pretences suggested in the bill,—as that the said instrument of 1833, and the subsequent instrument, under which the respondent was appointed guardian, were valid and legal, and that he was not liable to account for the acts and receipts of himself and his agents, or of the Duke of Cambridge and his agents, otherwise than to William, Duke of Brunswick; but the bill charged the said instruments to be invalid according to the laws as well of Brunswick and Hanover as of Great Britain, however that the Duke of Cambridge and the respondent respectively took possession of the appellant's real and personal estates, as aforesaid, under colour of the said appointments as guardians and trustees for the appellant, and not adversely; and that the appellant and the respondent, both then residing in [7] England, were subjects of the Crown of Great Britain and Ireland, and that by the law of England such appointments of the Duke of Cambridge and of the respondent to be guardians of the appellant, and all the rights purported to be given to them respectively, were void, even if the same were valid by the law of Brunswick, and that if the said appointments were valid at the time they were made—which the appellant denied—there was then nothing in the circumstances, or conduct, or state of mind of the appellant to debar him from the full enjoyment of his property; and he charged, that in the circumstances aforesaid, the respondent was liable to account to him for the receipts and payments, acts, neglects, and defaults of himself and his agents, under his alleged appointment of guardian as aforesaid.

The bill, after charging in detail divers acts and dealings by the Duke of Cambridge and the respondent, and their respective agents, with the appellant's private property of various kinds, also charged, that in 1833-4, the appellant, then residing in Paris, and possessed of other property of large amount, the Duke of Cambridge, as guardian, acting by himself and agents, under colour of said appointment caused proceedings to be taken and attachments to be issued against the appellant and several persons in France, who had in their possession money, goods, and other effects of the appellant. The bill stated a long course of litigation arising out of those proceedings in France, resulting, in 1837, in a final decree awarding damages and costs to a large amount against the Duke of Cambridge, in respect of which the appellant received 100,000 francs in Paris, and for the unsatisfied balance, amounting to £1775, he, in 1838, brought an action against the Duke in Her Majesty's Court of Common Pleas, to which the Duke of Cambridge, after putting in several dilatory pleas, at last submitted in 1840, and paid £2000 in satisfaction of the debt and costs. And the bill charged that the said £2000 and 100,000 francs were paid out of the personal estate, or the rents of the real estates, of the appellant, possessed and received by the Duke of Cambridge or his agents, or by the respondent or his agents, under the said instrument of 1833.

The bill also charged that the appellant proceeded to the town of Osterode, in the kingdom of Hanover, in 1830, accompanied by a small retinue, with the intention of making a peaceable entry into his own dominions, and that while staying at the hotel there, he was attacked by a party of armed men, and compelled to escape into Prussia, leaving behind him cash and notes to the amount of 24,000 crowns, or £4500 sterling, all which came to the hands of the Duke of Cambridge; in evidence of which the bill set forth a letter from the Duke to the appellant, stating, "With respect to the property taken from you at Osterode, I have the satisfaction of being able to inform you that there is every reason to believe it is in perfect safety. I think, however, under actual circumstances, it would not be consistent with my duty to deliver the property into your hands, but I propose to place it at the disposal of the existing government of Brunswick, to whom you can make application, etc." And the bill

charged, that the Duke of Cambridge in resigning the office of guardian, accounted for the said cash and notes to the respondent, as the [9] new guardian, and that the latter was liable to account for the same to the appellant. The bill also charged, that the respondent was a peer of the realm, and his title as such, was "Ernest Augustus, Duke of Cumberland and Teviotdale, in Great Britain, and Earl of Armagh, in Ireland," and that since his arrival, and during his then residence in London, he exercised his rights and privileges as such Peer.

The bill prayed that it might be declared that the said instrument of the 6th of February and 14th of March 1833, and the appointment of the Duke of Cambridge as guardian of the fortune and property of the appellant, thereby purported to be made, and the subsequent appointment of the respondent as such guardian, were absolutely void and of no effect; and that it might be declared that the respondent was liable and ought to account to the appellant for the personal estate, property, and effects, and the rents and profits and produce of the sale of the real estates of the appellant, possessed or received by the respondent, or any person or persons by his order or for his use, etc., since his appointment as guardian, by virtue of the said instrument, including therein the personal estate and effects, rents, profits, and produce paid or accounted for to the respondent by the Duke of Cambridge as aforesaid, etc.

The respondent appeared (see 6 Beavan, p. 9, (note) and p. 33), and demurred to the bill for want of equity and for want of jurisdiction. The Master of the Rolls allowed the demurrer. The appeal was brought against that decision.

[10] Mr. Rolt and Mr. Heathfield for the appellant:—The respondent's defence to this suit is put on two grounds; first, that, as an independent sovereign, he is not liable to be sued in the courts of this country, and his right of exemption is not affected by the circumstance of his being also a subject of her Majesty; secondly, that the matters complained of in the bill are not the subject of municipal jurisdiction, being either matters of state or political transactions, which cannot be dealt with in our courts, consistently with principles of public policy; so that the whole of the respondent's case is made to rest upon the political character of himself and of the transactions in question.

The matters stated in the bill, and which are, or at least must be taken upon the demurrers to be, admitted by the respondent, are transactions of a private nature as between one subject of her Majesty and another, for the bill does not complain of any act done in respect of the appellant's sovereignty or Dukedom. The instrument, under colour of which he was deprived of the management of his private property, purported to have for its object to preserve the property, and not to deprive him absolutely of it. The bill alleges that that instrument is invalid according to the law as well of Brunswick and Hanover as of England. That allegation also must be taken to be admitted, but it is capable of proof in due form if necessary. The bill further alleges that the Duke of Cambridge, the first guardian under that instrument, seized and possessed himself of the appellant's property, not adversely, but as guardian—

[11] [Lord Lyndhurst.—Is the Duke of Cambridge a defendant?]

He was not made a party, as the bill stated that he accounted for his management to the respondent, his successor in the guardianship. It is not, however, necessary to discuss that point, as there was no demurrer to the bill for want of parties, nor was any question of that kind raised in the Court below.

The bill further alleges, that the appellant and respondent are both subjects of the Crown of England; that the said instrument, even if valid according to the laws of Brunswick, is invalid according to the law of England, and that there is nothing now in the mind or character of the appellant to shew that he is not perfectly competent to manage his property. The demurrer admits all these allegations.

Besides the seizure by the guardians of the appellant's private property within the territory of the duchy, the bill states that proceedings were taken in 1834 by the Duke of Cambridge, as such guardian, against the appellant, then residing in France, and against various persons there who held money or effects belonging to him. The result of that long and expensive litigation was a decree for the appellant, with costs, against the Duke. The bill states, and the statement cannot be denied, that these costs, as well as another sum of £2000, for which a suit brought in the English Court

of Common Pleas was compromised, were paid out of the appellant's own property in the hands of the respondent. The bill also states, that in a criminal attack, made by an armed party on the appellant in the Hanoverian town of Osterode, in 1830, he was deprived of 24,000 crowns, [12] equal to £4500 sterling, besides his carriage and some jewels; and there is set forth as evidence of that statement, a letter from the Duke of Cambridge, in effect admitting that the money and other property came to his hands, and that he thought it his duty to place them at the disposal of the then existing government of Brunswick. All these statements amount to this clear and admitted fact, that the Duke of Cambridge first, and the respondent afterwards, took possession of the appellant's property of various kinds at divers times and places—acting as guardians throughout, although under an invalid instrument,—and he, according to the course of the Court of Chancery, asks for an account. If these transactions had taken place between private individuals, there could be no doubt whatsoever of the appellant's right to such account. But it is objected that the matters complained of, being matters of state transacted abroad, cannot be the subject of municipal jurisdiction here. That defence has been long exploded; it was the same that was set up against inquiry into the levying of ship money and the issuing of general warrants, and, if it were to prevail, would lead to an intolerable state of tyranny. The principle of our Courts is, that whenever any person, subject to their jurisdiction, whether sovereign or not, acts without authority or exceeds it, he is liable to account; *Nabob of the Carnatic v. East India Company* (1 Ves. Jun. 371), *Mostyn v. Fabrigas* (Cowp. 161), *Frewen v. Lewis* (4 Myl. and Cr. 254-5), *Attorney General v. Forbes* (2 Myl. and Cr. 123), *Ellis v. Lord Grey* (6 Sim. 214).

[13] The second defence to the bill is, that the respondent is, by his character of foreign independent sovereign, placed above the jurisdiction of the Court. The appellant, though also a foreign Prince, is by the act of 4 Anne, c. 4, to be taken to be a natural-born subject of this realm, as a descendant of the Princess Sophia of Hanover. The respondent also, though an independent sovereign, is a subject of her Majesty, being a Peer of the realm, and was actually exercising his privileges as such at the time the bill was filed, so that both parties maintain the character of subjects of the realm as much as any other suitors of the Court. The question then is, whether there is anything in the character of the instrument by which the King of these realms and a foreign sovereign Prince could authorise a third person, a subject of this realm, to take possession of the property of the appellant, and retain it without accounting? It is quite clear that the sovereign of this country has no power by law to authorise any person in this country to seize and retain, without account, the property of another. Do the laws of Brunswick or Hanover confer such authority? The bill charges in effect, that they do not, but the demurrer implies that they do, for after stating in the usual way that there is no equity in the case made by the appellant, it adds, in a very unusual form, that the Court has no jurisdiction as to any of the matters stated in the bill.

The respondent, before putting in the demurrer, adopted the ordinary course of moving the Court to discharge the process, as in *Viveash v. Becker* (3 Maule and Sel. 284), [14] *Davidson v. The Marchioness of Hastings* (2 Keen, 509), and *Kinder v. Forbes* (2 Beav. 503); but Lord Lyndhurst refused the application, observing that "the defendant is a Peer of the realm, has taken the oath of allegiance to the Sovereign, and has a seat in the House of Peers, and at present is resident here" (6 Beav. 9 (note)). That was an adjudication of the entire question of jurisdiction which was actually exercised in that order; it is, literally, *res judicata*.

But if the question was not then determined and disposed of, the *onus* lies on the respondent to establish his immunity. There is no case or authority shewing that a foreign sovereign residing within the realm, is not subject to the jurisdiction of our Courts. The Master of the Rolls, in his judgment, referred to a passage in Bynkershoek, Tom. 2, "*De foro legatorum*," cap. 3, but not to cap. 4, "*Principis bona in alterius imperio, etc.*," in which is given a clear opinion, applicable to the present question. Any person who claims exemption from the jurisdiction must shew the grounds of exemption. Ambassadors are declared exempt (7 Anne, c. 12), because perfect freedom is necessary to the exercise of their vocation. But an ambassador may, by other means, be brought to account and to render justice to a party complaining, as by an application to his own sovereign and government. That mode of re-

dress is here impossible, because the party is himself the Sovereign, and will not, of course, at home grant the redress which he refuses here, so that there is here, if the defence be upheld, a complete failure of justice. There is no necessity to contend that the respondent is liable to [15] arrest, but no reason can be assigned against permitting process against him up to sequestration. All that is required in this case is that, it being shewn that wrong has been done, the respondent should be called on to make reparation. The defence set up in this case would, if allowed, give the respondent an immunity which is not claimed by the Sovereign of these realms, who, in answer to the subject's complaint, directs right to be done, whereupon the courts take jurisdiction between the subject and Sovereign, as in the case of *Viscount Canterbury v. The Attorney General* (1 Phillips, 306).

But though it may be held that an independent foreign sovereign is exempt from the jurisdiction—how to serve him with process would be the difficulty—there is in this case the additional ingredient, that the respondent is also a subject, and was not only in this country, but in the exercise of his privileges as a Peer when the bill was filed and he was served with process. He might, as a foreign sovereign, sue at law or in equity any subject of the realm. There is no principle of law or reason on which he may not be sued; *Calvin's Case* (7 Co. Rep. 15), *Hullett v. The King of Spain* (1 Dow and C. 169), *King of Spain v. Hullett* (1 Clark and F. 333), *Glyn v. Soares and the Queen of Portugal* (1 You. and Col., p. 688), *Queen of Portugal v. Glyn* (7 Clark and F. 466), *Melan v. Duke de Fitzjames* (1 Bos. and Pul. 138), *Barclay v. Russell* (3 Ves. 424; see p. 431), *De la Torre v. Bernales* (1 Hov. Sup. to Ves. 149), *Moodalay v. The [16] East India Company* (1 Bro. C. C. 469; 2 Dick. 652), *Munden v. The Duke of Brunswick* (16 Law J. 300), Vattel, B. iv., ch. vii., sec. 108, Bynkershoek, Tom. 2, cap. 4. From these cases and authorities is to be clearly inferred this principle, that if process from our Courts can be enforced against a foreign sovereign, he is liable to the jurisdiction;—so that the authorities, as well as principle, are in favour of the jurisdiction.

Mr. Turner and Mr. Elmsley for the respondent, were not heard.\*

The Lord Chancellor:—I find that all the noble and learned Lords, who attend on this argument, are clearly of opinion that the judgment of the Master of the Rolls is right. The whole case must depend on the allegations of the [17] bill, there being no matters out of the bill which can be brought into question, except so far as they are referred to by the bill. After the House has heard the very able arguments that have been adduced in opposition to the judgment of the Master of the Rolls, we are all of opinion that there is no ground for impeaching that judgment.

The whole question seems to me to turn upon this (that is to say, for the purpose of this decision, it has not been otherwise contended at the bar, and if it had been, it is quite clear that the contention could not be maintained), that a foreign Sovereign,

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\* The "reasons" annexed to the respondent's printed case, signed by Sir C. Wetherell, Mr. Turner, and Mr. Elmsley, were,—

"First, Because the respondent, being an independent sovereign Prince, is not liable to be sued in any Court in this country.

"Second, Because the immunity of the respondent from suit, as an independent sovereign Prince, cannot be affected by his being a subject of her Majesty, in cases in which he is sued in respect of matters not transacted by him as such subject; and although it is stated in the bill that the respondent is a subject of her Majesty, as well as King of Hanover, yet it also appears by the bill, that none of the matters therein set forth, and in respect of which relief is prayed and discovery sought from the respondent, were transacted by him as a subject of her Majesty.

"Third, Because the immunity or exemption of a foreign independent sovereign Prince from being sued in the Courts of this country, cannot be less than that of an ambassador, and ambassadors are exempt from such suit by common and statute law.

"Fourth, Because it appears by the bill that the matters therein complained of are not the subject of municipal jurisdiction, being either matters of state or political transactions, which cannot be dealt with in the Courts of this country.

"Fifth, Because the maintenance of this suit is inconsistent with principles of public policy."

(See also the argument in the Rolls, 6 Beav., p. 10.)

coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign.

[18] That is the sole question; therefore I avoid the question which does not necessarily arise,—how far a foreign Sovereign, coming into this country, is amenable at all. I do not enter upon that question, because it does not necessarily arise upon the proper disposal of the matter now before us, as I am of opinion that, upon the face of this bill, the allegations show that the acts could not have been done, and were not done in any private character, but that they were done, whether right or wrong, in the character of the Sovereign of a foreign state.

My Lords, that must be found upon the face of the bill; or rather, I should say, the converse ought to be found upon the face of the bill; because, before you can raise a question how far a foreign Sovereign is answerable for a private transaction in the case of some person complaining of an act done by him as an individual, the Court would require that there should appear clearly upon the face of the bill such a case as gives the Court jurisdiction. The Master of the Rolls seems to have thought there was a nice balance as to whether the allegations amounted to acts done by virtue of sovereignty abroad, or whether they were merely to be considered as acts done in a private character. He seems to have held that whilst there was any ambiguity upon that subject, the Court could not entertain a bill, which did not distinctly state a matter bringing it within the jurisdiction of the Courts of Equity in this country. Certainly, looking at these pleadings, there does not appear to me to be any ambiguity at all, but that the whole transaction arose from acts done in the exercise of rights of sovereignty, [19] claimed to be vested in those who were the actors. The commencement of the bill, the foundation of the whole transaction, in my mind, sufficiently shews that.

There are, in point of fact, but two passages which seem to me to be necessary to be adverted to for the purpose of showing the authority under which the acts complained of are alleged to have taken place. The bill states, "That pending the aforesaid revolutionary movement, and before the same could be subdued, a decree of the Germanic Diet of Confederation was made or passed, bearing date the 2nd of September, 1830, whereby your orator's brother, William, Duke of Brunswick, was invited to take upon himself provisionally the government of the said Duchy, and the Diet left it to the legitimate *agnati* of your orator to provide for the future government of the said Duchy."

That, at least, was an act of sovereign state; it was by virtue of a decree of the Germanic Diet. Whether the constitution of Germany authorized it or not, is a question we have no power to interfere with, or to inquire into. There is no allegation that, according to the constitution of Germany, it was not a legal act; but there is upon the face of the bill that which is the foundation of all, namely, the decree of the Germanic Diet, depriving the plaintiff of the sovereignty of the Duchy, and appointing his brother William to take his place, and that the Diet left it to the legitimate *agnati* to provide for the future government of that Duchy.

Then the bill alleges, "That his late Majesty King William the Fourth, as King of Hanover, was a member of the said Germanic Diet of Confederation, and [20] that his said late Majesty, as such King of Hanover, or the Duke of Cambridge, as his Viceroy or proxy, voted in support of the said decree."

Then comes the instrument under which the defendant, or his predecessor, the Duke of Cambridge, acted. That is stated upon the face of the bill; it is part of the statement, and when you come to consider it, I do not apprehend there can be a doubt upon the face of that instrument—which is the foundation upon which all those transactions have taken place—that it does allege that those acts are acts of persons claiming to have the right so to act by virtue of their sovereign authority. It is stated to have been made between his late Majesty King William the Fourth, and William, Duke of Brunswick. The bill states it: "We, William the Fourth, by the grace of God, King of the United Kingdom of Great Britain and Ireland, and of Hanover, Duke of Brunswick and of Luneburg, and we, William, by the

grace of God, Duke of Brunswick and of Luneburg, make known," etc.; then it states, "moved by the interests of our house, whose well-being is confided to us," etc., "have thought it necessary to consider what measures the interests (rightly understood) of his Highness Charles, Duke of Brunswick, the preservation of the fortune now in his hands," etc.; "and whereas after the dissolution of the German empire, the powers of supreme guardianship over the princes of the empire, which up to that period had appertained to the Emperor, devolved to the heads of sovereign states" (see the instrument, *supra*, pp. 3 and 4).

Your Lordships will observe that they say the duty [21] had devolved upon them, and they state how it had devolved upon them, that that right which had originally belonged to the Emperor of Germany had now devolved to them as the heads of sovereign states. As such heads of sovereign states, and by virtue of the law and the constitution to which they refer, they are authorized to give directions for the appointment of a guardian, not as individuals, but as the heads of sovereign states, who, by the decree of the Germanic Diet, had previously deprived the appellant of his sovereign authority, which, taken from him, they had conferred upon his brother.

All the allegations of this bill follow from that act. The Duke of Cambridge is, under the authority of a decree of William the Fourth, King of Hanover, and of the reigning Duke of Brunswick, appointed to be the acting guardian of this deposed sovereign, and in that character it is alleged that he received certain sums of money; and that at a subsequent period when the Duke of Cumberland became King of Hanover, that duty devolved upon him, and the Duke of Cambridge then accounted to him, as the then guardian of the deposed sovereign, and in that character, from the beginning to the end of the bill, that property alleged to have come into the hands of the defendant, is stated to have been received by him under the authority of that appointment to which I have referred.

It is true, the bill states that the instrument was contrary to the laws of Hanover and Brunswick, but, notwithstanding that it is so stated, still if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it. If it were a private transaction, as in some of the instances referred to in [22] the argument was the case, then the law upon which the rights of individuals may depend, might have been a matter of fact to be inquired into, and for the Court to adjudicate upon, not as a matter of law, but as a matter of fact. But, as I stated at the beginning, if it be a matter of sovereign authority, we cannot try the fact whether it be right or wrong. The allegation that it is contrary to the laws of Hanover, taken in conjunction with the allegation of the authority under which the defendant had acted, must be conceded to be an allegation, not that it was contrary to the existing laws as regulating the right of individuals, but that it was contrary to the laws and duties and rights and powers of a Sovereign exercising sovereign authority. If that be so, it does not require another observation to shew, because it has not been doubted, that no Court in this country can entertain questions to bring Sovereigns to account for their acts done in their sovereign capacities abroad.

For these reasons it does appear to me, that as the bill fails in stating facts bringing the case within the cognizance of the Courts of Equity in this country, the demurrer, which assumes all the facts to be correct as stated, was very properly allowed by the Master of the Rolls. I move, therefore, that your Lordships do affirm his judgment.

Lord Lyndhurst.—I am entirely of the same opinion. None of the acts stated upon the face of this bill was done in this country, nor, as it appears to me, by the defendant in his character of a subject of this country. They were all done abroad; and admitting that circum-[23]-stances may exist in which a foreign Sovereign may be sued in this country for acts done abroad—about which I say nothing, because it is not necessary to decide such a question upon the present occasion—there are no such facts stated upon the face of this bill as to justify us in entertaining a suit of this description. It must be a very particular case indeed, even if any such case could exist, that would justify us in interfering with a foreign Sovereign in our Courts. No such case appears to me to be stated on the face of this bill, but as it seems to me, upon the proper construction of this instrument, directly the contrary appears. Without, therefore, further entering into the consideration of this question, I am of opinion that the judgment of the Master of the Rolls must be affirmed.



Lord Brougham.—I entirely agree with both my noble and learned friends upon this subject. I had no doubt whatever upon it in the course of the argument. The moment you come to look at the facts disclosed in this bill, which the demurrer admits—for the argument's sake at least admits—and denies the equitable jurisdiction and relief sought; the moment you see those facts, it is clear in every way, that it is not a case for the interference of a Court of Equity here. It would have been necessary where two foreign princes come to the Courts of this country respecting a matter transacted abroad, to have disclosed such a case as would have shewn clearly that it was upon a private matter, and that they were acting as private individuals, so as to give the Courts in this country jurisdiction.

I will not argue the question as to how far one [24] Sovereign might sue another in respect of any matter not a matter of state; it is unnecessary, for that is not the case here. If that had been the case, it might have been fit for us to discuss the point. It is not the case, however, and I agree with my noble and learned friend, (Lord Lyndhurst,) that that not being the case here, there is no occasion to say, one way or the other, how we should deal with such a case if it were to arise. This is quite clear, that, at all events, it ought to have been shewn that there were private transactions in order to make it possible that the Court could have jurisdiction. But on the contrary, it is clear that these are acts between the parties in their sovereign capacities; they are clearly matters of state upon which the question arises. It is not at all necessary to say that, supposing a foreign Sovereign, being also a naturalised subject in this country, had a landed estate in this country, and entered into any transactions respecting it, as a contract of sale or mortgage; it is not necessary to say that a Court of Equity in this country might not compel him specifically to perform his contract. That question does not arise here; there is nothing like it; and I do not say that the Courts here would not have jurisdiction in that case, as in the cases of all other parties, subject to their jurisdiction. But this is a case of a foreign Sovereign doing an act assumed to be in his capacity of Sovereign, he assuming that he has a right to do that act, which assumption is denied by the other party. Although these are matters of state that are in controversy between these parties, the bill, instead of setting forth—what ought to have been done clearly—that they were private transactions subject to the jurisdiction of the Courts in this country, sets [25] forth the very reverse, and thereby, in my opinion, excludes the jurisdiction.

I have, therefore, no hesitation whatever in agreeing with my noble and learned friends that the Master of the Rolls has come to a perfectly right decision, ably supported by him in a very elaborate argument, and that his decision ought to be affirmed, with costs.

Lord Campbell.—I am of the same opinion. In the first place, it seems to me that there is no ground at all for contending that this is *res judicata*. When the matter came before Lord Lyndhurst, he did quite right in refusing to quash the letter missive. What appeared before that noble and learned Judge? Why, that there was a bill filed against his Royal Highness "Ernest Augustus, Duke of Cumberland and Teviotdale, in Great Britain, and Earl of Armagh in Ireland, King of Hanover;" and that a letter missive, according to the common proceeding of the Court where a Peer is sued, had issued. Then an application was made to his Lordship to quash that letter missive (see 6 Beavan, p. 9, note). I am of opinion that he did quite right in refusing the application, because peradventure the bill might have disclosed matters that would have shewn that the Duke of Cumberland was liable to be sued in the Court of Chancery. If he had been a trustee of a marriage settlement, while he resided within this realm, and had become liable, in the execution of the trust which he had undertaken, and which he was not properly executing, I am by no means prepared to say that the Court of Chancery would not have had jurisdiction over him. [26] Therefore inasmuch as it was possible that he might have been properly sued in the Court of Chancery, the letter missive was not at all irregular.

But when we come to look at the bill itself, and the cause of suit, that is therein disclosed, I have no doubt that the demurrer is proper. You cannot say that a defendant, after appearing, cannot demur to a bill if it does not disclose any cause of suit over which a Court of Equity has jurisdiction. Well, then, is it not quite

clear that this bill does not disclose any matter over which the Court of Chancery has jurisdiction?

I think the learned gentlemen who have argued this case, with very great ability, were rather sanguine in almost assuming it as a postulate that the Duke of Cambridge might have been sued for this matter. I have most serious doubts upon that point, because even if he had been sued, it would equally have been a matter of state; the same questions would have been submitted to the Court of Chancery, namely, Whether the King of England as King of Hanover, and William, Duke of Brunswick, acting as sovereigns, had jurisdiction to do the acts which are impeached by this bill. The inclination of my opinion certainly is, that the Duke of Cambridge could not have been sued in a Court of Equity in respect of what he had done under this instrument. But when we find that the party sued is a Sovereign Prince, that he is King of Hanover, and an independent sovereign, then, at all events, it becomes indispensably necessary that the bill by which he is sued in an English Court of Equity should disclose matters over which that Court has jurisdiction.

It has been clearly stated by my noble and learned [27] friends that the question that is raised here is as to the validity of an act of sovereignty, because the bill would have been nothing without that allegation that the instrument was absolutely null and of no effect. But that instrument clearly professes to be made in the exercise of powers which those who were parties to it have as sovereigns, and the question of its validity must depend upon whether they have the power to do those acts of sovereignty which they profess to do. I am quite clear, therefore, that this is a matter over which the Court of Chancery has no jurisdiction, and that the demurrer was properly allowed.

I have the most sincere deference for the Court of Chancery, acting within its jurisdiction. I believe there never was a tribunal established in any country which is more entitled to respect, but still there are limits to its jurisdiction, it cannot do every thing. The Lord Chancellor, I presume, would not grant an injunction against the French Republic marching an army across the Rhine or the Alps. The Court of Chancery must be kept within its jurisdiction, and then I am sure it confers the highest benefits upon the community. I think it was by this bill called upon to exceed its jurisdiction, and that the Master of the Rolls was acting in conformity to the just principles of the law of this country in ordering the bill to be dismissed.

[It was ordered, that the appeal be dismissed, and the decree complained of be affirmed, with costs.]

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[28] EDWARD THOMAS FOLEY,—*Appellant*; THOMAS HILL and Others,—*Respondents* [July 31, August 1, 1848].

[*Mews'* Dig. i. 42, 1007; ix. 76; xi. 988. S.C. in 8 Jur., 347; 1 Ph. 399; 13 L.J. Ch. 182. On point as to relation between banker and customer, considered in *St. Aubyn v. Smart*, 1867, L.R. 5 Eq. 189; *A.-G. v. Edmunds*, 1868, L.R. 6 Eq. 390; *Moxon v. Bright*, 1869, L.R. 4 Ch. 294; *Summers v. City Bank*, 1874, L.R. 9 C.P. 587; *Marten v. Locke*, 1885, 53 L.T., 1948. Distinguished on point as to limitation (1 Ph. 399; cf. 2 H.L.C. pp. 41, 42) in *In re Tidd* (1893), 3 Ch. 156, and in *Atkinson v. Bradford Third Equitable, etc., Society*, 1890, 25 Q.B.D. 381.]

*Banker and Customer—Accounts not complicated, subject for action, and not for bill.*

The relation between a Banker and Customer, who pays money into the Bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the Bank.

The relation of Banker and Customer does not partake of a fiduciary character, nor bear analogy to the relation between Principal and Factor or Agent, who is *quasi* trustee for the principal in respect of the particular matter for which he is appointed factor or agent.

Held, therefore, that an account between Bankers and their customer, not long

nor complicated, but consisting of a few items and interest, is not a fit subject for a bill in equity.

This was an appeal against an order of Lord Chancellor Lyndhurst, by which he reversed a decree of the Vice Chancellor of England, and dismissed the appellant's bill (13 Law Journ. 182, and 1 Phillips, 399).

In, and previously to, the year 1829, the appellant and Sir Edward Scott, owners of collieries in Staffordshire, kept a joint account at the respondent's bank at Stourbridge, in Worcestershire. In April 1829, a sum of £6117 10s. was transferred from that account to a separate account then opened for the appellant; and the respondents, in a letter inclosing a receipt for the sum so transferred, agreed to allow £3 per cent. interest on it. From 1829 to the end of the year 1834, when the joint [29] account was closed, the appellant's share of the profits of the collieries was from time to time paid by cheques, drawn by the colliery agents against the joint account. These cheques were, as the respondents alleged, paid in cash or by bills drawn by them on their London bankers in favor of the appellant, and none of them was entered in his separate account. The only items found in that account were the £6117 10s. on the credit side, and two sums of £1700 and £2000 on the debit side, both being payments made to or on behalf of the appellant in 1830. There were also entries, in a separate column, of interest calculated on the sum or balance in the Bank, up to the 25th of December 1831, and not afterwards.

The appellant filed his bill in January 1838, against the respondents, praying that an account might be taken of the said sum of £6117 10s., and all other sums received by the respondents for the plaintiff on his private account since April 1829, with interest on the same at the rate of £3 per cent. per annum; and also an account of all sums properly paid by them for or to the use of the appellant on his said account since that day, and that they might be decreed to pay the appellant what, upon taking such accounts, should be found due to him.

The defendants at first put in a plea of the Statute of Limitations (21 James 1, c. 16), supported by an answer; but the plea being overruled (3 Myl. and Cr. 475), they put in their further answer and claimed the benefit of the statute.

A schedule annexed to the answer set forth the separate account of the appellant from the bank book, containing the items and entries before mentioned.

The Vice-Chancellor, on the hearing of the cause, [30] decreed for an account as prayed, being of opinion that the respondents were bound in duty to keep the account clear; that they were to be charged according to their duty, the neglect of which could be no excuse, and that the agreement to allow the interest was in effect the same, in answer to the Statute of Limitations, as if the interest had been regularly entered or paid (13 Law J. p. 183).

Lord Lyndhurst, taking a different view of the case, upon appeal, held, first, that the Statute of Limitations was a sufficient defence; and, secondly, that the account, consisting of only a few simple items, was not a proper subject for a bill in Equity, but a case for an action at law for money had and received, and his Lordship reversed the decree, and dismissed the bill (*id. ib.*; and 1 Phill. 403).

Mr. Stuart and Mr. G. L. Russell for the appellant:

The judgment appealed from proceeded partly on the ground that the Statute of Limitations is a bar to the appellant's demand and partly on the ground that he account prayed for is a simple account of debtor and creditor, and, therefore, not a fit subject for a suit in Equity. The question is, what is the nature of the relation between a banker and those who deposit money with him, and who are called his customers. If it could be shewn that a banker is in the position of a trustee for those who employ him, that he is clothed with a fiduciary character in relation to them, and that there is a personal trust and confidence in him, then the Statute of Limitations would be inapplicable, and the second defence also must be held to fail.

The respondents were not in the relation of mere debtors to the appellant for the money deposited, [31] which, in ordinary cases, is considered to be a loan, and therefore a debt; *Carr v. Carr* (1 Meriv. 541 (note)), *Devaynes v. Noble* (*id.* 568), *Imms v. Bond* (5 Barn. and Ad. 392-3), *Potts v. Glegg* (16 Mees. and W. 321). The Chief Baron, in *Potts v. Glegg*, doubted whether in all cases there was not an implied contract between a banker and his customer, as to the money deposited, which

distinguishes it from an ordinary case of loan, but he yielded to the opinion of the other Judges, that it was a simple loan and debt.

It may be admitted that bankers are debtors, but debtors with various super-added obligations, as, for instance, to repay the money deposited, by honouring the depositor's cheques, *Marzetti v. Williams* (1 Barn. and Ad. 415), according to the custom of the trade; and in this case there was an additional obligation by the special contract to pay interest on the deposit.

It was the duty of the respondents to keep the accounts with the appellant clear and intelligible, to calculate the interest on the balances in their hands from time to time, to make proper entries of it in the account, and to preserve all vouchers and other evidence of their transactions with him. These duties and transactions constitute a relation more complex than that of mere debtor and creditor, and an account of them is a fit subject for a bill in equity, not only by reason of the admitted concurrent jurisdiction of Courts of Equity with Courts of law in matters of account, but also because the account here sought is of moneys received by the respondents, the receipt of which is within their own knowledge, and the entries and record of which they were bound to keep.

[32] The right to an account in equity does not depend on the number of items, and it is no answer to a bill for an account and payment of balances to say that they might be recovered in an action at law. Such a doctrine would supersede the long established equitable jurisdiction in the cases of stewards and agents and factors in relation to their employers and principals. There cannot be a distinction made between those relations and the relation of banker and employer or customer.

The respondents made entries of the interest in this account up to December 1831, from which time, for the purpose probably of taking advantage of the Statute of Limitations, they abstained, without notice to the appellant, from making any entry of interest in his account, contrary to their custom as bankers, and in violation of their special duty to the appellant. That constitutes a case of a fraudulent breach of duty, of which, although the bill does not contain any such charge, the Court may nevertheless take cognizance, where it finds the respondents broadly stating in their answer that they omitted to make the entries in order to avail themselves of the Statute of Limitations, a defence which was never before allowed in such a case as this. But the respondents do, however, admit in their answer several transactions in 1831, 1832, 1833, and 1834, connected with the appellant's account, in receiving cheques drawn in his favour, and which they say they paid to the person presenting them, either by cash or by bills on their bankers. Those admissions would take this case out of the statute, if otherwise pleadable; *Topham v. Braddick* (1 Taunt. 572), *Lady Ormonde v. Hutchinson* (13 Ves. 47), *Sterndale v. Hankinson* (1 Sim. 393).

[33] It is clear that the accounts sought here can best be discovered and examined in a Court of Equity; and the objection that an action at law is the proper course, not having been suggested in the answer of the respondents, took the appellant by surprise. The case of *Dinwiddie v. Bailey* (6 Ves. 136), cited on that point before the Lord Chancellor, is not applicable, because some of the matters of which the plaintiff there sought discovery, were, as Lord Eldon observed (*id.* 139), "rather in his own mind than in the defendant's;" and others were capable of proof in an action at law. Courts of Equity entertain jurisdiction in various matters, in which remedy might be had in the Courts of Law, as in bills for partition, assignment of dower, etc. (Mitf. Plea. 119) Lord Redesdale in his Treatise says (*id.*, pp. 120, 123), "in matters of account, which, though they may be taken before auditors in an action, etc., yet a Court of Equity, by its mode of proceeding, is enabled to investigate more effectually," etc. His Lordship laid down the same doctrine, judicially, in *O'Connor v. Spaight* (1 Sch. and Lef. 309), and it was adopted by this House in the late case of *The Taff Vale Railway Company v. Nixon* (1 H. of L. Cas. 121). In *The Corporation of Carlisle v. Wilson* (13 Ves. 278), which was a bill filed for tolls, the Lord Chancellor says "The principle upon which Courts of Equity originally entertained suits for an account when the party had a legal title is, that though he might support a suit at law, a Court of Law either cannot give a remedy, or so complete a remedy as a Court of Equity, and by degrees Courts of Equity assumed a concurrent jurisdiction in cases of account." [34] The same principle had been before recognized in *Barker v. Dacie* (6 Ves.; p. 688), and afterwards in *Adley v. The Whitstable Com-*

*pany* (17 Ves., p. 324), *Ryle v. Haggie* (1 Jac. and W. 237), *Frietas v. Dos Santos* (1 You. and J. 574), and in numerous other cases.

Mr. Bethell, Mr. Kenyon Parker, and Mr. Craig, appeared for the respondents, but were not heard.

The Lord Chancellor.—My Lords, we do not think it necessary to call upon the learned counsel for the respondents to address your Lordships, the appellant not having succeeded in showing any ground for impeaching the decree which has been made in the Court of Chancery.

The bill in this case—as is usual in cases of this description where bills state matters of account, and where there is concurrent jurisdiction of law and equity—alleges that the account is complicated and consists of great variety of items, so that it could not be properly taken at law. If that allegation had been made out, it would have prevented the necessity of considering any part of the case. But that allegation has entirely failed of proof; for it appears that the account consisted of only one payment of £6117 10s. to a private account of the customer, and that against that sum two cheques were drawn and paid. That is the whole account in dispute as raised by these pleadings. Therefore there is certainly no such account as would induce a Court of Equity to maintain jurisdiction as if the question had turned entirely upon an account so complicated, and so long, as to make it inconvenient to have it taken at law.

[35] It has been attempted to support this bill upon other grounds, and one ground is, that the relative situation of the plaintiff and defendant would give a Court of Equity jurisdiction, independently of the length or the complexity of the accounts; although it is not disputed that the transactions between the parties gave the legal right, it is said a Court of Equity nevertheless has concurrent jurisdiction, and that is attempted to be supported upon the supposed fiduciary character existing between the banker and his customer.

No case has been produced in which that character has been given to the relation of banker and customer; but it has been attempted to be supported by reference to other cases supposed to be analogous. These are cases where bills have been filed as between principal and agent, or between principal and factor. Now as between principal and factor, there is no question whatever that that description of case which alone has been referred to in the argument in support of the jurisdiction has always been held to be within the jurisdiction of a Court of Equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee, the factor—as the trustee for the particular matter in which he is employed as factor—sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money remains the property of the principal. So it is with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to [36] the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged; and therefore in these cases the Courts of Equity have assumed jurisdiction.

But the analogy entirely fails, as it appears to me, when you come to consider the relative situation of a banker and his customer; and for that purpose it is quite sufficient to refer to the authorities, which have been quoted, and to the nature of the connection between the parties (as to a banker's right to lien see *Brandao v. Barnett*, 12 Cl. and F. 787). Money, when paid into a bank, ceases altogether to be the money of the principal (see *Parker v. Marchant*, 1 Phillips 360); it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all

intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the [37] principal, when demanded, a sum equivalent to that paid into his hands.

That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor. Then the analogy between that case and those that have been referred to entirely fails; and the ground upon which those cases have, by analogy to the doctrine of trusteeship, been held to be the subject of the jurisdiction of a Court of Equity, has no application here, as it appears to me.

If that analogy fails, and we come to the mere contract, then the matter is not brought within the rules of a Court of Equity as in reference to the other matters of contract. I am surprised to find that this very well known analogy and established principle should be matter of doubt or discussion at this time. But as they have been, I will refer to one or two cases in which the rule and doctrine have been most clearly established, and that, although Courts of Equity will assume jurisdiction in matters of account, it is not because you are entitled to discovery that therefore you are entitled to an account. That is entirely a fallacy. That would, if carried to the extent to which it would be carried according to the argument at the bar, make it appear that every case is matter of equitable jurisdiction, and that where a plaintiff is entitled to a demand, he may come to a Court of Equity for discovery. But the rule is, that where a case is so complicated, or where, from other circumstances, the remedy at law will not give an adequate relief, there the Court of Equity assumes jurisdiction.

[38] Lord Redesdale's Treatise has been referred to. But, however valuable his treatise may be, it is much more satisfactory when we have, from the same eminent Judge, his opinion declared in the exercise of his judicial duties. For that purpose I will refer to the case of *O'Connor v. Spaight* (1 Sch. and Lef. 309), in which Lord Redesdale applies the rule. The subject-matter there was between a landlord and tenant. There the connection gave no original jurisdiction to the Courts of Equity, but complicated accounts had arisen between the parties, and Lord Redesdale thus expresses himself: "The ground on which I think that this is a proper case for Equity is, that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *Nisi Prius*, with all necessary accuracy, and it could appear only from the result of the account that the rent was not due. This is a principle on which Courts of Equity constantly act, by taking cognizance of matters, which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law, and until the result of the account the justice of the case cannot appear." Lord Redesdale there puts it upon the ground, that it is considered an established principle of the Courts of Equity that it is on account of the infirmity of the jurisdiction at law, for the purpose of taking an account, that a Court of Equity assumes jurisdiction.

Again, in the case of *The Corporation of Carlisle v. Wilson* (13 Ves. 276), referred to for another purpose (it was a case for tolls), the language of the Court is this: "The question is whether, upon the facts stated by this bill, this court ought to decree an account. The objection is, that the right to take these tolls is, undoubtedly, [39] a merely legal right, that the plaintiffs therefore may have a discovery, and, having obtained that, cannot also have relief, but should use the discovery in an action, which undoubtedly might be brought. The principle upon which Courts of Equity originally entertained suits for an account where the party had a legal title, is, that though he might support a suit at law, a Court of Law either cannot give a remedy, or cannot give so complete a remedy as a Court of Equity."

These are principles which those who are conversant with the proceedings of a Court of Equity imbibe from the earliest period of their legal education. It is a well known rule. The question is whether, in the present case, this demand by the plaintiff is brought within that rule. I am assuming, for the present purpose, that there is nothing in the relative situations of banker and customer which gives, *per se*, the right to sue in Equity; and that is proved, I apprehend, by the consideration

of the question, whether, if there had been no money drawn out at all, and simply a sum of money had been deposited with the banker,—I will not say deposited, but paid to the banker,—on account of the customer, a party could file a bill to get that money back again. The learned counsel judiciously avoided giving an answer to that question. But that tries the principle; because if it is merely a sum of money paid to a factor, or paid to an agent, the party has a right to recall it,—he has a right to deal with the factor or his agent in his fiduciary character. But the banker does not hold that fiduciary character, and therefore there is no such original jurisdiction; and if there be no such original jurisdiction growing out of the relative situations of the parties, then, to see if the account is of [40] such a nature that it cannot be taken at law, we are to look to the account itself, and not to the bill; we are to look to the facts as they exist. We find no complicated account at all here. There is merely a sum of money paid in on the one hand, for which there is a receipt, which receipt is the evidence of the party's title, and if there be any sum of money drawn out, it is no part of his title and no part of his case; but it is a part of his case to make that demand, and to shew that part of that money had not been repaid.

My Lords, that exhausts the case, with the exception of one argument, which your Lordships have heard, with regard to a supposed contract. Here it is a contract by the banker, who, it is said, so far divested himself of his original character as to give a Court of Equity jurisdiction over the subject-matter. What is that contract?

He agrees to pay £3 per cent. for the use of the money. Then it is said, those £3 per cent. ought to have been entered in the banker's books; that though there was no transaction between the principal and the banker during the lapse of eight years, the banker ought to have entered in his books the £3 per cent. annually or half yearly (it is not very easy to state what the period should be), and that not having done so, he therefore has been guilty of default. Now he might have been guilty of default if he had not kept his contract,—that is, if he had either refused to pay the £3 per cent. or had refused to pay the money when demanded. That was the whole of his contract. He had contracted for nothing more. I can see no breach of contract by this banker, who, if it had been demanded at the proper time, we may suppose would have kept his contract, and have paid the £3 per cent. But because in his own books he has not entered up the £3 [41] per cent. interest, which might have been a beneficial entry for the customer, it is not to be said that that is a breach of contract or a breach of duty. His duty was to account for the £3 per cent. and for the principal. That was all his contract; I do not apprehend that that can possibly make any difference in the question of his liability.

I do not advert to the question on the Statute of Limitations at all, because, if I am right upon this, which is the first question, the Statute of Limitations does not apply. Therefore it is unnecessary to reason upon what the effect might be of that defence being set up, even if there had been a good title in the plaintiff to institute proceedings in equity. The principle upon which my opinion is formed is, that there is nothing to bring the demand within the precincts of a Court of Equity. Upon that ground I think the decree was right in dismissing the bill.

Lord Brougham.—My noble and learned friend (Lord Lyndhurst)—who, from his right of precedence here, would naturally have addressed your Lordships before me—being the Judge from whose decree this appeal is taken—I nevertheless take leave, before he addresses your Lordships, to state my entire agreement in the reasons stated by my noble and learned friend (the Lord Chancellor), and in the opinions at which he has arrived through those reasons, in favour of the decree of the Court below, and shall join with him, or rather shall make, which he omitted, the motion which, from the tenour of his statement, it is evident he meant to make, that your Lordships should affirm the decree, with the costs of the appeal.

[42] I agree with my noble and learned friend, that the question of the Statute of Limitations would arise if there was an equitable title, and it came within the proper cognizance of a Court of Equity. But the question does not arise, and I therefore abstain, as he did, from saying a word upon it.

There is clearly no such account,—whatever may be set forth by the bill,—upon the facts of the case, which calls upon a Court of Equity, upon that head of jurisdiction, to give relief. And, in passing, I would observe that, to say that whenever there is a right to discovery, there must be an account allowed,—where that comes in question,—is rather reversing the thing. Discovery, on the contrary, is incident

to the order to account. The two things are separate. But the account being excluded by the facts of this case, which shew that there is no reason for this statement of account, there being but one sum paid in, and two sums of money drawn out, there is no reason, upon this statement of the facts, for giving relief in equity. The question then comes to be, whether they have succeeded on one or other of the two grounds, the first of which is, holding the banker to be in a *quasi* fiduciary position towards his customer, and proceeding against him as if he were a trustee; and the other is, whether the stipulation for interest by the banker makes any difference in the case?

Now, with respect to the latter question, arising upon the interest, I think that may be disposed of in a few words. It does not follow that, because a banker contracts to pay any strictly legal demand, therefore that puts the case on a different footing. I should be very sorry if that should be so; because I am sure the Court of Chancery might have then a bill from every [43] tradesman for payment of his account, for goods sold and delivered, and wherever there was a stipulation to pay after a certain time, as in many cases there is, in such a case a bill might be filed. But we know pretty well it is the A B C of the practice of the Court of Equity that no such bill can be filed.

I come then to the only other ground, which was the main contention, ably contended in some respects, judiciously in others; I particularly allude to the judicious course taken by the learned counsel, in avoiding to answer the question upon which he was pressed once and again by your Lordships, but who delivered an able argument in other respects. Now, as to the banker: is his position with respect to his customers that of a trustee with respect to his *cestui que trust*? Is it that of a principal with respect to an agent? or that of a principal with respect to a factor? I see no ground for contending that there is any identity in those two points. I am now speaking of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon, or of receiving money from other parties, to the credit of the customer, upon like conditions to be drawn out by the customer, or, in common parlance, the money being repaid when asked for, because the party who receives the money has the use of it as his own, and in the using of which his trade consists, and but for which no banker could exist, especially a banker who pays interest. But even a banker who does not pay interest could not possibly carry on his trade if he were to hold the money, and to pay it back, as a mere depository of [44] the principal. But he receives it, to the knowledge of his customer, for the express purpose of using it as his own, which, if he were a trustee he could not do without a breach of trust. It is a totally different thing if we are to take into consideration certain acts that are often performed by a banker, and which put him in a totally different capacity, for he may, in addition to his position of banker, make himself an agent or a trustee towards a *cestui que trust*; for example, suppose I deposit exchequer bills with a banker, and he undertakes to receive the interest upon them, or undertakes to negotiate or make sale of these exchequer bills, and to credit my account with the proceeds of the sale, I do not stay to ask whether, in that case, he might not be in the position of a trustee, and might not partly sustain a fiduciary character; but he does that incidentally to his trade of a banker; for his trade of a banker is totally independent of that,—his trade of a banker consists in the general trade, to which the other is an accidental addition. This trade of a banker is to receive money, and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor. That being the trade of a banker, and that being the nature of the relation in which he stands to his customer, I cannot, without breaking down the bounds between equity and law,—without, as it were, removing the land-marks of jurisprudence,—I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character. I therefore entirely agree with my noble and learned friend, thinking that the view taken of this case in the Court [45] below was a correct one, and, therefore, I move that this appeal be dismissed, and the decree appealed from be affirmed, with costs.

Lord Campbell.—I cannot help thinking that when this case was before his Honor the Vice Chancellor of England, the decree he pronounced must have pro-



ceeded upon some incorrect statement of the facts, and that he had thought that several actions would have been necessary.

My Lords, when you come to examine the facts, it is quite clear that this is a purely legal demand, the relation between banker and customer, as far as the pecuniary dealings are concerned, being that of debtor and creditor. It has been said, that the banker is liable to do something more than merely to repay the money. He is bound to honour cheques, and perhaps to accept bills of exchange, if drawn upon him, he having assets in his hands; but these are purely matters of legal contract, and, it seems to me, that there is nothing of a fiduciary character at all in the relation subsisting between them.

That being the case, why should this legal demand be recovered by a bill in equity? The learned counsel at the bar could not contend that a bill could be filed the moment that there was a sum of £1000 entered to the credit of the customer. Then at what time could a bill in equity be maintained? Is it when one cheque is drawn; or when a second payment is made, even of £100 more? The time when the jurisdiction of equity attaches, is when, at law, there is not a satisfactory remedy, or when, from the complexity of the accounts, it is not a fit case to be referred to a jury. I most heartily concur in the case of *The Taff Vale Railway [46] Company v. Nizon* (1 H. of L. Cas. 111), in its, I think, most salutary doctrine, that where there are complex accounts, it is a much better thing, though all rests upon a legal demand, to file a bill, and at once to go to the Master's office, and have the accounts taken there, than to bring an action at law, and have that investigation before a jury, for which a jury is clearly inadequate.

There is no such difficulty here. The items are of the simplest description, and the matter might have been settled by a judge and jury at *Nisi Prius*. I therefore think the noble and learned Lord (Lord Lyndhurst) was perfectly right in reversing the decree of the Vice Chancellor, and that we shall do right in dismissing this appeal.

The other points that were raised in the argument, it is wholly unnecessary to consider, and I abstain from entering into them.

Lord Lyndhurst.—I expressed my opinion very fully upon the subject in the Court below, and, as that opinion is in print (1 Phil. 399), it appears to me to be unnecessary to repeat the grounds upon which I decided the case.

I entirely concur in the view that has been taken by my noble and learned friends, with respect to jurisdiction in matters of account. I will only refer, therefore, in addition to those authorities which were cited by my noble and learned friend on the Woolsack, to the case of *O'Mahony v. Dickson* (2 Sch. and L. 400). It appears to me to apply very closely to the present case. The marginal note is this:—"The account sought in this case, consisting only of three disputed items, admitted to have been paid, if at all, on account of rent, and [47] being such as a jury might easily have investigated; the bill was dismissed, with costs." That almost in its terms applies to the case before your Lordships. I am of opinion, therefore, with my noble and learned friends, that this judgment must be affirmed.

The appeal was then dismissed, with costs.

## IN COMMITTEE FOR PRIVILEGES.

### LORD DUFFERIN AND CLANEBOYE'S CLAIM.

#### *Evidence—Certificate of baptism abroad; Copy.*

A copy of an entry, made from a certificate of baptism by a chaplain of a British minister at a foreign Court, is not sufficient evidence of birth and parentage.

This was the claim of an Irish Peer to vote at the election of representative Peers for Ireland. To prove the claimant's birth, a copy of an entry in a registry of baptisms, kept in a parish church in Ireland, in which the family mansion was situated, was produced. That entry was made in 1827, by direction of the claimant's grandfather, the then Lord Dufferin and Claneboye, from a certificate of the chaplain

to the British minister at Florence, stating that the claimant was baptized there by the said chaplain in 1826, as "the son of Captain Price Blackwood and Helen Selina, his wife."

The evidence was not deemed sufficient, under the circumstances, and the case was postponed until the claimant's mother attended and deposed he was the only son of her and the said Price Blackwood, her husband, and was born at Florence in 1826 (see the Earl of Athlone's Claim, 8 Cl. and F. 262).

Resolved, that the claim was made out.

[48]

## FIELD'S MARRIAGE ANNULLING BILL.

[August 4, 8, 10, 1848.]

[Mews' Dig. vii. 628. Commented on in *Cooper v. Crane* (1891), P. 369; and cf. *Scott v. Sebright* (1886), 12 P.D. 21; *Bartlett v. Rice* (1895), 72 L.T. 122; *Ford v. Stier* (1896), P. 1.]

*Marriage—Infant—Undue Influence—False Publication of Banns—Consent.*

A young lady, eighteen years of age, entitled to considerable property, her parents being dead, having been passing her vacation at the house of one of the executors named in her father's will, whom she considered as her guardian, was induced by his brother, who was residing in the same house, and was fifty-two years of age, to promise to marry him; she withdrew that promise a few days afterwards but was importuned again and prevailed upon to renew it, and the marriage was celebrated without the knowledge of any of her friends, upon a false statement made by him of her age and residence in the publication of the banns and in the register of the marriage. There was no cohabitation, nor consummation of the marriage, as she alleged. She, after a few days, went to a friend's house, and by his advice applied for an act to annul the marriage, the same being considered valid in law:

Held, that it did not appear by the evidence, that the marriage was not solemnized with the free consent of the lady, and that the case made was not such as to justify legislative interference.

The preamble to this bill—which was brought in with leave of the House upon a petition (see Lords' Journ. for 1848, pp. 570, 661, 685, and 693)—recited that Esther Field, being an infant of the age of eighteen years, was, on the 19th of June, 1847, at Trinity district Church, in the parish of Saint Mary-le-bone, in the county of Middlesex, by "intimidation, fraud and contrivance, and without any free and voluntary consent on her part, made and induced by one Samuel Brown, to marry him," by banns, according to the rites of the Church of England; that S. Brown was afterwards tried at the Central Criminal Court, and found guilty of having made false statements of certain particulars relating to the marriage, which were, by the act 6 and 7 Wm. IV., c. 86, required to be [49] known, for the purpose of being inserted in the register of marriages in the said district church, and he was then suffering the sentence of the law upon the said conviction; and that it was expedient that the said alleged marriage should be declared null and void. The bill then prayed, in the usual form, that the marriage might be deemed and adjudged to be null and void to all intents and purposes.

On the day appointed for the second reading of the bill:

Sir F. Kelly (with whom were Mr. Rolt and Sir John Bayley) for the petitioner, stated the case at great length, but in substance as follows:—

This petition was presented on behalf of a young, helpless, and most unhappy woman, who appealed to their Lordships, by a special act of justice and compassion to annul the marriage into which she had been intimidated and ensnared, and thus to save her from a fate far worse than death. She was the daughter of a gentleman who resided in Hertfordshire, and died in 1842, her mother having died previously; so that she was an helpless orphan, with only one brother some years younger than herself.

The father left considerable property, consisting principally of real estate, which, by his will, was to be in effect equally divided between his children (there were three, one is since dead), with the benefit of survivorship between them. The share of each of the two survivors was from £1000 to £1200 a-year, or worth about £30,000 altogether.

Unhappily, no guardian of these children was appointed by the father's will. Two persons were appointed executors and trustees, one a Mr. Moore, who acted in that capacity, but did not interfere in the care or education of the children; the other executor was Mr. John Brown, a brewer and farmer at Tring, in [50] Hertfordshire, a married man, with a family of children. He acted as guardian, in all respects, to this young lady. She was, after her father's death, placed under the care of a lady, Mrs. Orme, of Edwardes square, Kensington, eminently fitted for the task of education, and she remained under her care until the year 1844, when she was placed by the trustees with a Mrs. Roberts, at Penzance, with whom she remained until April 1847, when, having intended to finish her education in France, she came to spend the vacation at the house of her acting guardian at Tring. She attained the age of eighteen on the 31st of May, 1847.

Unfortunately for this girl, Mr. John Brown had a brother of the name of Samuel, residing in the house with him. This man had been a butler, for some time, in a family in Wimpole street. He had left that situation, and came to reside with his brother, as his helper. His habits and tastes led him to have a deal to do with the sale and purchase, the management and breeding of horses; but, except that business and that he had been butler, he had no trade or calling, nor any property, and he was fifty-two years of age.

This child coming from school into the house of her only guardian and protector, treated him as her father, treated his wife as her mother, and she would naturally treat his brother as her uncle; and in that sort of intercourse carried on between them, it could never have entered her contemplation that this man of fifty-two, the brother of one whom she treated as a father, and himself being in that situation of life before described, could have treated her otherwise than as a child, upon whom he might bestow care and tenderness, always for her good and protection. Accordingly, she was off her guard; she was allowed to walk out and to ride on horseback, with him; and the most unrestricted inter-[51]-course as between parent and child undoubtedly took place between her and Samuel Brown, as well as between her and John Brown. This being the kind of life led between him and this young lady, he, a few days before the 18th of May, 1847, proposed marriage to her. She met the proposal as one would naturally have anticipated,—she laughed at him, and told him “he was old enough to be her grand-father,” and his proposal was met with a firm and decided refusal. But from that hour forth, his system of persecution began and was continued. His power over this unhappy girl and his opportunities were unrestricted. She was in the house of Mr. John Brown, which was her home; she had no relation, no other friend to go to; she was exposed to the persecution of this man, to every species of art and intimidation calculated to work upon the best feelings of her nature, and the result was, that within the five days preceding the 18th of May, he succeeded in driving her to a bitterly reluctant consent to become his wife. He pressed his suit; in vain she said, “you are old enough to be my grand-father.” Under this pressure she at length was induced to confess to him that it was impossible, even if he had been of suitable age and circumstances, that she could ever become his wife, inasmuch as her affections were already bestowed upon another. When he forced her to confess, what she felt she ought not to confess—and which she did in the guileless simplicity of her heart, in order to get rid of his unseemly and continued persecution—he began to work upon her fear, by threatening mischief and revenge on the object of her affections, telling her that she should never marry him, or that if she did, he would be revenged upon him, although he would not harm her. He thus filled her mind with that terror [52] which would be calculated to produce a strong effect upon a person of her age and sex and feelings, by threatening mischief to the object of her sincere and warm attachment. He did not stop there; he likewise gave her to understand, that if she did not agree to become his wife, he would commit self-destruction.

By this means, by enfeebling and working upon an enfeebled mind—by working upon her fears and upon her affections, which she had disclosed to him she had already formed for another—by threats of mischief to that person if she should ever marry

him—he at length succeeded so far in persecuting her into an incapability of further resistance, that on the 18th of May she most reluctantly gave her consent to marry him. He then left the house for Epsom races, and returning after two or three days, he informed her that he had been to London, to procure a marriage licence. That communication was made to her on the 21st of May, and on the 22nd, she, who had passed the interval in a state of misery, no longer able to endure the feelings of wretchedness with which her previous consent had filled her mind, told him that she never would perform that promise. She remonstrated with him, again talked of the disparity of their ages, and of her attachment to another, and that, in fact, she could not keep her promise to become his wife; and on that day she withdrew the consent which she had given on the 18th. She had then some repose; but this man's persecution was soon renewed, and was continued at intervals, with more or less violence of language, alternate intimidation and persuasion, threats and reproaches, until, on the 18th of June—just a month after the first promise was extorted from her, and nearly a month after it was withdrawn—she, unable to resist his persuasion, broken [53] in spirit and bewildered in intellect, again yielded a forced and reckless consent to become his wife. It may be asked why, when thus persecuted, she did not complain to Mr. John Brown, or Mrs. Brown, or make her escape to some friend's house. The answer to that question discloses further the deep designs and base arts of this man, from the beginning. He had, at the time he first proposed marriage to this girl and was refused, exacted a solemn promise from her not to tell any one of the matter, and by the pressure of that promise of secrecy, she was prevented from appealing to any one for advice or assistance.

Having thus obtained the renewed consent on the 18th of June, he took her to London on Saturday the 19th, and in pursuance of arrangements previously made by him, in violation of the law, a marriage ceremony was celebrated at Trinity district church, Mary-le-bone. Practising the same system of deception in respect to the solemnization of the marriage, he had told her that they were to be married by licence at St George's, Hanover Square, concealing from her that the marriage was to be by banns, which he had, on the 19th of May, arranged to be published on the three subsequent Sundays. Fortunately for this unhappy girl, the marriage has not been consummated. They returned, immediately after the ceremony, to John Brown's house at Tring, as if they had been absent for a morning walk, and then they occupied separate apartments, as they had done previously, until the 24th of June, when she, no longer able to bear the misery of her condition, made her escape to the house of Mr. Smith, at Hemel Hempstead, a short distance from Tring. Mr. Smith, who had been the solicitor and intimate friend of her father, took a great interest in her, and afforded her refuge and protection. It was [54] afterwards found that one of his sons was the person upon whom, she had confessed to Samuel Brown, that she had placed her affections. She was at Mr. Smith's some days before an opportunity occurred for telling the tale of her miseries; but the depression of her spirits having excited attention, she was questioned, and she then disclosed the circumstances of the marriage. Mr. Smith, as was his duty, set inquiries on foot, and after diligent search, found that the marriage was celebrated in pursuance of banns, upon the false statement of this man, and without her consent, that they were both of full age, and residing in Wimpole Street, within Trinity Church district.

By the construction put by the Courts upon the Marriage Act, 4 Geo. IV., c. 76, s. 22, a marriage celebrated by banns published, in disregard of the directions of that act, upon a false statement of the age or residence of the parties, with the guilty knowledge of only one of them, is a valid marriage (*The King v. Wroxtton*, 4 Barn. and Ad. 640; *Wright v. Elwood*, 1 Curtis' Eccl. Rep. 49; and *Tongue v. Allen*, 1 Curtis, 38); a provision intended by the legislature for the protection of the woman. But if both parties participated in the false statement, in violation of the law, and aware of the false publication of banns, nevertheless celebrated the marriage, that would be a void marriage. If this young lady had been a guilty participator with Brown in the illegal publication of these banns, she would, by the operation of the law itself, be redeemed from the wretchedness which drives her to solicit relief by a special interposition of the legislature. Had she been cognizant of Brown's false statement, she would be saved by the existing law; her innocence is her ruin, while his guilt is his [55] triumph; for as he alone violated the law, the marriage is not void; he has the

benefit of his own wrong, and avails himself of his falsehood and of the violation of the law, to maintain this marriage, which was brought about by fraud and falsehood, persecution and intimidation.

Another feature in this case—worthy of notice with a view to the special interposition of the legislature—is, that by the 29th section of the act 4 Geo. IV., c. 76, any false representation in the registration of marriage was made a felony, punishable with transportation for life. If that section had not been in effect repealed by the act 6 and 7 W. IV., c. 86, for registration of births, marriages, and deaths,—which, by section 41, subjects false representations only to the penalties of perjury, and not of felony,—this man would, for misrepresentations of the age and residence of this young woman in the publication of the banns and in the register of the marriage, have been liable to transportation for life. So that, if she failed in obtaining the interposition of the legislature to set aside this marriage, she, or her advisers, might have prosecuted him for felony, and caused him to be transported for life, and thereby released her from actual cohabitation with a man whom she loathes, and to whom she never can be reconciled. That is another special ground for the interference of the legislature, to give relief in a case of hardship, which is partly caused by the Legislature's own act, and which, without such interposition, remains without a remedy.

This man has been prosecuted, and punished to the utmost extent of the law, for the fraud he committed; but not in a way to afford any relief to his victim. It happened that, under a bill filed in 1846, for the administration of her father's estate, she was made a ward in Chancery, but no guardian was appointed. By the celerity of Brown's movements, and the power he acquired over her, he had the marriage solemnized before, according to the forms of the Court of Chancery, a guardian could be appointed; but still it was a high contempt of the Court to marry a ward without leave, and for that contempt, this man was committed to prison by an order of the Vice-Chancellor—it being part of the order that the young lady should, until a guardian should be appointed, remain under the protection of Mr. Smith, to whom she had escaped from John Brown's house. By the Vice-Chancellor's directions also, a statement of the circumstances was laid before the Attorney-General, with a view of putting the criminal law in force against Brown, for his false statement of the lady's age and of her and his own residence. The Attorney-General doubted whether the 38th section of the Marriage Act, subjecting a party guilty of such misstatement to the punishment of transportation for life as a felon, was repealed by the act 6 and 7 W. IV., c. 86 (he, Sir F. Kelly, had no doubt at all that it was repealed),—but entertained no doubt, nor could any one else, that for this false statement through which the marriage was celebrated, the party making it had incurred the penalties of perjury. And accordingly Brown was indicted at the Central Criminal Court, for his false and fraudulent misrepresentations, made in the publication of the banns for the solemnization of the marriage. He was found guilty; and the conviction being affirmed by the Judges on a point reserved at the trial, he was sentenced to six months' imprisonment,—a punishment very inadequate to his guilt. Had he been convicted of felony, and transport[57]-ed for life under the act 4 Geo. IV., c. 76, this young lady would be free from personal subjection to him, and his right to her property would be forfeited; but his power over her person and fortune returns with his discharge from prison, unless the legislature will humanely interfere to rescue her from such a doom.

Having thus laid the main facts of this case before their Lordships, the proposition which he had to submit, and to support with reference to cases and precedents of legislative interference, was this:—Where a marriage has been procured, not by physical force or actual peril of life or limb, but by undue influence, by inspiring the mind with undue alarm—procured by moral force, which a mind of ordinary firmness is incapable of resisting—then, when the facts can be completely proved to the satisfaction of the Ecclesiastical Court, that Court has the power of declaring the marriage null and void, as wanting that free will and consent which upon religious, moral, and legal considerations is essential to the due celebration of marriage. But where, as in this case, the necessary proofs are to be supplied by the evidence of the party complaining—which is not admissible in the Ecclesiastical Court, but is received in this High Court of Parliament—then Parliament interposes, and by a special act annuls the marriage which was celebrated without that free will of the parties, which is

required by the law to give validity and perfection to it. Happily in this country, from the safeguard which the law throws around the weak, the young and unprotected female, the crime with which this man is here charged is of rare occurrence, and not more than four or five analogous cases are found in the whole judicial and legislative history of the country.

[58] The first case is that of Miss Wharton, which occurred in 1690, and all that is known of it is from the journals and records of Parliament (see 10 Commons' Jour. (for 1690); and 14 Lords' Jour., pp. 583, 585, 591). From them it appears that Miss Wharton was a young lady entitled to a considerable fortune—in all those cases, it was not affection, however lawless, but rapacity and love of lucre, that prompted men to the commission of this crime. She was returning home at night with a relative from a party, and a gentleman of the name of Campbell (brother to the then Duke of Argyle) with the aid of his confederates, seized her as she was stepping out of her carriage, and carried her to the house of a Mrs. Collingwood, which they had taken for the purpose, and there they induced her to go through the ceremony of marriage with Campbell. It appeared clearly in the evidence that, although she was taken away by force, the marriage and all that followed was apparently with her own will and consent; there was no physical force or threat used at the time of the marriage. It was even sworn that she permitted herself to be undressed and put to bed after the ceremony. It does not appear in the evidence whether the marriage was or was not consummated, but after she was for some time in bed, her friends succeeded in repossessing themselves of her, and then proceedings were taken in Parliament for annulling the marriage, and the legislature passed an act to annul it, on the ground that the lady, in contracting it, had not the liberty of exercising her free will; had not the advice and countenance of her friends, and that there was no redress to be obtained for her in the ordinary tribunals. That case was a precedent to govern future cases, and teach wrongdoers that wherever the law cannot afford a remedy [59] for an egregious wrong, the legislature is not only powerful but humane enough to afford it, and will not withhold it when a proper case is made out.

The next case is that of Miss Knight (see 12 Commons' Jour. (for 1697); and 16 Lords' Jour., pp. 146, 148, 149), in 1697, which had this peculiarity, that the young lady not only of her free will consented to her marriage, but was really attached to her husband, remained with him when she might have gone away; that she professed her attachment to him, and even petitioned the legislature not to annul the marriage. There was no physical force used in her case either; but it appeared that she was only twelve or thirteen years of age, had a fortune of £5000—a large sum in 1697—and that the marriage was procured by fraud. Her mother was a party to the fraud. The person who married her, was not a butler or assistant in a stable, like Samuel Brown, but the son of a serjeant-at-law; so that there was not any objection in respect of station. Still the marriage having been proved to have been brought about by fraud, the legislature thought she was not of such an age as would confer on her that freedom and power of will, the exercise of which is essential to the validity of the marriage ceremony; and on that ground dissolved the marriage by act of parliament.

The next case, which occurred at the distance of eighty years—which shews the crime is not of frequent occurrence, and that there is no danger of making precedents so as to render marriage an obligation of easy dissolution—was that of Miss Harford, in 1776. That case deserves particular attention, as it closely resembles the present case in many of its features. Miss Harford was entitled to considerable fortune; was only of the age of thirteen, and a ward of Chan-<sup>[60]</sup>cery. Mr. Morris, who married her, was her guardian, and knowing that she was a lady of fortune, and of an unsuspecting flexible mind, he contrived to induce her to accompany him to places of amusement, and by thus indulging and gratifying her wishes, he obtained an undue influence over her mind. He took her abroad, and there induced her to consent to a marriage ceremony. The statement of her case in the articles exhibited in the Ecclesiastical Court for annulling the marriage was, that “by the arts aforesaid he seduced the said Mary Harford from the house of Mrs. L., and when he had gotten her into a coach, he, in violation of his duty and trust, took advantage of her ignorance and inexperience, and by divers specious pretences and entreaties, persuaded and prevailed upon her to go with him to France; that when she was in

France, and wished she was at home, Mr. Morris threatened that he would kill himself if she went home, and that terrified her" (2 Hag. Cons. Rep. 423; see p. 426).

How like is that case to the present! Brown was *quasi* guardian to this young lady, being brother to her acting guardian; he knew she had considerable property; he used to accompany her out on horseback and to amusements; he threatened to destroy himself if she would not marry him. In fact the case of Miss Harford was in all respects, except the age of the young lady, a weaker case than this; for here we have not only the same acts and the same threats, but further, after this poor girl confessed to Brown that her affection was bestowed on another person, we find him further operating on her enfeebled mind by threatening mischief to that other person.

The Spiritual Court decided in Miss Harford's case, that the circumstances as proved were not sufficient [61] to warrant a decree of nullity of the marriage. There was then an appeal to the Court of Delegates—which consisted of three Bishops, three Temporal Peers, three Judges of the Common Law Courts, and three eminent civilians—and they unanimously reversed the decision of the Spiritual Court (2 Hagg. Cons. 436), and declared the marriage void upon the ground that the young lady had not that free will to consent or refuse, which is essential to the validity of a marriage; and that the situation of Morris in regard to her made the marriage a fraud. That case must, from the construction of the Court that decided it, be regarded as a case of the highest authority, and ought to have much weight with the House in disposing of the present case.

Another long interval elapsed before any case occurred of an offence leading to an application by the victim of it to the legislature for a nullity of the marriage. The case of Miss Turner, which occurred in 1827, must be in the recollection of most members of the House (2 Lewin Cro. Cas. 1). That case, though much weaker than this, is strictly analogous in principle. Miss Turner was in her 16th year, and at school, when she was induced to leave it, upon a false representation that her father sent for her. On her way home, as she thought, she was met by Edward Gibbon Wakefield, the wrong-doer in that case, and was prevailed on by him to believe that her father was on the eve of bankruptcy, and could be saved from total ruin only by her consenting to marry him, Wakefield; she, believing his statement, and in her natural grief and affliction for her father, wishing to avert the calamity which she was told was impending, consented to the marriage. They proceeded to Gretna Green, where a marriage ceremony was per-[62]-formed, after which Wakefield bore her away to Calais, where they remained for some days at the same hotel, until the young lady, having been traced there, was brought away by her relatives, who had gained access to her, and explained how she had been deceived, whereupon she expressed her indignation at the fraud practised on her, and her abhorrence of the author of it. The circumstances of that case would be sufficient to entitle Miss Turner to a sentence of nullity of the marriage in the Ecclesiastical Court; but as they could be proved only by herself, and her evidence would not be admissible in that Court, an application to it was useless. She therefore petitioned Parliament, and her case was brought first before this House, and an act was passed by the legislature annulling the marriage. (See 2 Lewin Cro. Cas. p. 21.)

There was no physical force used in Miss Turner's case; no compulsion on her to go through the ceremony; no threat of personal injury to her or to any one; there was no bodily fear. She consented to the marriage, and went through the ceremony of her free will, but she did so under the belief that her father was threatened with a great calamity, which nothing but her consent to the marriage could avert. So in this case there was no physical compulsion, nor apprehension of bodily injury to Miss Field; but she consented and went through the ceremony of marriage under the terror inspired by Brown's threat of destroying himself—who stood in the relation of friend and guardian to her—and under the more grievous terror, arising from the threat of mischief to the man on whom she had placed her affections. What is the distinction in principle between the two cases? None whatever. All that can justly be required is to prove that this young lady acted under intimidation and fraud, [63] to entitle her to the relief she seeks. If there was no power in this country to which she might successfully appeal for relief and protection against this man, there would be a failure of justice, an injury without a remedy, contrary

to the much-lauded constitution under which she lives. But the precedents which have been cited shew that whenever a fitting case has been made out, and neither religion nor morality nor right nor justice forbids the interposition of the legislature; that when, on the contrary, morality, right, and justice imperatively call for protection of innocence against fraud and crime, the legislature never refuses to interpose. If it shall be made apparent, as it will be, that religion, morality, duty, conscience, and justice cry aloud for the dissolution of this marriage to save this innocent but unhappy girl from being the victim of the rapacity of this man—who ought to have protected her as a father, instead of making her his victim—her appeal will not be made in vain to an all-powerful legislature to extend to her the same protection that was extended to those other victims of men's artifices, as exemplified in the cases that have been referred to. The great question for the legislature to consider is, whether by allowing this marriage to stand, a grievous wrong will not be perpetrated, while by annulling it no wrong at all will be done. That consideration involves another great question—a question of principle,—which is, whether this marriage has been celebrated with that free and unfettered consent of both parties which religion and the law alike require, or whether it has been brought about by fraud and persecution and intimidation, or by any other of those undue means which the legislature will never permit to be successful. The interposition of the legislature [64] is sought in this case, as it was in Miss Turner's, upon the principle that this, like hers, being a valid marriage, redress cannot be obtained from the ordinary tribunals of the country; or being of doubtful validity, it cannot be set aside in the Ecclesiastical Court on account of the rules of evidence, which do not admit either of the parties to a marriage to be a witness in a suit to dissolve it; and in this case the knowledge of the facts affecting the validity of the marriage is derived from the parties to it, and from them only.

The precedents that have been referred to justify this application; but if there were no precedents, that would be no reason for the refusal of relief from the legislature, which is entrusted with transcendent power, not for evil but for good. If, therefore, a case were made out, though wholly without precedent or analogy to any previous case, but in which the legislature should be satisfied that it alone could afford relief, it would be the duty of the legislature on that consideration alone to interpose its unbounded power, which was conferred on it for the well-being of the whole people. It was upon that principle that this House, in the Session of 1843, initiated a measure for the preservation of the Marquess Townsend's honours and estates \* to his brother and family, against an invasion of them by the Marchioness's illegitimate children—a measure, although opposed by a very high authority (Lord Cottenham, Devon, and other Peers) (*id.* 314) received the sanction of the House, and was passed into law. The object of that act was not to dissolve or annul a marriage, but to bastardize the wife's children, who were themselves blameless—an [65] object certainly not so unexceptionable as the object of the bill in Miss Field's case. By this bill no human being can be prejudiced; there is no issue, nor possibility of issue, of this marriage, which fortunately was never consummated. That fortunate circumstance was proved in the proceedings in the Court of Chancery, before referred to, and will be proved again at this bar by the oath of the young lady herself, and by such other evidence as the matter is capable of, and which shall be, if not perfectly conclusive, at least such as to satisfy the House that her statement is founded in truth:—

Lord Brougham.—Was Miss Turner examined in support of her bill in this House?

Lord Radnor.—Yes, she was.

Sir F. Kelly.—If any doubt were to be raised as to the non-consummation of the marriage it is to be remembered, and will be likewise proved, that on the fifth day after this unhappy marriage was celebrated, this young lady quitted Brown's house, and had no communication since with Samuel Brown or any of that family; and now more than a year has elapsed, so that whatever may be the truth respecting the consummation, all idea of issue is out of the question—

\* 10 Cl. and Fin. 289. (The report there is, by mistake, headed "In Committee of Privileges.")



The Earl of Devon.—Is it not for the party who opposes the bill to urge that point, if it be a part of his case? It is for him to shew that this proceeding would be prejudicial to the rights of third parties: it is not a point for the petitioner to anticipate.

Sir F. Kelly was glad to be thus relieved from that part of the case, although he was perfectly prepared to meet the suggestion, if it should be made on the other side.

[66] There was one point more requiring observation: one objection to applications for bills of this sort is, that precedents multiply and lead to too great a facility for the dissolution of marriage; so that couples who got tired of each other might by collusion make out an apparent case for the interposition of the legislature, and so set aside their marriage by act of Parliament. In this case there is no ground for even the suspicion of collusion; the nature of the case negatives the possibility of it. Again, it might be objected, if long cohabitation had taken place, even without issue, that it would be contrary to morality, and an encouragement to vice, to dissolve the marriage. Here there is no ground for such an objection, as there was no cohabitation, the petitioner having escaped five days after the marriage to Mr. Smith's, under whose protection she has since continued.

The case upon the whole is this:—Here is a very young lady, betrayed, persecuted, and intimidated into a consent to marry; having a moment for reflection, in the absence of her persecutor, she withdraws her consent, and resists his renewed persecution for weeks; but at last, with a debilitated mind, teased and worked upon, and its powers frustrated by this man's worrying, she at length in an evil hour again consents, and then by fraud and violation of the law a marriage is celebrated. Here she is, at one side of this bar, an orphan, helpless, unprotected, and unhappy—a young lady yet innocent and undefiled, with her affections previously bestowed on another, a person of suitable age and position in society; all which was well known to this man, who seeks to take her to himself. He stands at the other side of this Bar, old enough to be her grandfather, who has persecuted and oppressed her; who has availed himself of the oppor-[67]tunities afforded him by his being in the situation of a guardian, to gratify—not any passion for her, bad as that would be, but worse,—his base desire to possess her fortune; will this House—holding and exercising the supreme power of the state, wisely conferred for the well-being of the community—will this House, under its responsibility to God and to the country, deliver this poor girl over to such a man, and consign her to a life of misery and pollution in the loathsome embraces of this man, her heart having been, as he knew, given to another person? As a ward in Chancery, under her father's will, her fortune may be settled on her; but this man will be entitled, unless the legislature interferes, to compel cohabitation, and therefore to enjoy her fortune through her, for her enjoyment of it would be his, and therefore he will reap the reward of his rapacity and fraud, and violation of the law.

Lord Radnor.—Is there any reason or explanation given why Miss Field did not sooner betake herself to Mr. Smith's protection?

Sir F. Kelly.—A promise of secrecy had been extorted from her; it was part of the art and contrivance of this man to obtain a promise from her—thus turning her honourable principles to her destruction—to keep his designs on her a secret, but for which, no doubt, she would have sooner resorted to the protection to which she fled at last.

Esther Field, examined by Sir F. Kelly, said she was nineteen years of age the 31st of May last (1848). Her father died in 1842, leaving her and two brothers, one of whom has since died: her mother died long before. By her father's will, a Mr. Moore, and Mr. John Brown, of Tring, brewer and farmer, were appointed executors: since her father's death she had no guardian but Mr. J. Brown and his [68] wife; they have three children. Having been placed by J. Brown with a Mrs. Orme, for her education, she remained with her two years, and was then removed to the care of a Mrs. Roberts, at Penzance, with whom she finished her education, and returned to Mr. J. Brown, at Tring, on the 5th of April, 1847. Samuel Brown, brother of John, was living there, assisting in the business; he was fifty-two years of age; she had known him all her life; he was very kind, and paid much attention to her,—used to ride out and go to places of amusement with her when his brother could not go, and she considered him the same as her guardian.

On the 18th of May he asked her to marry him—he had been then, and for some days before, more affectionate than usual; she did not understand it and did not take any notice; when he asked her to marry him, she was surprised, laughed at him, and said she could not think of such a thing, for he was old enough to be her grandfather; he was angry at her refusal, and left her, after begging her never to mention the matter to any one—which she promised; he came back, was very violent in his language; she was frightened, depressed in spirits, and bewildered; he said he would shoot himself if she did not consent, and would also injure Mr. Montague Smith, on whom she said she had bestowed her affections; believing he meant all he said, she consented, not from love or liking for him, but most unwillingly, in consequence of her fright. He left the house early on the 19th of May for Epsom races, and returned on the 21st. On the 22nd she told him she had been very unhappy in mind for having promised to marry him, that she could not keep that promise, that he was too old, and she was attached to Montague Smith, which she would not confess but she hoped it would prevent further annoyance. He for some days kept constantly taunting her for not keeping her promise. She did not tell Mr. or Mrs. J. Brown of the matter, because she had promised Samuel she would not tell any one. He kept constantly persecuting her to the 18th of June, when, after continually refusing him, she was again induced to consent to marry him, not voluntarily nor from affection, but being in so excited and bewildered a state that she scarcely knew what she said. The next day, [69] the 19th, being fixed for the marriage, she, after spending a restless night, came down, and they breakfasted together earlier than usual, and before John Brown and his wife came down. They left in a chaise, saying they were going to Chardlowes to see the gardens, but they drove direct to Drayton railway station, and proceeded by railway to London, went to the clerk's house in Mary-le-bone, and with him and his wife to Trinity church, and were married. She did not know it was by banns, as he had told her they were to be married by license in St. George's church. In going through the ceremony, she certainly gave her consent, though it was unwillingly given. He had previously told her if any questions were asked, he would answer them, and he did answer questions that were asked by the clergyman after the ceremony. They then returned to the clerk's house, had cake and wine, then visited two or three shops, and returned by rail the same day to Drayton, and thence by Chardlowes to Tring, where they arrived about six o'clock. For the five nights, from the 19th to the 24th of June, she slept, as usual, with one of John Brown's daughters; and on the 24th, she went, by invitation, to Mr. Smith's, at Hemel Hempstead: he was the friend and adviser of her father. He has three sons and five daughters. Montague Smith was the second son. On the 28th she disclosed the circumstance of her marriage, first to Montague, and then to his father, who, by her desire, took proceedings in Chancery.

Cross-examined by Mr. Ballantine, counsel for the husband.—She said her father had been well acquainted with John and Samuel Brown, and she heard that her sister, much older than herself, and long since dead, had been engaged to marry John Brown. After her father's death, in 1842, she went to John Brown's, and remained there two months before she went to school; she used to spend her vacations there. She heard Samuel Brown was fifty-two years old, but had no knowledge of his age. After laughing at his proposal, and saying he was old enough to be her grandfather, she consented to marry, because he was very violent and threatening in his speech, and she was frightened into consent by his threatening to destroy himself. During the ab-[70]sence of John and Samuel Brown at Epsom, on the 19th of May, she was alone with Mrs. Brown, and could, but did not, tell her that Samuel exacted the promise of marriage, because she had promised him not to tell any one about it. She used sometimes to go to Mr. Smith's from Brown's, but both the Browns disliked her going.

Edward Speller, clerk of Trinity district church, in his examination, said, that on Sunday, the 23rd of May (1847), Samuel Brown came to him, just as he was going to church, and in his hearing he took down, in pencil writing, the particulars for the publication of the banns (a copy of which he produced) which were published on that day and on the 30th of May and 6th of June. He came again with the young lady to witness's house on the morning of the 19th of June, when witness and his

wife went with them to the church where they were married by Mr. Robinson the clergyman.

In cross-examination, witness said the young lady did not appear agitated or nervous,—as some ladies are on similar occasions,—but took it all very coolly. Witness and his wife signed the register as witnesses. No other person except the clergyman was present.

Mrs. Speller, wife of last witness, said they came to her house about eleven o'clock on the 19th, in a cab, and Brown asked her to be bridesmaid, as they had no one. The young lady went up stairs, and was alone with witness for about five minutes, and seemed quite composed. They and witness went in the cab to the church, and after the ceremony was performed, came back to witness's house, where luncheon, consisting of coffee, wine, etc., had been prepared by Brown's directions. They were alone in the room for half an hour; witness did not see them eat, but she saw that nearly all the luncheon was gone.

The Reverend Mr. Hamilton said, he solemnized the marriage between Samuel Brown and Esther Field on the 19th of June, 1847. The register (which was produced) is generally prepared by the clerk before the marriage, in order that the parties may not be delayed; and after the ceremony the custom is for the clergyman to read the first line, relating to the husband, as "Samuel Brown, full age, bachelor, gentle-[71]-man, 31, Wimpole Street," etc., and to ask, "Is that correct, Mr. Brown?" and then to read the line relating to the woman, as "Esther Field, full age, spinster, Wimpole Street," etc., and ask her if that is correct. He had no doubt, although he did not recollect it, that he went through that form with this couple, and that unless the impression had been most distinctly conveyed to his mind, by word or nod,—by which assent is sometimes expressed,—that the particulars of the entry so read from the register were correct, he would not have signed the register, nor have allowed the parties to sign it. When the particulars of the entry are read, and the question put, unless dissent is expressed, assent is inferred.

Another witness proved that Samuel Brown was butler to Miss Clitherow, 31, Wimpole Street, eleven years ago; and Mr. Steele, a medical gentleman who knew Miss Field all her life, said he saw her at Mr. Smith's on the 24th of June,—the day she arrived there,—and again on the 26th and 27th. She was in a state of tremulousness, nervous agitation, and depressed—wanting her usual alacrity. He apprehended that fever was forming, and he recommended to her to be quiet and at rest,—not to accept any invitation out. Her illness was entirely bodily.

Mr. William Smith, solicitor, of Hemel Hempstead, and other witnesses, were examined as to the facts stated by Sir F. Kelly, and their evidence is set out at great length on the Journals (for 1848), but as the question for the consideration of the House was, whether the lady's consent to the marriage should, under the circumstances, be held binding, no more of the evidence is here given than was material to that point.

Mr. Rolt summed up the whole of the evidence.

Mr. Ballantine, for Samuel Brown,\* was about to address the House—

[72] The Earl of Devon: † Before you go on, Mr. Ballantine, I wish to state what the feeling of the House is.

The case of the promoters of the bill has now been fully gone into, and it has been listened to patiently by the noble lords who have attended here from the commencement, and I need not say that I have listened to it with every possible attention; and, certainly, I, having originally introduced the bill into the House, came to the consideration of it with as much prepossession in favour of it, and with as much desire to see that it was a remedy that we might justly afford, as was at all consistent with the character of an individual legislator. I am afraid I had a great prepossession in favour of the party bringing forward such a bill.

Now the evidence has been gone through, and undoubtedly it does not assume that character in Miss Turner's case to which Lord Tenterden adverts, in his observa-

\* Leave had been granted to him, on his petition, to appear by counsel and examine witnesses against the bill.

† His Lordship was the only law Lord present, after the first day, and he presided during the examination of the witnesses, and Mr. Rolt's summing up.

tions that have been reported to us in Sir F. Kelly's speech—namely, that of a case of overpowering strength. On the contrary, I am of opinion that the facts, as they appeared before us, relative to the conduct of Miss Field immediately preceding the marriage and during the day of the marriage, were not such as would justify us in holding that that which appears to be a consent was so far influenced by fear or the continuance of any persecution, as to justify the Legislature in interfering, by an act of rather a peculiar nature, to render void the contract which has been solemnized in the face of the church and is binding in law. Of course, my individual opinion would not signify much, except so [73] far as it would influence my own conduct, with reference to the further proceeding with the bill. I thought it my duty to consult with every one of the noble Lords who have attended to this case, and whose opinion is of quite as much weight as any of the law Lords. I have consulted Lord Denman; I have consulted Lord Lyndhurst, and I know my Lord Chancellor's opinion from what he has said of the case, though he has not attended to it so fully as the others. My Lord Lyndhurst has read everything that was put in evidence before your Lordships, and he has a strong opinion in accordance with mine.

Under these circumstances it does appear to me to be unnecessary to call upon the counsel in opposition to the bill to address any observations to the House; because, assuming the case to stand as it now stands, as it is represented by the promoters of the bill, I, for one, am not prepared to move the second reading of the bill, and none of the noble Lords who have heard the case is prepared to do so. I do not, under these circumstances, conceive that the promoters of the bill would wish that the time of the House should be wasted by further proceeding with it.

The bill was dropped.

#### WORTHAM'S CASE.

[Mews' Dig. vii. 628.]

A case—similar to the above in many of its circumstances—was brought before the House in 1846, upon petitions for leave to bring in "A Bill to dissolve, rescind, and make void the marriage of William Newnham Burton and Frances Louisa Wortham." She was entitled to real estate of £450 a-year, and was only fourteen years of age when taken away from her mother, a widow, by W. N. Burton, and married to him at Gretna Green. There was cohabitation, and birth of a child. On Lord Brougham's motion, the petitions of the mother and daughter, together with the evidence on the trial of Burton for the abduction, were printed; but no further proceeding was taken. (See 76 Lords' Jour. (for 1846), pp. 76, 96, and 303.)

[74] ALEXANDER BAILLIE,—*Appellant*; EDWARD EDWARDS and Another,—*Respondents* [August 1 and 4, 1848].

[Mews' Dig. xii. 684. S.C. 14 L.J. Ch. 341.]

*Principal and Agent, Consignee and, Trustee—Accounts—Set-off.*

Innes, consignee of a West India estate, was appointed trustee thereof by B., the tenant for life, for the purpose of keeping down incumbrances. Innes was also private agent and banker for B., with the understanding that B. was not, nor were his funds, to be liable for advances made by Innes for the estate; Innes, becoming embarrassed, was declared bankrupt, and assignees were appointed:

Held, by the Lords,—reversing orders of the Court of Chancery, on a bill filed by B. and the other owners of the estate, to remove Innes from the possession and management,—that a sum found due from Innes to B., on their private dealings, might be set off against a sum found due to Innes in respect of his advances and payments for the estate.

The appellant was, under his father's will, dated in 1793, tenant for life of the

Bacolet estate, in the Island of Grenada, subject to the payment of an annuity to the testator's widow, and of legacies to his five younger children, in the event of the insufficiency of the personal estate,—which was the case.

By an indenture, dated in 1812, Messrs. Winter and Innes, merchants, in partnership in London, and then consignees of the Bacolet estate, were appointed trustees thereof, for the purpose of regularly paying the annuity and interest on the legacies, and of gradually reducing the principal of the legacies. They acted also as private agents and bankers to the appellant. Winter died in 1824, from which time Innes continued the same connection with the estate, and with the appellant, respectively. Considerable advances were made from [75] time to time by Winter and Innes, and, after Winter's death, by Innes, on account of the estate, with the express understanding that the appellant should not be personally liable for them, and that the consignees should look for repayment to the estate alone.

A large sum was claimed by Innes to be due to him in 1831, on account of the supplies furnished to the estate, and in respect of payments made by him to the annuitant and legatees, exceeding the proceeds of the estate. The appellant, on the other hand, claimed a large balance to be due to him from the firm of Winter and Innes, and from Innes, on account of the various dealings and transactions between them and the appellant on his separate account.

The suit, in which this appeal arose, was instituted in 1832 by the appellant and his brothers, who were entitled to the reversion in the Bacolet estate, against Innes and the representatives of Winter and others, for the purpose of redeeming the estate and taking it out of the management of Innes. He was declared a bankrupt in 1833, before he put in his answer, and, thereupon, his assignees, Thomas Palmer and Edward Edwards, were made defendants to the suit by supplemental bill. In their answer to the bill they stated their belief that the expenses in respect of the estate, and the payments made by Innes, greatly exceeded the proceeds thereof, and that a balance of £9191 was due to them as his assignees in respect of his advances towards the said expenses and payments, and for supplies furnished by him for the estate; and, in reference to allegations and charges in the bill, suggesting a question of set-off, they said they were informed, and they believed that Innes was indebted in a large sum to the appellant in respect of the dealings that [76] Winter and Innes,\* and Innes alone, since Winter's death, had with the appellant, and they submitted to the Court whether Innes, and they in his right, as his assignees, were entitled to be paid the said sum of £9191 until the said sum due to the appellant from Innes was paid; and they said they heard, and believed, that the appellant was not personally liable to Innes for the said balance, and that notwithstanding the larger balance due to the appellant from Innes, he, Innes, was entitled to retain the Bacolet estate until the said sum of £9191 was paid, and they submitted whether they, in his right, were not so entitled.

The Vice-Chancellor made a decree in the cause in 1834, referring it to the Master to take the several accounts prayed for by the bill, and in taking such accounts, he was to have regard to all such rights, if any, of lien and set-off as the appellant and other parties to the suit might be entitled to.

In order to save expense of part of the accounts, the claim of Innes, and of his assignees, in respect of his advances in payment of the charges on the Bacolet estate was adjusted, by compromise, at £8000, without prejudice to any claim of lien or set-off; and the Master's report that that was a proper adjustment, beneficial to all parties, was confirmed; and it was ordered that the assignees of Innes should be entitled to the dividends to accrue due on so much of the Bank annuities standing to the credit of the cause as was equivalent in value to the sum of £8000, but without prejudice to the appellant's claim of set-off; and accordingly, the sum of £8920, £3 per cent. Bank annuities, the agreed value of £8000, together with £133 in cash, was ordered to be carried over to an account, entitled "The Contingent Account of the defendants, Thomas Palmer and Edward Edwards, assignees of the defendant Innes," with the usual direction for investment and accumulation

\* The appellant's claim on the partnership of Winter and Innes was settled in another suit instituted for taking the partnership accounts. See *Winter v. Innes*, 4 Myl. and Cr. 101.

of dividends. (These Bank annuities were part of a larger sum of like stock standing to the credit of the cause, which arose from compensation money paid in 1836 for the slaves, etc., on the Bacolet estate, under the act for the abolition of slavery.)

The Master, by his general report in 1841, found the sum of £11,884 to be due to the appellant in respect of the separate dealings and transactions between him and Innes, but he was of opinion that the appellant had no right to set-off that sum, or any part of it, against the debt due to the assignees of Innes from the Bacolet estate.

To this report exceptions were filed by the appellant, on the ground that the Master ought to have reported in favor of his claim of set-off. The Vice-Chancellor, upon the hearing of the exceptions, and of the cause on further directions at the same time, made an order, dated the 15th of July, 1842, overruling the exceptions, with costs, and declaring on the further directions that the sum of £10,460 and upwards, then standing to the credit of the cause, to "The contingent account of Palmer and Edwards, assignees of Innes," which sum was produced by the said sum of £8920 Bank annuities, and the accumulation and investment of the dividends thereof—belonged to Palmer and Edwards as assignees of Innes.

That order was affirmed, on appeal, by Lord Chan-[78]-cellor Lyndhurst, by an order dated the 7th of May, 1845, dismissing the appeal, with costs (see 14 Law Journal, N.S., Chan., 341).

This appeal was brought against both the orders.

Mr. Bethell and Mr. Wood, for the appellant, contended that he had a clear right to redeem his life interest in the Bacolet estate from the lien of Innes, with the money which Innes owed him. That right was not abandoned or in the least degree affected by the contract that the appellant should not be personally liable to Innes for his advances. The right of set-off was expressly recognized by the decree of 1834, in the direction to the Master in taking the accounts thereby referred to him, "to have regard to all such, if any, rights of lien and set-off as the appellant or other parties to the suit might be entitled to." The lien there referred to, was the charge which Innes had on the Bacolet estate—and which, under the indenture of 1812, must be held to be limited to the appellant's life interest in that estate. The right of set-off so referred to in the decree, was the claim of the appellant to discharge such lien, by telling Innes to retain the sum found due to him from the estate out of the sum he was found to owe to the appellant. The case was just the same as if the appellant said to Innes—"You have a claim for £8000, with the dividends thereof since 1837, against my estate; you owe me on my private account £11,884; and, although I am not personally liable to you, nor are my funds in your hands liable to the payment of your charges, I desire to pay them out of the monies you have of mine, and to take back my estate." If that offer had been made to Innes [79] in 1832, before his bankruptcy—had the mutual debts been then ascertained—he could not make any objection to it. Are his assigns in a better position than he was at that time?

It may be admitted that the appellant's claim of set-off cannot be supported on the strict legal principles of set-off, in respect of mutual debts and demands; but the right of Innes to charge the appellant's life estate, and the appellant's right as against Innes, to direct payment of the charge out of what was due from him to the appellant on his private account, constitute a state of circumstances sufficient to maintain the appellant's claim in the nature of an equitable set-off; *O'Mahoney v. Dickson* (2 Sch. and Lef. 400), *Beasley v. D'Arcy* (*id.* 403, note), *Piggott v. Williams* (6 Madd. 95), *Williams v. Davies* (2 Sim. 461). The Vice Chancellor's order, disallowing the exceptions, and the Lord Chancellor's order, affirming it, must be reversed.

Supposing, however, but not admitting, that the appellant's exceptions were properly disallowed, it is clear that the orders complained of contain a fatal error, so far as it was declared by the former, and affirmed by the latter, that the sum of £10,460 Bank annuities, belonged to the assignees of Innes. That sum arose from the accumulations of £8920 Bank annuities, which were part of the *corpus* of the Bacolet estate, being a portion of the compensation money paid for the slaves thereon; whereas the charges on which the claim of Innes, and of his assignees in his right, depended, were limited, by the deed of 1812, to the appellant's life interest in the estate; therefore, under any circumstances, the assignees had [80] no right to have

payment of more than the dividends on the £8920, and that only during the life of the appellant.

Mr. J. Parker, and Mr. Roundell Palmer, for the respondents. The advances made by Innes, in respect of the Bacolet estate, were charges on that estate, and are not liable to be set-off at law or in equity against the sum found due to the appellant from Innes on private dealings and transactions between them. It is essential to the doctrine of set-off that there should be cross-demands between persons mutually indebted, and that the right of set-off should be mutual. It is not necessary to cite cases to support that doctrine. There was no mutual demand or mutual debt in this case. The appellant was not personally liable to Innes for the debt due to Innes, in respect of his advances as trustee and consignee of the estate; the estate was his only security; but Innes was personally liable to the appellant for the debt due on the separate account. There was no mutuality between those debts; there could be no set-off of one against the other. The mere existence of cross-demands is not sufficient to establish an equitable set-off, which is allowed only where the party seeking the benefit of it, can shew some equitable ground for protection against the other party's demand; *Whyte v. O'Brien* (1 Sim. and Stu. 551), *Rawson v. Samuel* (4 Myl. and Cr. 172). The exceptions to the Master's report were properly disallowed.

The declaration in the Vice Chancellor's order, affirmed by the order of the Lord Chancellor, that the £8920 stock, set apart as the agreed value of the £8000, found due to Innes from the Bacolet estate, and the accumu-[81]-lations of that stock, amounting to £10,640, belonged to the assignees of Innes, was founded on an order made in July 1837, which is not appealed from. By that order, stock, equivalent in value to £8000, was carried over to "the contingent account," etc. of the assignees, and the dividends to accrue thereon were appropriated specifically to the payment of the debt due to Innes from the Bacolet estate, without prejudice to the claim of set-off then set up by the appellant, which claim has been since disallowed. Not only the appellant's life interest in the estate, but also the legacies charged on it in favour of those who were parties to the deed of 1812, were in equity liable for the advances made by Innes as trustee and consignee under that deed. The stock carried over to "the contingent account," etc. of the assignees, under the order of July 1837, was liable to pay the debt so due to Innes. None of the persons interested in the Bacolet estate, except the appellant, complained of the orders of the Vice Chancellor and Lord Chancellor.

Mr. Bethell, in reply, insisted that a clear case of set-off was established for the appellant. His bill put it thus:—"give me up my estate, and retain out of my funds in your hands, what is due to you from it."

Lord Lyndhurst.—If he had a right to set off one debt against the other, there would be an end of the question. The question is whether he had such a right. If an action had been brought by the appellant against Innes, Innes could not have set-off against the debt claimed in that action the £8000 found due to him from the estate.

Mr. Bethell.—Certainly not; because that would be a personal action; and there was no personal liability from the appellant to him.

[82] The Lord Chancellor.—The question is, whether the appellant, having a sum of money due to him, has a right to say to his debtor, the creditor of the estate, "Take the £8000 out of the money you owe me."

Lord Lyndhurst.—Suppose we are of opinion that the exceptions to the report should be allowed, then what shape does the case take?

Mr. Bethell.—I am going to state to your Lordships the form of the order which I should humbly submit to your Lordships. First, I should state in a very few words what has been done. [Having read minutes of the order which he submitted for their Lordships' adoption, he proceeded.] These directions are exceedingly simple and plain. On the subject of costs, which is the only point on which the respondents' counsel could even raise a question, I should not propose to your Lordships to make any order.

The Lord Chancellor.—The defendant is entitled to his costs,—he is a mortgagee on the estate.

Mr. Bethell.—He is entitled to principal, interest, and costs.

The Lord Chancellor.—The cause will only be referred back with a direction.

Lord Lyndhurst.—Assuming that we shall be of opinion that the exceptions ought to have been allowed, the question is, what we ought to do upon that. Mr. Bethell's minutes are too long for me to repeat.

Mr. Bethell.—All I propose is, to reverse the order, over-ruling the exceptions; to allow the exceptions to the Master's finding that there was no right to apply the one debt in satisfaction of the other. Then there is nothing further to be done by the Master; there is no necessity for a direction to send that matter back.

[83] The Lord Chancellor.—The Master found that £8000 were due for principal and interest.

Mr. Bethell.—Your Lordships will recollect that, instead of prosecuting the account of what was due upon the mortgage or charge, it was agreed that what was so due should be taken to be £8000. The interest on that sum was provided for by the order of 1837, that it should carry such interest as that sum of money when invested in stock would produce. The value of £8000 was set apart from the slaves compensation money previously invested, and the dividends were to accumulate to answer the interest of the £8000, provided the debt of £8000 should not be found to have been satisfied; but my contention is, that the £8000 were to be regarded as satisfied, immediately after the direction was given to Innes to apply an adequate part of his debt of £11,884 in discharge of it; therefore there will be no interest on the £8000.

The Lord Chancellor.—That is from the filing of the bill. You say the stock now invested meets the whole of the mortgage debt?

Mr. J. Parker, for the respondents, admitted that.

The Lord Chancellor.—Do you admit that the £8000 invested represents the full amount, up to the present time, of the mortgagee's claim?

Mr. Parker.—Undoubtedly.

The Lord Chancellor.—Then you are paid by receiving that sum?

Mr. Bethell.—They are paid by wiping off £8000 out of the £11,884. The stock in Court, to the credit of the cause, was set apart to give them ultimate security for the £8000, in case it should be found it ought not to have come out of the £11,884.

The Lord Chancellor.—That satisfies the mortgagee's [84] claim; then as to the mortgagor, there must be a declaration as to the amount of stock purchased with the £8000 invested to meet the debt; there is nothing to refer back to the Master.

Mr. Parker.—You will find, according to the exceptions, the first of which is the substantial one, that they present a number of alternative propositions.

The Lord Chancellor.—Do you contend that it is necessary to refer them back?

Mr. Parker.—There will be this question, which I do not know that you have yet decided; that is, whether the whole of the Bacolet debt is to be considered as money that is to be separate estate of Innes?

The Lord Chancellor.—Yes; that is decided.

Mr. Parker.—If your Lordships have decided that, then the only question will be the question of set-off.

The Lord Chancellor.—That is going into the whole case. We are putting these questions, assuming that we are of opinion that the plaintiff has a right, as against the mortgagee, to say, "Take your £8000 out of the £11,884, and restore me my estate," and that by the filing of the bill he did say so. My question first was, whether there was anything forming matter for inquiry—assuming the exceptions to be allowed, whether it is necessary to go back to the Master, or whether, allowing the exceptions, it is competent for the court to dispose of the case on further directions? We have now decided the whole case, and the only question is this, what form of order this House should draw up? whether you want any other form of order than is suggested. It turns upon this, whether there is any matter for a reference back to the Master; if not, then the matter is very clear.

Mr. Parker.—After the intimation your Lordships [85] have given, I do not ask any reference back to the Master.

The Lord Chancellor.—You take the stock in full payment of your debt.

Mr. Bethell.—They (respondents) wipe off £8000 out of the £11,884, in full payment of their debt.



Mr. Parker.—They (appellant) take the stock as it now stands, with the dividends which accrued upon it.

Mr. Bethell.—We take the whole of it—

The Lord Chancellor.—Do you claim to have restored to you the dividends of the £8000, between the times of the filing of the bill and of the investment?

Mr. Bethell.—Yes, certainly; because the debt of £8000, for securing which that sum of stock was set apart, is now considered as paid by an equal sum out of the £11,884 due to us.

The Lord Chancellor.—You say, and I think properly say, that you have a right to consider the debt was paid when you filed your bill. Then that fund, now existing, represents not only the mortgage fund, but a portion of the interest which accrued between the filing of the bill and the investment.

Mr. Bethell.—It is in this way. In 1837 we wanted to know the full amount of what was due to the mortgagee; it was found to be £8000, both principal and interest; and a large sum of money had been paid into court, arising from the slaves compensation; the assignees said, “we require to have security for this £8000.” We said, “we will give security,—take a part of the fund in court, and let it be invested and held for your security.” The fund in Court, therefore, was a security for the £8000.

The Lord Chancellor.—There can be no especial [86] matter for a reference back to the Master. There will be a declaration that the plaintiff had a right to pay the mortgage debt out of the money due to him from Innes; then that being so, of course the order will be merely to restore the estate.

[After some discussion between their Lordships and the counsel on both sides, on the form of order proposed and read by Mr. Bethell.]

The Lord Chancellor.—The order will be, to reverse the two orders, and allow the exceptions to the Master's report.

Mr. Bethell.—And direct the costs paid by the appellant to be repaid; there can be no objection to that on the other side.

The Lord Chancellor.—They would be entitled to the costs of suit as mortgagee. There is no doubt what is the right order to be made.

It was then ordered and adjudged, that the order of May 1845, be reversed, and that the costs that were paid thereunder to the several respondents, be repaid by them respectively to the appellant. And it was further ordered, that the order of July 1842—so far as it held the exceptions taken by the appellant to the Master's report to be insufficient, and over-ruled them; and so far as it ordered the appellant to pay the several defendants their costs of the said exceptions; and so far as, on the further directions, it declared that the £10,460 6s. 11d., 3 per cent. bank annuities, standing in trust in the causes, to “The contingent account of the defendants Palmer and Edwards, assignees of the defendant Innes, surviving partner of Winter,” and the sum of £152 cash, in bank, remaining to the credit of the said cause, to “the like account,” belonged to Palmer and Edwards, as such assignees, without prejudice to any question between the said Innes and the partnership—be reversed, and that the deposit mentioned in the said order of 1842, and the costs which have [87] been paid thereunder to the several respondents, be repaid by them respectively to the appellant. And upon the matter of the said exceptions it was declared, that the appellant was entitled to have the sum of £8000, at which the claim of Palmer and Edwards, as assignees of Innes, in respect of his advances on account of the Bacolet estate, had been ascertained and settled as mentioned in the Master's report, paid and satisfied by the application of a sufficient part of the £11,884, found and appearing by the said report to have been due from Innes to the appellant, in respect to the dealings and transactions therein mentioned, and that the same sum of £8000 was to be considered and treated as having been paid and satisfied accordingly; and that the appellant having thus paid the said debt or sum of £8000, was entitled to have transferred to him the sum of £12,756 17s. 4d. Bank annuities, then standing to the credit of the account entitled, “The contingent account of the defendants T. Palmer and E. Edwards, assignees of the defendant Innes, surviving partner of N. Winter,” being the amount which had been produced by the investment of the £8000, set apart in pursuance of the Master's report, dated the 3rd June, 1837, and of the dividends which accrued in respect thereof. And it was therefore further

ordered, that the same be transferred and paid accordingly. And it was further ordered, that the cause be remitted back to the Court of Chancery, to do therein as should be just and consistent with this declaration and judgment.

(The order is set out more fully on the Journals for 1848, vol. 80, p. 717, where the title of the case is, *Baillie v. Palmer and others*; but as Mr. Palmer died before the appeal was argued, the name of the surviving assignee is substituted for his in the report.)

[88] MICHAEL SAWARD and Wife,—*Appellants*; FRANCIS M'DONNELL and Wife,—*Respondents* [April 22, May 17, 1847; August 4, 1848].

[*Mews' Dig. v. 1540; x. 1440. S.C. 12 Jur. 685. See as to question of reference to power when testator has more than one, decided in this case, Sugd. Prop. H.L. 502, 508, Pow. 295.*]

*Marriage Settlement—Power of Appointment—Construction.*

R. P., being entitled to one-third share of real and personal estates, settled such share upon her marriage, with power of appointment to herself (in events that happened) over one-third part thereof, by deed or will, and over the other two-third parts by will, subject to the husband's life interest therein, and in default of issue of the marriage. R.P. becoming entitled to a moiety of another third share of the same estates, settled it to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage.

R. P. by her will devised, bequeathed, and appointed "all that one-third part of her real and personal estates, over which she had a disposing power," upon trust, immediately after her death to raise a sum of £500; and "as to the residue of the said one-third part, and the remaining two-third parts," she gave the same to her husband for life, remainder to her infant son, and his heirs; but in case he should die under twenty-one, without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will,—the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold;—and as to the remaining two-third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under twenty-one without issue:

Held, that the appointment of the "one-third part" for payment of the annuity and legacies, extended only to one-ninth of R. P.'s original third share, and to one-third of her moiety of the other third share.

2. That the annuity and legacies became payable on the death of the son, with interest on the legacies from that time.
3. That the will did not affect the husband's rights under the settlement, and no case of election was raised against him.

Rhoda Prothero, before her marriage with Colonel William Pearce, in February 1826, was, under the [89] wills of Thomas Prothero, her father, and Samuel Browne Prothero, her brother, and by various conveyances, and in the events which had happened, entitled in possession to one equal undivided third part or share of all their real and personal estates. The other two undivided third parts or shares belonged to her two sisters, Mrs. M'Donnell and Mary Prothero.

By articles in writing, dated the 1st of February, 1826, entered into prior to the said marriage between the said William Pearce of the first part, Rhoda Prothero of the second part, and Thomas Oakley and William Addams Williams of the third part, it was agreed that the said one-third share should be settled upon trusts, as therein mentioned.

By an indenture of release, dated the 13th of May, 1826 (grounded on a lease, dated the 12th) and made between W. Pearce and Rhoda, then his wife, of the one part, and Oakley and Williams of the other, after reciting the said articles, it was witnessed that, in pursuance thereof, and in consideration of the said marriage,

W. Pearce and Rhoda his wife conveyed all that one equal third part or share, and all other share and interest (if any) of which she was seised or to which she was in anywise entitled at the time of the execution of the said articles and of her marriage, of and in the freehold estates in the first part of a schedule thereto mentioned; and also of and in all other freehold hereditaments whereof or whereto she was, at the time aforesaid, seised or entitled for any estate in possession, reversion, or expectancy, to Oakley and Williams, their heirs and assigns (subject to all charges affecting the same) upon the trusts thereafter mentioned: And W. Pearce thereby covenanted, for himself and his said wife, to levy a fine of her share of the freehold premises (which was after-[90]-wards levied), and to surrender her third-part of the copyhold premises (mentioned in the second part of the said schedule), to the uses of the said trustees, and on the same trusts: And he and his wife thereby assigned all her personal estate to which she was entitled at the time of her marriage, under the wills of her father and brother, or otherwise, unto Oakley and Williams, their executors, etc., upon the trusts thereafter mentioned: And it was declared that they should stand seised of the said one equal third-part or share of the said freehold and copyhold premises, upon trust, as to such parts thereof as were agreed to be sold, to complete or abandon the contracts for them, and, as to the remainder, and also such parts as were comprised in the contracts for sale, if they should be abandoned, to concur with the persons for the time being entitled to the other two third parts, in making partition of the same, or selling or mortgaging them, and to hold the monies to be raised by partition, sale, or mortgage, and to arise from the said personal estate, upon such trusts as should be declared concerning the same respectively by another indenture.

By that other indenture, dated the same 13th of May, and made between the same parties, after reciting to the effect aforesaid, it was declared that Oakley and Williams, their heirs, executors, etc., should stand possessed of the monies to arise by partition, sale, or mortgage of Rhoda Pearce's said one-third share of the said real estates, and to be received from the said personal estate, on trust to vest the same in lands, or on government or real securities, and settle the same to such uses as W. Pearce and Rhoda his wife should jointly appoint, *and in default of such joint appointment, "then, as to one equal undivided third part or [91] share of and in the same premises,"* to such uses as Rhoda Pearce should by deed or will appoint; *"and as to the other or remaining two undivided third parts or shares,"* and also as to the said one-third part, in default of such last mentioned appointment, to the use of W. Pearce during his life or until his insolvency; with remainder, in case of the determination of W. Pearce's estate therein during his life and the life of his said wife, to the said trustees, for her separate use during the life of W. Pearce; with remainder after his death to the use of the said Rhoda for life if she survived; with remainder to their children, as therein mentioned; and if there should be but one child, then, as to the entirety of the said messuages and other hereditaments, to the use of such only child, and his or her heirs or assigns; with remainder, in default of such issue, to Rhoda in fee, in case she survived her said husband, but if she should die in his lifetime, then to such uses as she should by will appoint; with remainder to her right heirs.

No partition or sale was made of the real estates.

Mary Prothero (sister of Rhoda Pearce) died in February 1826, having by her will, dated the 1st of that month, given and devised all her real estate to the said Addams Williams (whom she appointed her executor) for the term of five hundred years; upon trust, by sale or mortgage, to raise thereout and out of her personal estate the sums of £5000, £750, and £2000, for purposes therein mentioned, and, subject to the said term and the trust, she devised all her real estate to her sisters, Ann M'Donnell and Rhoda Pearce (then Rhoda Prothero), their heirs and assigns, as tenants in common; and as to her personal estate, she gave £300 to Rhoda Pearce, and the residue to her and Ann M'Donnell.

[92] W. Pearce and Rhoda his wife, and F. M'Donnell and Ann his wife, levied a fine unto John Williams, of the real estates so devised by Mary Prothero: And by an indenture dated the 1st of August 1826, made between W. Pearce and wife of the one part, and J. Williams of the other, it was declared that the fine should enure, as to the moiety of Rhoda Pearce in these estates, to such uses as W. Pearce and Rhoda his wife should jointly appoint; and in default of such appointment, to the use of W. Pearce for his life, and after his death, to the use of Rhoda his wife for her life;

with remainder to such uses as she should by deed or will appoint; and in default of such appointment, to the use of her right heirs. The property comprised in this indenture consisted of one equal sixth part of the real estates of Thomas and Samuel B. Prothero.

The joint powers of appointment reserved to W. Pearce, and Rhoda his wife, by the deeds of the 13th of May and 1st of August, 1826, were never exercised.

Rhoda Pearce died in September 1827, leaving William Prothero Pearce, her only child and heir-at-law. By her will (after stating that she did thereby, in pursuance of the powers in her vested by the said two indentures, and of all other powers in her vested or in anywise enabling her in that behalf, and in exercise and execution thereof, declare her last will) she gave, devised, and bequeathed, limited and appointed, "all that one-third part" of her messuages, hereditaments, and premises, "and also all that one-third part" of her personal estate and effects, unto the said William Addams Williams, his heirs, executors, etc., upon trust, immediately after her death, by sale or mortgage "of all or any [93] part of the said one-third of her real and personal estate, over which she had a disposing power," to raise the sum of £500, and pay the same to her husband, for the purpose therein mentioned; and after the payment thereof, "then as to the residue of the said one-third part of her real and personal estate, and also as to the remaining two-third parts thereof," subject as thereafter mentioned, she limited and appointed, gave, devised, and confirmed the same unto her said husband, to hold to him and his assigns for his life; and after his death, she gave, devised, and bequeathed, limited and appointed the said messuages, hereditaments, premises, and real estate, and all her personal estate and effects, unto her infant son W. Prothero Pearce, to hold to him, his heirs, and assigns; provided, nevertheless, that in case of his death during her lifetime, or before he should attain the age of twenty-one years, without leaving issue, then as to one-third part of the said messuages, hereditaments, and premises which she had devised and bequeathed unto W. Addams Williams in trust as aforesaid, and subject thereto, she directed that the said one-third part, or so much thereof as might remain after raising the £500, might be sold, and that the monies arising therefrom might be received by W. Addams Williams, and be by him applied in discharge of the annuity and legacies therein-after by her given. The testatrix then gave and bequeathed unto her mother, for her life for her separate use, an annuity of £100, to be paid quarterly, the first payment to be made on the first quarter-day next after the death of her said infant son; and she directed that the sum of 2000 guineas, part of the monies to arise by the sale before by her directed to be made, be vested in government or real security, to pay the [94] said annuity; and after the death of her mother, she gave the 2000 guineas to one Thomas Prothero absolutely. And she bequeathed to the appellant, Michael Saward, the sum of 1000 guineas, unto Ann Lewis £100, unto W. Addams Williams £100, and unto her said husband £2500, which said annuity and legacies she directed should be paid by her executor as soon as the "said one-third part of her said real and personal estates could be sold and disposed of, and the monies arising therefrom could be received;" but if such monies should prove insufficient to pay the annuity and legacies, she directed that the same should be abated equally in proportion: And "as to the remaining two-third parts of her said real and personal estate, subject to her said husband's life estate therein," she directed and appointed, gave, devised and bequeathed the same to her sister Ann M'Donnell, wife of F. M'Donnell, her heirs, executors, etc. And the testatrix declared her will to be that in case her said infant son should survive her and live to attain the age of twenty-one years, then, after raising the £500 for her husband as before directed, she revoked the appointment of the residue of the said one-third of her real and personal estate, and the annuity and legacies directed to be paid therefrom, and also the appointment and devise of the remaining two-third parts of her said estates to Ann M'Donnell, and she confirmed the estates and interests before appointed, devised, and bequeathed to her husband for his life, and after his decease to her said son, his heirs, executors, etc.

W. Addams Williams, who was appointed sole executor in the will, having renounced probate, administration with the will annexed was granted to W. Pearce, the husband of the testatrix.

[95] W. Prothero Pearce, the son, died in 1828, at the age of four or five months,

leaving the said Ann M'Donnell, his heiress at law, who was also the heiress at law of Mrs. Pearce.

By an indenture dated in June 1832, the legacy of 1000 guineas given by the said will to Michael Saward was assigned to Thomas Weatherall and Thomas Welch, upon certain trusts, for the benefit of Saward and his wife and their children.

The bill, which led to this appeal, was filed in 1833 by Saward and his wife, and the said trustees, against the said F. M'Donnell and Ann his wife, W. Pearce, T. Oakley, W. Addams Williams, and others, as defendants thereto. The bill, after stating the said several indentures, and will, and other matters before mentioned, made a case to the effect that the legacies given by the will were thereby charged on one-third of all the real and personal estates of the testatrix, and prayed (amongst other things) that the will and appointment of Rhoda Pearce might be established, and the trusts thereof carried into execution; and that an account might be taken of what was due to the plaintiffs on account of the legacy of 1000 guineas; and that an account might also be taken of the real and personal estates which passed by the said will or appointment, and what part thereof had been possessed by, or by the order or for the use of, the defendants, F. M'Donnell, W. Pearce, T. Oakley, and W. Addams Williams, or any of them, and of the rents, profits, and interest thereof, which had accrued since the death of W. Prothero Pearce, and what parts thereof had been possessed or received by, or by the order or for the use of, the said defendants or any of them; and that they might be [96] decreed to pay what should be found due from them respectively; and that the said one-third part or share of Rhoda Pearce of the said real and personal estates might be sold, and that the sum found due on account of the legacy of 1000 guineas and the interest thereon might be paid to the plaintiffs Weatherall and Welch, upon the trusts of the settlement made on the marriage of the plaintiffs Michael Saward and Harriette his wife.

F. M'Donnell and his wife, by their answer to the bill, said certain accounts relating to the trust property had been settled by and between them and W. Pearce and Rhoda his wife, and others; and that in August 1830, W. Pearce agreed to sell, and by indentures of that date, did, in consideration of £3500, convey and assign all his estate and interest in the real and personal estates, late belonging to Rhoda Pearce, deceased, (except certain trifling articles) unto F. M'Donnell. They submitted to the judgment of the Court the construction and effect of the said indentures of May and August 1826, and of the said appointment of Rhoda Pearce; and also, whether the legacy of 1000 guineas became payable at the death of W. Prothero Pearce, or only at the death of W. Pearce.

W. Pearce, by his answer, stated that he claimed no right or interest in the said trust property, he having disposed of all his interest therein to the other defendants.

The cause was heard by the Master of the Rolls in December 1838, when his Lordship declared that the appointment of Rhoda Pearce extended over one-third part of the whole of the property included in the indentures of the 13th of May and 1st of August 1826; that the legacies and annuity given [97] and bequeathed by the will of Rhoda Pearce, became payable on the death of her son W. Prothero Pearce, and that W. Pearce, her husband, having elected to take under her will, was bound to confirm it. And it was referred to the Master to take an account of the legacies given by the said will, and compute interest thereon at £4 per cent. from the end of a year from testatrix's death, and also to take an account of the arrears of the annuity given by the will from the death of the testatrix's infant son. And it was referred to the Master to inquire and state to the Court of what the property consisted which was subject to the said appointment, having regard to the above declaration, and what had been received in respect thereof by F. M'Donnell and the other defendants, or any of them: and the Master was also to inquire and state whether the said one-third part was subject to any, and, if any, what charges, and in whom such charges were vested. The consideration of further directions and of the payment of plaintiff's costs was reserved.

F. M'Donnell and Ann his wife, W. Pearce, and other defendants in the cause, appealed to the Lord Chancellor against so much of the decree as declared that the appointment of Rhoda Pearce extended over one-third of the whole of the property included in the indentures of the 13th of May and 1st of August 1826, and that W. Pearce having elected to take under her will, was bound to confirm it, and as

directed the Master to compute interest on the legacies given by Rhoda Pearce, at the rate of £4 per cent. per annum, from the end of one year from her death, and as directed the Master to inquire and state of what the [98] property consisted which was subject to the said appointment, having regard to the said declaration.

The Lord Chancellor, on the rehearing of the cause in June 1839, ordered that the said decree be varied by a declaration that the appointment or will of Rhoda Pearce extended only over the one-third part of her property comprised in the settlement of the 13th of May, 1826, over which one-third she had a power of appointment expressly reserved to her by the said settlement; and also over the whole of her property comprised in the indenture of the 1st of August 1826, subject nevertheless to the estate for life reserved to her husband, W. Pearce, in the property comprised in the last mentioned settlement; and that the annuity and legacies were charged on one-third only of the property so appointed; and by striking out so much of the decree as regarded the election of the husband; and also by directing that the interest on the legacies bequeathed by Rhoda Pearce should be computed from the death of W. Prothero Pearce, with other directions consequential to the said declaration.

The effect of these alterations of the decree of the Master of the Rolls was—as the parties to the cause understood it—to charge the annuity and legacies only on one-twenty-seventh part of the real and personal estates originally belonging to Thomas Prothero and Samuel B. Prothero immediately, and on one-eighteenth part of the same real and personal estates in reversion, after the death of W. Pearce.

The appeal was brought against so much of the decree as proposed the alterations.

[99] Mr. Kindersley and Mr. Torriano, for the appellants:—The only question in this appeal is, how much of the real and personal estates of the original owners, Thomas and Samuel Browne Prothero, the father and brother of Mrs. Pearce, was affected by the appointment contained in her will. The conflict between the decisions of two eminent Judges upon the extent and effect of that appointment, and of the power, in exercise of which it was made, raised an additional difficulty in the case. The Lord Chancellor held that only one-ninth of Mrs. Pearce's original third share, and one-sixth of her moiety of her sister's third share—equal to one-twenty-seventh, and one-eighteenth parts of the whole real and personal estates—were affected by the appointment for payment of the annuity and legacies. That appears, from a note on counsel's brief, to have been the effect of his Lordship's construction of the two indentures of the 13th of May and 1st of August 1826, and of the terms of the appointment. The Master of the Rolls was of opinion that the full one-third of the whole property comprised in both indentures was appointed for the payment of these charges.

The appellants submit that the construction of the Master of the Rolls was right. In the events which happened, and which were provided for the indentures of settlement, Mrs. Pearce had power, first, under the indenture of the 13th of May 1826, to appoint, by deed or will immediately, one-third of her share, that is, one-ninth of the whole of the real and personal estates, formerly of Thomas and Samuel B. Prothero, and the remaining two-thirds of her share, equal to two-ninths of the whole of the said estates, subject to the life interest given by that indenture to her husband. She had also power under the indenture of the 1st of August 1826, to appoint a moiety of Mary Prothero's third share—equal to one-sixth of the whole of the same real and personal estates,—subject to her husband's life estate therein under the indenture of the 13th of May. That being, upon the plain construction of these instruments, the extent of the powers thereby reserved to Mrs. Pearce, it became necessary in the next place, to examine the will, and see whether she did not thereby exercise the powers to their full extent. There could be no doubt that she intended to do so. It could not be supposed that she would charge the annuity for her mother, and the legacies for the appellant and for her husband and others, on property manifestly insufficient, when she had power over property fully adequate, consisting, altogether, of the moiety of the large real and personal estates of her father and brother. The contrary construction is erroneously inferred from some forms of expression used by the testatrix. By the expression in her will, "all that one-third part of my real and personal estate, over which I have any disposing power," on which the respondents rely, she must be understood as meaning one-third of the whole of the real and personal estate, in which she had an interest under the indentures of May and August 1826, and not one-third of the one-third of the estates comprised in the indenture of May. And in speaking of "the remaining two-third parts thereof," she

must be understood to refer to the entire residue, after the application of one-third of the real and personal estates over which she had power of appointment, and not as intending to speak of only that portion over which she had such power under the indenture of the 1st of August.

[101] The petition of appeal also complained of that part of the Lord Chancellor's decree, which declared that no case of election was raised on the will against the husband. The appellants on further consideration were disposed to submit to the Lord Chancellor's striking out that passage from the decree of the Master of the Rolls; they complained only of so much of his Lordship's decree as declared that the appointment in favour of the legatees extended to one-ninth part only of the property comprised in the indenture of May 1826, and not to one-third, as was held by the Master of the Rolls—that was the substance of the difference between the two decrees—they also acquiesced in the direction that the interest on the legacies should be computed from the death of W. Prothero Pearce.

[The Lord Chancellor observed that there was a rehearing of the appeal before him on the minutes. He was of opinion that the power of appointment could only operate on one-ninth of the whole property, and he explained to the parties that the Master of the Rolls must have meant that. The appellants, on seeing him concurring in the decree of the Master of the Rolls, then said they were entitled to more than either of the decrees gave them.]

Mr. Turner, counsel for the respondents, said, they always understood his Lordship's decree to be that only one-ninth of the property comprised in the deeds of May 1826, was appointed to pay the annuity and legacies.

Mr. Kindersley.—That construction is impossible. The question is, whether the annuity and legacies are not charged on one-third of the whole of the estates comprised in the deeds of May and August 1826.]

[102] Mr. Turner and Mr. Hodgson (with whom was Mr. James Campbell), for the respondents:

The sole question in the case is, whether Mrs. Pearce's appointment applied to more than one-twenty-seventh and one-eighteenth parts of the whole property left by her father and brother. She, being a married woman, could not appoint any part of that property, except in virtue and exercise of powers vested in her by the indentures of settlement. She was by the first of them enabled to appoint one-third of her original share. The appointment executed by her in favour of the annuitant and legatees, as the terms used by her manifestly shew, extended only to one-third of that one-third, and to one-third of her moiety of her deceased sister's third share. The remaining two-thirds she appointed in favour of her husband for life, and of her son in fee; and in the event of his death, under twenty-one, without having issue, then in favour of Mrs. M'Donnell. But the son having survived his mother, the two-thirds, whether well appointed or not, vested in him, and on his death passed to Mrs. M'Donnell, his heiress at law. *Doe v. Perryn* (3 T. Rep. 484), *The King v. The Marquess of Stafford* (7 East, 521), *Doe v. Smeddle* (2 Barn. and Ald. 126), *Tar buck v. Tar buck*—a decision by Lord Cottenham at the Rolls in 1835, and stated by Mr. Jarman in his *Treatise on Wills* (2 vol. p. 375)—and *Gompertz v. Ellicombe* (3 Myl. and Cr. 127).

It was not necessary to enter into the question of election against Mrs. Pearce's husband, as the appeal on that point was abandoned. His rights under the [103] settlement were not in the least affected by the will, and therefore no case of election could arise.

Mr Kindersley in reply, said, that after the observations of the Lord Chancellor, it was clear that his Lordship's opinion and judgment were in favour of the claim of the appellants, though the decree was against it. The cases referred to on the other side had no application to this case. It would now seem that the appeal was not really against the Lord Chancellor's judgment, except on the case of election, in which the appellants admit that the decree of the Master of the Rolls was erroneous. Some prejudice was, perhaps, raised by that determination at the Rolls against the other parts of the case of the appellants in the Lord Chancellor's Court.

The Lord Chancellor said he would search for his notes of his judgment in the Court of Chancery, before the House gave judgment on the appeal.

Lord Brougham (August 4).—This is an appeal from a decree of the present Lord

Chancellor; and upon looking into the case, my opinion is in favour of that decree, and against the decree of the Master of the Rolls, which the Lord Chancellor altered in its most material particulars. I have my Lord Chancellor's authority to state that, after having re-considered the case, and heard it argued, he retains his original opinion. So that here we both agree. No other noble and learned Lord was present at the argument.

By a settlement of the 13th of May 1826, between William Pearce and Rhoda his wife, of the one part, and Thomas Oakley and William Addams Williams, of the other part, after the recital of one-third share of certain freehold and copyhold hereditaments being [104] hers, it is stated that one-third share of the said freehold and copyhold hereditaments should be put in settlement, and then she, being a married woman, could, of course, have no power or right to make a will during coverture, by reason of the coverture, unless in so far as it was made in execution of the power which was given to her by the settlement; and the question arose as to what that power entitled her to do.

The power was, first, a joint appointment by the husband and wife, standing in that relation, during the coverture, and in default of such joint appointment, "then as to one equal undivided third part or share of and in the same premises." Now every thing turned upon whether "of and in the same premises" was to be taken as being of and in one-third part of and in the same premises which were in the settlement, together with the subsequent settlement; or whether it was not confined to the last antecedent "of and in the same premises, one-third part of the estate," namely, which was conveyed under the marriage settlement? The Master of the Rolls thought that it extended over one-third of the whole property. My Lord Cottenham, then Chancellor, thought that it extended over only one-third of that third, and not over one-third of the whole estate in settlement.

My Lords, this is not a case which admits of any very great dissertation, upon either principle or authority; it turns upon the mere construction of that short clause in the settlement. Upon the whole I am very clearly of opinion, that there was a mis-carriage at the Rolls, and that instead of one-third of the whole, she only had the power of appointment over a third of that third; and her will was confined to that power; of course, her only authority being that power,—and in [105] execution of that power alone did she make that will,—and that power was confined to one-third of that which was in the settlement, namely, one-third of the one-third.

I am also of opinion that the doctrine of election, namely, that the husband taking under the will should be put to his election, was not applicable to this case, and that it was rightly struck out from the decree by the Lord Chancellor when he gave his judgment.

There are cases a great deal stronger than this, with respect to the words used, but it is unnecessary to trouble your Lordships with them, as my noble and learned friend sees no reason to alter his original opinion, and as I have no doubt whatever that the first decision below was erroneous,—that the second decision was right, and that therefore the second decision should be affirmed by your Lordships.

I do not know whether, in this case, costs were reserved below (*vide supra*, p. 97). The respondent, for whom we give judgment, must have the costs of this appeal, at all events. I do not know what was done with the costs at the Rolls. Nothing can be done to alter the costs there, because the present appellant was in possession of the judgment there; but the respondent must have his costs of this appeal.

Mr. Pocock, solicitor for the appellant,—his counsel being absent,—said that all the costs were to be paid out of the fund in the cause.

Lord Brougham.—It may be all very well to make the fund sometimes pay the costs up to a certain point, but it does not follow that it is to pay the costs eternally:—for instance, it does not follow that the fund is to be charged with the costs of this appeal. We do not consider that right; indeed we set our faces against it, though it is often urged by learned counsel, when there is a conflict of opinion in the Courts below, the Lord Chancellor reversing the decision of the Master of the Rolls or Vice-Chancellor, that there should be no costs given of the appeal. But every case must depend upon its own special circumstances. Therefore, I should say, that unless something should be urged to shew that the costs of this appeal should be thrown upon the estate, they must be paid by the appellants. It does not at all follow that the party



who might be justified in taking the opinion of the Superior Court below, ought not to be satisfied with that opinion. It appears that the case had been very well considered below. I am very much afraid of breaking in upon our rule, of generally giving the costs upon an appeal to the party who succeeds. The appellants may, if they think fit, make an application to the Lord Chancellor, in the course of next week, but, as at present advised, I should recommend to your Lordships to give the costs of the appeal, unless some cause be shewn to the contrary, because, it is one thing to say, "Let the estate pay the costs of taking the opinion of the Court once, or twice even," but it is a totally different thing to say, "Let the estate be saddled with the costs up to the very last moment, to which litigation can be carried on."

Mr. Hodgson.—In this case, there can be no pretence for any alteration in the rule as to costs. The appeal must be dismissed, with costs, especially as the case was re-heard twice below before the Lord Chancellor.

[107] Lord Brougham.—If there were two rehearings, I should not hesitate for one moment. We affirm the decree generally, with the costs of this appeal. The former costs being thrown upon the estate, there is no dispute about them; but we give the costs of this appeal to the respondents, unless the appellants shall, before this day week, make application to the contrary, any morning that the Lord Chancellor sits here.

The decree of the Lord Chancellor was accordingly affirmed, with costs.

[108] ROBERT HARRISON,—*Plaintiff in Error*; WILLIAM STICKNEY and Others,—*Defendants in Error* [June 25, 28, 1847; July 10, August 21, 1848].

[*Mews'* Dig. xi. 1553; xii. 1097. Adopted on point as to retrospective rate, in *Reg. v. Wigan*, 1874, L.R. 9 Q.B. 327; and see *A.-G. v. Church*, 1864, 2 H. and M. 709.]

*Retrospective Rate—Statute.*

There is no rule of law which prohibits a retrospective rate

In every case of rating the question is, whether the Act under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective.

The 2 W. IV., c. 50 (public local) for draining the lands of Holderness, in the East Riding of the county of York, contains no prohibition against a retrospective rate. The commissioner under that act borrowed money (on which interest became due), for the purposes of the works directed by the act:

Held, that a rate made to pay off the debt thus incurred, was under the provisions of that Act, a valid rate.

This was an action of replevin, and the plaintiff in error was the plaintiff below. The defendants avowed under the authority of the act of the 2 W. IV., c. 50. The defendants replied *de injuria*, and the question was, whether the distress made by the defendants, under the circumstances hereinafter mentioned, was lawful.

By the forty-ninth section of this act of Parliament, the commissioner mentioned in it was authorised to enter into the lands and grounds within the limits of the said act, and to adjudge and determine what lands should be deemed and taken to be low lands and liable to contribute to the expences of the drainage thereof, and to cause a map to be made of such lands, expressing the names of the owners, and the [109] quantities in acres, roods, and perches of the same, belonging to each several and respective owner. The determination of the commissioner on this point was made subject to an appeal to the Quarter Sessions for the East Riding of the county of York, which appeal was to be made within a time therein mentioned. The fiftieth section enacted, that "after the expiration of the time for making the appeal, and after any alteration was made consequent upon such appeal, the commissioner should and might proceed to assess, tax, and charge all the low lands and grounds, and the owners and occupiers thereof, with such *gross sum and sums of money* as he should from time to time find necessary and requisite for defraying the charges and expences attending the obtaining of the act, and carrying the same into execution, and to assess and rate every

owner and occupier of the low lands and grounds by an acre rate, with such share, part, and proportion of such gross sum and sums as should be in proportion to the number of acres, which each such owner or occupier had or was reputed to have of and in the said low lands or grounds." The commissioner was to give twenty-one days' notice in writing of such tax to be made, and of the time appointed for payment, and, in case of neglect to pay within such twenty-one days, he was authorized, by warrant, to levy the sum by distress.

By the fifty-first section, the commissioner and certain valuers named in the act were required to make a true valuation of the said low lands and grounds in their then present state; and by the fifty-second section the said commissioner and valuers were required, as soon as in the judgment of the commissioner the drainage and works necessary for effecting the same were perfected and completed, again to view and make [110] a second valuation of the said low lands and grounds in their drained and improved state.

By the fifty-third section, when and as soon as the said second valuation was completed, so that the real improvement of the lands and grounds belonging to each owner and proprietor by means of the said drainage might be fully ascertained, by a comparative view of the said two valuations, the commissioner and valuers were required by some instrument in writing under their hands, to set forth the names of all the owners of the said low lands, and the quantity of acres belonging to each, and the improved value of such lands, and in and by the same instrument to proceed to tax the said lands and owners according and in proportion to the improved value, with each owner's respective *quota* or portion of the costs, charges, and expences attending the obtaining the act, and carrying the same into execution, up to the time of the completing such instrument. And in case the *quota* or portion of any owner as so assessed and taxed should exceed the sum with which such owner should have been taxed by virtue of the previous powers and authorities, that then such persons should, within twenty-one days after notice of such excess, pay the same to the commissioner, and in case of default in payment of such excess, the commissioner was authorized to enforce payment by the same means as other taxes were therein directed to be recovered; and the commissioner was further required to pay and apply such excess, when paid as aforesaid, in paying and refunding to such other of the said proprietors, such sum as they had paid over and above what was their respective *quotas* and proportions as assessed and taxed by the said commissioner and valuers should amount unto, and in case the monies [111] which should be raised for such excess should not be sufficient to refund to the said last-named owners what they should have overpaid, then such deficiency should be made good to them out of the next assessment of taxes that should be made under the act.

The fifty-fifth section provided, that after the last mentioned assessment, the commissioner should cease to be a commissioner, and the owners of the said lands were authorized to appoint trustees for the purpose of carrying the said act and certain other acts therein recited, into execution; and by the fifty-seventh section, the trustees were authorized thereafter to tax the owners of the said lands proportionately, according to the tenor of the last instrument, with such further sums as they should from time to time judge necessary, for defraying the expences of repairing and maintaining the works, and any improvements which might from time to time be found necessary, and the salaries of officers and other incidental causes.

By the fifth-ninth section, the tenants were authorized to deduct out of their rents the amount of the rates paid by them; by the sixtieth section, unoccupied lands were to remain a security for the assessments; and by the sixty-first section, tenants for life were enabled to borrow money on the security of their land.

The seventy-third section enacted, that no order, etc., made by any justice, nor any bye-law, rule, order, or other proceeding, to be made or had by or before the said commissioner, by virtue of the powers granted by the said act, should be quashed or vacated for want of form only; and the seventy-eighth section enacted, that where any distress should be made for any sum of money to be levied by virtue of the act, the distress it-[112]-self should not be deemed unlawful nor the parties trespassers on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceeding relating thereto, nor should the party distraining be deemed a trespasser *ab initio* on account of any irregularity which should be after-

wards committed, but the person aggrieved by such irregularity should recover full compensation for such special damage by an action on the case.

The commissioner appointed by the act was William Stickney, one of the defendants, and he and two other persons, Godfrey Park and Cornelius Collett, were appointed by the act valuers; and they continued to fill these offices until the completion of the drainage. Soon after the passing of the act, Stickney adjudged and determined what lands ought to be deemed and taken to be low lands, and after the time limited by the act for the appeal, he, on the 26th of November, 1833, assessed upon each owner and occupier an acre rate of £2 per acre, the amount of which rate was £23,178 13s. 6d. This sum was fully paid.

After the making and completing of this survey, a valuation of the lands in their then state was made. The commissioner made no further gross or acre tax, but opened an account with a banker, and borrowed at interest, from time to time, such sums of money as he alleged were necessary.

On the 28th October, 1837, Stickney, Park, and Collett, by an instrument of that date, which recited that in the judgment of Stickney, the works of drainage, and all works necessary for effecting the same, were completed, made a second valuation of the said low lands and grounds, according to their then improved value, in alleged pursuance of the fifty-second section of the act.

[113] By an instrument dated the 12th of January 1838, Stickney, Park, and Collett set forth the names of the owners of the said low lands, the quantity of acres belonging to each, and the improved value of such lands, and imposed a tax on the lands, in proportion to their improved value, with each owner's portion of the entire costs and charges incident to the passing of the act, and carrying the same into execution up to the date of the instrument.

In this assessment every person was assessed with the full amount of his share of the whole expenditure, according to the improved value of his land, and no mention was made or credit given for the previous acre tax. No owner or proprietor had ever paid by the acre rate his *quota* or portion of the expense of the drainage, and works thereof, and there was consequently no excess, as contemplated by the fifty-third section, to be recovered, distrained for, or paid over. The sum of £88,027 10s., required by this assessment to be raised, included all the money borrowed, and interest upon it, to the amount of £7000 odd.

By a notice dated the 24th of January 1838, the said William Stickney gave notice to the plaintiff that he, the said William Stickney, and the said valuers, had assessed all the said low lands and grounds, containing in the whole 11,515a. 1r. 29p., with the costs and charges incident to and attending the obtaining the said act, and carrying the same into execution, and which amounted to the said sum of £88,027 10s., and that the *quota* or portion thereof payable by the said plaintiff was £5351 15s. 6d., from which was to be deducted the sum of £1202 13s. 6d., being the gross or acre tax, which had been previously paid in respect of his lands, leaving a sum of £4149 2s. to be paid, which [114] he, the said William Stickney, ordered to be paid to certain bankers on the 28th day of February 1838. The money in question was duly demanded, and not being paid, a distress was issued for it, and then this replevin was brought. The cause was tried before Mr. Justice Coleridge, who thought that the commissioner had no right to make the rate of October 1837, and that the distress was therefore illegal. The defendants tendered a bill of exceptions to his Lordship's direction, which was argued before the Court of Exchequer Chamber, which overruled the judgment of Mr. Justice Coleridge, and gave judgment for a *venire de novo*. The plaintiff then brought the present writ of error.

The arguments were heard in the presence of the following Judges: Lord Chief Justice Wilde, Justices Coleridge, Coltman, Maule, Cresswell, and Erle, and Barons Parke, Alderson, Rolfe, and Platt.

Mr. Martin and Mr. Crompton for the plaintiff in error.—The proceedings of the commissioner here have been irregular and invalid, and the judgment which sustains the rate must be reversed. There had been an acre rate, which raised one-fourth of what was required. When more was found to be wanted, the commissioner opened an account at a bank, and borrowed money, on which interest was chargeable. This was a disregard of the provisions of the legislature, and he cannot now enforce against the proprietors of the lands a rate which he has imposed, not merely to pay

the expenses incurred, but the money borrowed, and likewise the interest chargeable upon it. The Court below was of opinion that the money ought to have been raised by an acre rate, but seems also to have considered that the money now sought to be [115] levied, could be treated in effect as part of the same tax. That, however, is but an evasion of the statute, which certainly gives the commissioner no power to raise money by borrowing it of bankers, and thus impose on the owners a charge of interest as well as principal.

Besides, the rate itself is not valid. There is no authority given by this act to raise money, except for a particular purpose, and in a particular manner. The first purpose is to pay the expenses of obtaining the act. The present rate is not demanded for that purpose. Nor is it demanded in the manner required; for the act says that it is to be raised "from time to time," which is clearly an expression employed with the very object of preventing a retrospective rate. Now when the legislature directs that the money shall be raised in a particular way, it is unlawful to raise it in any other way. Parties cannot speculate how far another mode of raising it will amount to a proximate fulfilment of the intentions of the legislature.

The rate is bad, as being retrospective, and being imposed to cover borrowed money. There is a legislative declaration against the principle of borrowing money in cases of this kind. The 7th and 8th Vict., c. 85, s. 19, recites that many railroad companies have borrowed money without authority, and instead of treating this as a mere matter of form, the Act provides for existing cases, and forbids the practice in future. The 73rd clause of the Holderness Act relates to orders made by justices and by the commissioner under other clauses, and shews that the mode of proceeding is not here a mere matter of form. The case of *Cortis v. The Kent Waterworks Company* (7 Barn. and Cres. 314-344) may be referred to [116] for the opinion of the Court of Queen's Bench on this point. There, under a jail act, it was held that the commissioners could not make a retrospective rate to reimburse themselves, in one year, money which they had paid in a preceding year. *The King v. Wavell* (1 Doug. 116) shews that a rate cannot be made to repay money borrowed to repair and rebuild a workhouse, and *The King v. Flintshire* (5 Barn. and Ald. 761; 2 Dowl. and Ry. 843) is a case in which, under circumstances similar to the present, an order of sessions to pay a county treasurer a sum to enable him to reimburse certain persons for an antecedent debt, was held bad. Yet there the treasurer had acted with perfect good faith under the authority of a previous order of the sessions. The case of *Woods v. Reed* (2 Mee. and W. 777), where it was held that under the Municipal Corporation Act the council of a borough has no power to make a retrospective rate, is also in point, and the Act 7th W. 4, and 1 Vict., c. 81, was passed in consequence of that decision, as it was found that in certain instances the existence of such a power was absolutely necessary, and in them it has been expressly given by the legislature. The doctrine to be found in the cases already cited was fully applied in *Farlar v. Chester-ton* (2 Moore, Pr. C. Cas. 330).

It is clear from all these authorities that, in principle, the mode of proceeding by borrowing money, and then making a rate to pay off the loan and the interest, is one which cannot be sanctioned. The necessary result is to throw the burden of the improvements unequally on different persons. This was felt so [117] strongly in *The King v. Haworth* (12 East, 556), that a rate, which was in part prospective, was refused to be enforced, because it was also in part retrospective. The tenants for the first few years will pay nothing, but the whole charge will be thrown on the reversioner. This was a result which the legislature expressly desired to prevent.

The rate here was made without authority. The making of it was entirely beyond the jurisdiction of the commissioner. It is therefore an absolute nullity, for the same rule of law applies to such a matter as was applied by the Court of King's Bench to an order of removal in the case of *The King v. Chilverscoton* (8 Term Rep. 178).

The ruling of the Judge at the trial, that the defendants had no power to raise the money in this manner, was therefore perfectly correct; and the overruling of his opinion by the Court of Exchequer Chamber was erroneous. After the month of October 1837, the power of the commissioner to make a rate was gone; and this point is of considerable importance, because this is not the case of a mere single Act of Parliament with respect to the drainage of this particular district, but there are

many other acts, and many other districts, which must be affected by the decision in this case.

The 53rd section, on which the question is raised, is directed to two objects. The first is to enable the commissioner to put on every man his fair proportion of the expense of the drainage; the second is to afford to the trustees, who are to be appointed after that time, the scale by which the subsequent taxation shall be levied for the purposes and the benefit of the [118] country. After the second valuation in October 1837, all that the commissioner had to do was to make an assessment, and anything beyond that is an abuse of his power, and cannot be supported by the provisions of the act of Parliament. Powers such as are conferred by this act must be construed strictly; and the right of an individual to levy money by his own mere will should be shewn to be such as are exercised, not merely to the satisfaction of lawyers, but to the least detriment of the persons who are liable to pay. The power to make a retrospective rate was foreseen by the legislature, and is confined by the act to a case of absolute necessity, namely, that of defraying the expense of obtaining the act. In all other instances, it must be prospective. There are good reasons why this rule should be strictly adhered to.

The original estimate for the work was £20,000. Four or five years afterwards, the sum found to be required, was above £90,000. The legislature never intended to give a commissioner power to obtain money by loan for the purpose of carrying on works so enormously exceeding the original estimate. Where a power to raise money after the expence has been incurred was intended to be given, as in the case of paying the expences of the act, it is expressly given. All that the 53rd section intended was, to make a man liable to pay the excess, as ascertained by the second valuation, over what he had already paid; and the commissioner is, by that section, authorised only to do that which is necessary to equalize the burdens. Here he has done nothing of the sort; for there does not appear to have been any payment of excess to require him to restore that, and thus make all pay according to their quota of improvement.

[119] The 78th section is one of an ordinary kind. It refers to proceedings, lawful of themselves, but irregularly carried out, and protects the party, who commits a mere irregularity of form, from being liable as a trespasser.

Sir F. Kelly and Mr. Watson, for the defendants in error:

The facts of this case shew that the commissioner is justified in what he has done. The act was passed in May 1832; he was not appointed till November of that year, and it was therefore impossible that all he did should be anticipatory. The second valuation too, was necessarily made, after a large sum of money had become due; for it was impossible, until after the works had been completed, to ascertain how much the lands had been improved in value by those works. It is said that the commissioner had no power to borrow money, but he was bound to perform the works. He could not tell by anticipation how much those works would cost, nor what would be the amount of improved value received by each portion of land; he could not therefore make anticipatory assessments, etc., consequently the only course for him to pursue was, to borrow money, to be repaid when the works had been finished and the value of the improvements had been ascertained. For the purposes of this act it was absolutely necessary that the legislature should vest in the commissioner a large discretion as to the mode of proceeding, and if he possessed the right to exercise this discretion, this House will not inquire whether he exercised it in the best possible manner.

The cases cited are inapplicable. In *Cortis v. The Kent Waterworks Company* (7 Barn. and Cr. 314), the tax was to be [120] levied upon the occupiers of land; here it is a tax upon the owners of lands, and therefore the principle of law which discountenances retrospective rates does not apply,—besides which, this act allows tenants who shall pay the rate to deduct such payment from their rents. The necessity, therefore, is not the same in the two cases. The case of *The King v. Haworth* (12 East. 556), did not depend on the words of a particular act of Parliament, but on the general rule of law. Here it is the reverse. *The King v. Flintshire* (5 Barn. and Ald. 761), and *Woods v. Reed* (2 Mee. and W. 777), are cases where the tax was to be raised from time to time upon the occupiers of the land. There is however one case to which attention has not been called, but which distinctly establishes that a

rate may be made to pay for work actually done, and for law expences. That is the case of *The King v. The Commissioners of Sewers of the Tower Hamlets* (1 Barn. and Ald. 232), where it is said (*ib.* p. 238), "There can be no doubt that the nature of the duty of the commissioners, who may, in many instances, be called on to repair works injured by violent floods or other accidents, requires that they should have power to do so without waiting until an assessment can be made, and the rate raised; and the case of the *Level of Hull* (2 Strange, 1127), is an express authority that a rate may be made to reimburse charges already incurred." The similarity of the duties of the commissioners in the two cases makes that case peculiarly applicable to the present.

This is, in fact, a question as to the exercise of the discretionary power of the commissioners, and as such, ought not to be entertained: but supposing the House [121] to inquire whether the discretion of the commissioner has been rightly exercised, it is submitted that the circumstances of the case shew it to have been so. As to the objection that these rates were, in part at least, intended to repay borrowed money, the answer is, first, the necessity to borrow, and next, that if the borrowing was improper, that cannot be made an objection to the rate; for there is nothing on the face of the rate itself which shews that the money had been borrowed, or that the rate was raised to repay borrowed money. It is submitted, therefore, that this rate is good, both in substance and form, and that this judgment must be sustained, and the bill of exceptions dismissed.

Mr. Martin replied.

The Lord Chancellor put the following question to the Judges (*Vide supra*, p. 112):

"Whether the plaintiff in error, or the defendants in error, are entitled to judgment?" Time was given them to consider their answer.

Mr. Baron Parke (July 10).—In answer to your Lordships' question whether the plaintiff or defendants in error are entitled to judgment on the bill of exceptions in this case, all the Judges who heard the argument at your Lordships' bar are of opinion that it ought to be in favour of the defendants in error. The facts stated in the bill of exceptions, which it is necessary to notice, are very few.

By an act of Parliament for draining and improving certain low grounds and cars in Holderness, and which received the Royal Assent in May 1832, the defendant William Stickney was appointed commissioner for carrying it into execution, and God-[122]-frey Park and Cornelius Collett were thereby appointed valuers. By the forty-ninth section of that Act the commissioner was directed, as soon as conveniently might be, to determine what lands and grounds ought to be deemed low lands and to contribute to the charges of the drainage, and to cause a full and complete map or plan of all the same low lands and grounds to be made, expressing the names of the several owners, and describing the quantities in acres, roods, and perches, of all the same low lands, which map was to be lodged with the clerk of the commissioner, and a duplicate with the clerk of the peace for the east riding of Yorkshire. Against such decision of the commissioner any landowner might appeal within a certain time. By the fiftieth section, the commissioner was empowered, after the expiration of the time allowed for appeals, to proceed to assess, tax, and charge all and singular the said low lands and grounds, and the owners and occupiers thereof, "with such gross sums of money as he the commissioner should from time to time find necessary and requisite for defraying the charges and expenses incident to and attending the obtaining and passing of that act, and carrying the same into execution, and to assess, rate, and charge every owner and occupier of the said low lands and grounds by an acre rate, etc." By the 51st section, the commissioner and valuers were directed, as soon as the surveys and schedules were completed, to make a true and perfect valuation of all the low lands and grounds in their then state; and by the 52nd section, they were required, as soon as the drainage was perfected, again to view and make a second valuation of all the said lands and grounds to be drained and improved by virtue of that act in their then state. The 53rd section is very important; by it the commissioner [123] and valuers were directed to ascertain the real improvement of the lands belonging to each proprietor, by reference to the two valuations before mentioned, and by some instrument in writing to show how

much each owner's land had been improved, and by the same instrument proceed to assess, tax, and charge the lands and grounds of all and every such owners and proprietors, according and in proportion to such improved value, with his, her, or their respective *quota* or portion of the costs, charges, and expenses of obtaining the act and carrying the same into execution up to the time of making, executing, and completing such instrument and taxation; and in case the *quota* or portion of any such owner or proprietor, so to be assessed and taxed by the said commissioner and valuers as aforesaid, shall exceed the sum with which such owner or proprietor shall have been assessed and taxed by virtue and in pursuance of the powers and authorities herein-before given to the said commissioner and valuers, then such proprietor or person so interested as aforesaid shall within twenty one days after notice in writing under the hand of the said commissioner, of such excess shall be given to him or her, etc., pay the same excess to the clerk, receiver, or collector of the said commissioner; and in case of default the commissioner was authorised to recover and enforce payment by such ways and means as any other assessments or taxes are therein directed to be recovered. (Section 50 had previously given a power to distrain for the acre rate, and section 54 gave such powers as to any rate.) The 53rd section then specified the purposes to which the taxes so levied were to be applied.

The commissioner proceeded duly to appoint and determine what were low lands, and made the map and plan and schedules as directed by the act. As [124] soon as the time allowed for appeals had elapsed, the commissioner and valuers made a perfect valuation of the lands in their improved state. The commissioner then made an acre rate on the whole of the low lands, which was levied. He afterwards borrowed money of certain bankers at Beverley to pay the expenses of the drainage, and made no other rate until after the works had been perfected and completed. The commissioner and valuers then made a second perfect valuation of the lands in their improved state, and by comparison of the two valuations, ascertained the real improvement of the lands of each proprietor, and then assessed and taxed the lands of each proprietor in proportion to the benefit that he had received. The plaintiff was on this principle assessed and taxed at £5351 15s. 6d., which exceeded the sum which has been already paid in respect of his lands by the sum of £4149 2s. This latter sum was duly demanded; and, the plaintiff not having paid it, a distress warrant was granted by the commissioner and five trustees appointed under the 56th section of the act. The plaintiff brought an action of replevin. The defendants avowed the taking by virtue of the powers given by the statute. The learned judge who tried the cause ruled that the commissioner and valuers had no power to make and levy the assessment and tax in question, and that the plaintiff was entitled to recover, to which direction a bill of exceptions was tendered; and a writ of error having been brought, the Court of Exchequer Chamber awarded a *venire de novo*.

We are of opinion that that judgment was right. The material question in the case was, whether the commissioner under this Act of Parliament had a power to make a rate to reimburse expenses, or a retrospective [125] rate; and the greater part of the argument for the plaintiff in error was devoted to showing, by analogy to the cases of poor rates and other rates under several Acts of Parliament which were referred to, that he could not do so. From these cases a supposed rule of law was attempted to be deduced, that there could be no retrospective rate, or rate for paying bygone expenses.

The power of the commissioner depends upon the construction of this particular act; there is no rule of law which prohibits a retrospective rate. That depends upon the intention of the legislature, and the question is, whether the act under which each rate is made, does so expressly or impliedly. We are of opinion that by this act the largest discretion is vested in the commissioner, who is, no doubt, selected by the parties obtaining the Act from the confidence they repose in him, to make one or more rates, and at such time or times as he may think fit, and for expenses incurred and to be incurred. To have fixed rates for a small or limited amount, at particular times, might have been very inconvenient, troublesome in collection, and unnecessary from the state of the works then going on; to fix them at longer intervals might also be inconvenient. To avoid such inconveniences, instead of providing that rates should be made at any certain time, for any certain amount, or within certain limits of time or amount, the parties obtaining the private act have agreed to

invest, and the legislature has carried that agreement into effect by investing, the commissioner with the absolute discretion to make rates, without any appeal for the abuse of it, or any means of control, except those which are given by the power of electing another commissioner at the end of a certain time, or the removal [126] of the existing commissioner for misconduct. If the parties had intended to fetter this absolute discretion, they have themselves to blame for not taking proper precautions against the abuse of the unlimited power, by suggesting provisions for that purpose, to be introduced into the act of Parliament. As it is, the whole scheme of the act shews that the discretion is unlimited, including the power of making one or more rates, and providing money beforehand, or making retrospective rates. The forty-ninth section requires the commissioner to do many things which would occasion the outlay of a large sum of money before he can be in a condition to impose any rate or tax; and then the fiftieth section gives him power to raise, by an acre rate, such sums of money as he (the commissioner) shall from time to time find necessary and requisite for defraying the charges and expences incident to obtaining the act and carrying it into execution. Power is therefore given to raise money for the payment of expences already incurred, and the time of raising it is left entirely in the discretion of the commissioner; and giving this extensive discretion to the commissioner with regard to the sums to be raised and the time of raising them, is quite consistent with other parts of the act; for by section seventeen he is authorized to give directions for the making and executing all works that he shall think necessary, and to appoint engineers, surveyors, collectors, and other officers, agents, and servants, at his discretion, and to pay them such reasonable salaries and remunerations as he shall order and appoint. In short, the owners of lands to be improved by the drainage appear to have given the commissioner unlimited authority to execute the objects of the act in such manner and at such cost as he thought fit, reserv-[127]-ing to themselves only the power of electing another at the end of three years, or (sections seven and nine) to remove him at any time, if dissatisfied with his conduct. But whether they have this redress or not, is immaterial, if by the act an absolute discretion is given. By the exercise of that discretion they are bound; and the propriety of its exercise cannot be called in question in this action, whatever reason there may be to doubt it. The Court of Exchequer Chamber recently decided a similar point as to a rate made by commissioners of sewers, who are "to cause reparations and amendments to be made, as the case shall require, after their wisdom and discretion." That Court held that after the commissioners had exercised their discretion, no court of law in which an action was brought for anything done by them in carrying it into effect, had the power to question or review the exercise of that discretion,—that it must be assumed to be correct in all respects, and that the plaintiff would not be permitted to complain of it in that action; *St. Catherine's Dock Company v. Higgs* (16 Law Journ., Q. B., 377; 10 Q. B., 641).

It seems clear therefore, that when the works necessary for effecting the intended drainage had been completed, the commissioner might have raised, by an acre rate, the whole sum for which the assessment and taxation now called in question were made (except, perhaps, the expence of the second survey and valuation), and having so raised that money, might, with the assistance of the valuers, have made an assessment and taxation precisely similar to that in dispute, and have thereby compelled those, who had not by the acre rate been compelled to pay a portion of the whole expense of the [128] survey and valuation, in proportion to the benefit that they had received, to pay the difference. In either event, the sum to be paid by the plaintiff would have been the same; and it is a mere matter of form whether he is compelled to pay it by an acre rate, or by the rate apportioning the sums paid to the benefit received, or part by one, and the remainder by the other. And it seems to us, that when the drainage had been completed, and the benefit received by each proprietor could be ascertained, it would have been a very idle proceeding to make and levy an acre rate pressing unequally on the various proprietors, because not in proportion to the benefit received, and then to raise another rate merely to remedy the injustice done by the former. If, therefore, the proceeding of the commissioners, in making and levying the rate under which the goods of the plaintiff in error were distrained, had not been strictly regular, we think it would have been substantially



so, and a sufficient answer to this action. But it seems to us, that the course pursued was strictly within the fifty-third section of the act, in the case which has happened. Before the drainage works were commenced, a valuation was made of the low lands, in their then state; when the drainage had been completed, another valuation was made of the same lands in their then state; so that the real improvement of the lands of each proprietor was ascertained. The commissioners and valuers, by an instrument in writing under their hands, set forth the names of all the proprietors of the low grounds, and the number of acres belonging to each; and did by the same instrument assess, tax, and charge the lands and grounds of all and every such owners and proprietors, according and in proportion to such improved value, with his, her, and their respective [129]-tive *quota* or portion of the costs, charges, and expences, incident to obtaining the act and carrying it into execution, up to the time of making and completing that instrument and taxation. The *quota* and portion of the plaintiff in error did not exceed the sum with which he had been assessed and taxed, in pursuance of the power to raise acre rates. Notice of that excess was duly given, and the money not having been paid within the time limited by the act, it was levied by distress under a warrant granted by the commissioner, as directed by the fiftieth section, with reference to acre rates; which mode of proceeding is also made applicable to levying the rate made under the fifty-third section. The latter part of this section specifies the purposes to which the money, when received, is to be applied; but that does not affect the regularity of the proceeding in making and levying the rate. The direction of the statute as to the application of the money, is merely, that to those who have already paid more than their *quota* the excess shall be refunded, and does not contain any enactment that if the money raised is not expended by such refunding, it may not be applied to the payment of liabilities incurred for the drainage works.

We are therefore of opinion, that the objections made to the rate in question fail; and that it constitutes a good defence to this action, under the avowry and cognizance on the record; and consequently that on the bill of exceptions the defendants in error are entitled to judgment, and that a *venire de novo* ought to be awarded.

The Lord Chancellor (August 21).—My Lords, this case was argued before the learned Judges, and there has been [130] a unanimous opinion of the Judges delivered by Mr. Baron Parke, which enters very fully into the question. The learned Judges came to a conclusion, in which, after having carefully considered the reasons on which that conclusion was founded, I entirely concur. I am of opinion that the judgment ought to be for the defendants in error, and that a *venire de novo* ought to be awarded; and I therefore move, that the judgment of the Court below should be affirmed, with costs.

Lord Brougham.—My Lords, I considered this case when I sat here for my noble and learned friend, some weeks ago; and I entirely agree with the unanimous opinion then delivered by the learned Judges. They have come to a right construction of the statute, and we ought to give judgment for the defendants in error.

Judgment affirmed, and *venire de novo* awarded, with costs.\*

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\* This case was, on the 30th of April, 1849, brought under the consideration of the House, on an application to revise the judgment, so far as it allowed costs, as the plaintiff in error contended that the House had no power to grant costs upon an award of *venire de novo*. The case was only argued on one side, and was then ordered to stand over, that a search might be made for precedents.

[131] LADY EDWARD THYNNE (by next Friend),—*Appellant*; THE EARL OF GLENGALL and the COUNTESS his Wife, and Others,—*Respondents*.

AND

THE EARL AND COUNTESS OF GLENGALL,—*Appellants*; LADY EDWARD THYNNE, and Others,—*Respondents* [April 26, 27, and 29, 1847, August 21, 1848].

[Mews' Dig. x. 1299; xii. 788, 1083; xv. 1565, 1575. S.C. 12 Jur. 805; and below, *sub nom. Glengall v. Barnard*, 1 Keen, 769; 6 L.J. Ch. 25. On question as to portions, discussed in *Campbell v. Campbell*, 1866, L.R. 1 Eq. 387; *Chichester v. Coventry*, 1867, L.R. 2 H.L. 83; *Russell v. St. Aubyn*, 1876, 2 Ch. D. 405. On point as to Statute of Frauds, see *Murphy v. Boese*, 1875, L.R. 10 Ex. 131.]

*Portion—Debt—Bequest of Residue—Satisfaction—Marriage—Incomplete Agreement—Part-performance.*

A father having, upon the marriage of his daughter, agreed to give her a portion of £100,000, transferred one-third part thereof in stock to the four trustees of the marriage settlement, and gave them his bond for transfer of the remainder in like stock upon his death, the latter stock to be held by them on trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. The father afterwards by his will gave to two of the trustees a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, remainder for her children generally as she should by deed or will appoint:

Held, that the moiety of the residue given by the will was in satisfaction of the sum of stock secured by the bond, notwithstanding the differences of the trusts; and, it being found to be for the benefit of the daughter and her children, if any she should have, to take under the will, she was bound to elect so to take. (*Vide post*, 153-4.)

A father having agreed to settle a certain sum for the benefit of his daughter and the children of her intended marriage with Lord G., a memorandum of the terms of the settlement was by his direction written by his solicitor, and approved of by him and Lord G., and he gave the solicitor instructions to prepare such settlement, but died before the same was ready for execution, having by his will given the daughter real estates and a moiety of the residue of his personal estate. Lord G. married the daughter, and performed his part of the settlement, in conformity to the written memorandum:

Held, that the memorandum was not a complete agreement, binding within the Statute of Frauds; and of an incomplete agreement there cannot be part-performance.

These appeals were brought against a decree and orders of the Master of the Rolls. (See 1 Keen, 769—in p. 771 the trusts are not correctly stated.)

[132] The appellant in the first appeal is one of the two daughters and only children of the late William Mellish. On her marriage with Lord Edward Thynne, on the 8th of July, 1830, her father, in pursuance of a previous agreement, transferred to the names of the trustees of the marriage settlement £33,333 6s. 8d. £3 per cent. consolidated Bank Annuities, and executed a bond to secure to them payment of an annuity of £2000 during his life, and the transfer to them by his heirs, executors, etc., on his death, of £66,666 13s. 4d., like Bank Annuities, if his said daughter, or any child of the said marriage, should be then living.

The trusts of these different sums were by the indentures of settlement declared to be:—

As to the £33,333 6s. 8d., that the trustees should pay the interest, dividends, and annual income thereof, to Lord Edward Thynne during his life, and after his decease to the appellant for her life, and after the decease of the survivor of them, should apply the said Bank Annuities for the benefit of the child or children of the marriage, as Lord Edward Thynne and the appellant jointly, or the survivor of

them alone, should appoint, and, in default of appointment, then that the said trust fund should remain on trust for the child or children of the marriage, as in the settlement mentioned.

And, as to the annuity of £2000 and the sum of £66,666 13s. 4d. Bank Annuities, that the trustees should compel payment of the former, and on the decease of the obligor, in case the appellant or any child of the marriage should be then living, compel the transfer of the latter sum, and should stand possessed of each, on trust during the joint lives of Lord Edward Thynne and the appellant, to pay the annuity during the life of William Mellish, and, after his decease, the [133] interest, dividends, and annual income of the £66,666 13s. 4d., as the appellant should, without anticipation, direct, and in default of such direction, to herself, for her separate use; and after the decease of Lord Edward Thynne, if he should die in the lifetime of the appellant, then to her and her assigns during her life: And after her decease, that the annuity and the said sum of Bank Annuities and the dividends thereof, whether Lord Edward Thynne should be then living or not, should remain and be on trust for the child or children of the marriage,—who, being a son or sons, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry under it, with consent,—as Lord Edward Thynne and the appellant should, during their joint lives, by deed appoint; and in default of appointment, if there should be but one child of the marriage, who, being a son, should attain the age of twenty-one, or, being a daughter, should attain that age or marry under it with consent, in trust for such child, his or her executors, etc.; and if there should be two or more children who should attain the said age, or being daughters should marry under it with consent, in trust for all such children, in equal shares as tenants in common, to be interests vested in a son or sons at the age of twenty-one, and in a daughter or daughters at that age, or marriage under it with consent, as in the indentures mentioned.

And it was by the settlement declared that, if there should be no child of the marriage, or none who should live to acquire a vested interest in the trust funds, then the £33,333 6s. 8d. Bank Annuities, after the decease of the survivor of Lord Edward Thynne and the appellant; and the annuity of £2000 and the £66,666 13s. 4d. Bank Annuities, from and immediately after the de-[134]-cease of the appellant, and such failure of issue as aforesaid, and whether Lord Edward Thynne should be then living or not; should remain in trust for William Mellish, his executors, administrators, and assigns, for his and their absolute use.

William Mellish, by his will, dated November 1833, gave all his real estate to William Astell and Benjamin Barnard, two of the four trustees of the appellant's marriage settlement, upon trust, as to certain parts thereof in the will described, to pay the rents to the appellant for her separate use, for life, without anticipation; remainder to her first and other sons in tail, in strict settlement; remainder to her daughters as tenants in common in tail, with cross remainders among them in tail; remainder to the testator's other daughter, Margaret Lauretta Mellish (now Countess of Glengall, one of the respondents), for her life, for her separate use, in the same manner as her sister; remainder to her first and other sons in tail male in strict settlement; remainder to her daughters as tenants in common in tail, with cross remainders amongst them in tail; remainder to his own right heirs: And, as to certain other parts of his real estate in the will mentioned, upon the same trusts for the benefit of his daughter Margaret Lauretta Mellish and her children, with remainder over, in case of failure of issue, to the appellant and her children, as he had declared with respect to the property given to her, in the same manner as if such trusts were repeated, *mutatis mutandis*. And the testator gave his leasehold house in Richmond Terrace, Whitehall, to his said trustees, upon the same trusts, for the benefit of the appellant and her children, as he had declared with respect to the real estate given to her, [135] or as near thereto as the nature of the property would admit: And he gave his shares in the East and West India Docks, in the Wey and Avon Canal, and in the Poplar and Greenwich Ferry, to the said trustees, for the benefit of his daughter Margaret Lauretta and her children, in the same manner.

The testator, after some gifts to his wife, including an annuity of £2000 for her life, charged on his funded and other property, gave all the residue of his personal estate to his said two trustees, in trust to sell his ships and cargoes, and such other

parts thereof as they might think advisable, and to invest the money arising therefrom in Government or real securities; and, after providing for the payment of the said annuity to his wife, and paying such legacies as he might thereafter give, to stand possessed thereof on the trusts following:—

As to one moiety of such residue, on trust to pay the interest thereof to the appellant, for her separate use for her life, in the same manner as he had directed with respect to the rents of the real estate given to her, remainder for her children, in such shares as she should by deed or will appoint; and, in default of such appointment, to such children equally, sons to take vested interests at twenty-one, and daughters at that age or marriage; and in default of such issue, upon the same trusts for his daughter Margaret Lauretta and her children, with a like power of appointment; and if both should die without issue, then in trust for the testator's next of kin: And as to the other moiety, upon the same trusts for his daughter Margaret Lauretta and her children, with a like power of appointment, and failing issue, for her sister and her children, with ultimate remainder to the testator's next of kin, as declared with respect to the first moiety. And the testator desired [136] that there might be inserted in his will the usual power with respect to maintenance and advancement of his daughters' children during their minorities: And after other powers to his said trustees, he appointed them and three other persons executors of his will.

The testator died on the 27th of January, 1834. His will was proved by Benjamin Barnard alone.

Before Mr. Mellish's death, a marriage had, with his consent, been agreed on between the Earl of Glengall and Margaret Lauretta Mellish, his daughter, to whom he agreed to give a portion of £100,000 £3 per cent. reduced Bank Annuities, to be secured by his bond, and settled on her and the issue of the intended marriage. The Earl of Glengall had also agreed to charge his estates with a jointure for his intended wife, and with the sum of £20,000 for younger children of the marriage. Drafts of the intended bond and settlements were prepared by Mr. Mellish's direction, and approved of by counsel on his behalf, but he died before they were engrossed. The Earl of Glengall executed indentures of settlement on his part, as approved of by Mr. Mellish, with some slight alterations made necessary by his death; and the marriage was solemnized on the 18th of February, 1834.

The bill in this case was filed in April 1834, by the Earl and Countess of Glengall against Barnard the executor, Lord Edward Thynne and the appellant, his wife, and others, for carrying the trusts of Mr. Mellish's will into execution. The bill, after stating the matters before mentioned, stated the particulars of the treaty in contemplation of the marriage of the plaintiffs to the effect following:

That shortly after the date of the testator's will, [137] proposals of marriage were made to his daughter Margaret Lauretta by Lord Glengall, and the testator told his solicitor, Mr. Tooke, that in the event of his accepting them, he would settle on his said daughter an income similar to that which he had settled on the appellant, with no other difference than that of securing the whole of that income to the separate use of his daughter, Margaret Lauretta; and he should expect Lord Glengall to settle a jointure of £1200 on her, and a sum of £20,000 on the younger children: That the testator being afterwards satisfied with the result of the inquiries made by his said solicitor as to Lord Glengall's property, was induced to entertain his proposals, and to discuss the terms of a settlement: That several meetings took place between Lord Glengall, the testator, and Mr. Tooke, at all of which the testator expressed his intention to place his two daughters on an equal footing, and that at the last of such meetings, on the 7th of January 1834, it was finally agreed, that if the marriage should take place, the testator would give his bond to the trustees of the intended settlement for payment of an annuity of £3000 during his life, and for transfer to them of £100,000 £3 per cent. reduced Bank Annuities immediately after his death; and that such annuity and the dividends of the said stock, after his death, should be paid to Lady Glengall for her life, for her separate use; and if she should die without children, the capital of the stock should revert to the testator; but if there should be children of the marriage, the capital of the stock should go to the younger children, as their parents should appoint; and in default of appointment, among them equally; and if there should be but one child, then to such child: That

Lord Glengall should charge his estates with [138] the jointure and provision for younger children before mentioned, the latter to be subject to a like power of appointment among them: That as soon as the terms of the settlement had been so agreed upon, Mr. Tooke, by the testator's desire, drew up a memorandum of the arrangement, in the following words:—

“ Mr. Mellish to transfer £100,000 consols into the names of trustees, upon trust to pay the dividends to Miss Mellish for her life, to her separate use; on her death without children, to revert to her father's estate. Should there be children, to go to the younger children, as the parents may jointly appoint; if no such appointment, then to go among such younger children, share and share alike; if only one child, to such only child. Lord Glengall to exercise the power contained in the settlement, by covenanting to charge his estate with a jointure of £1200 per annum in favour of his lady, and £20,000 in favour of the younger, subject to a like power of appointment among them.”

The bill stated that Mr. Tooke read the memorandum over to the testator and Lord Glengall, and they both approved of it; but it was afterwards arranged that the proposed sum of stock should be secured by bond instead of being actually transferred to the trustees, and that the provision should be, not for the younger children only, but for all the children of the marriage, in conformity with the settlement made on the marriage of Lady Edward Thynne, which the testator desired to be the basis of the intended settlement: That, subsequently to the preparation of the said minute of the terms of settlement, Lord Glengall voluntarily proposed to make a further jointure for Lady Glengall of £6000 a-year, in case there should be no issue of the marriage; [139] but it was afterwards agreed between him and the testator that the increased jointure should not exceed £2000 a-year: That on the 13th of January, the testator declared to Mr. Tooke that he had finally accepted the proposals of marriage, and instructed him to prepare the deeds of settlement upon the terms which had been agreed to, and stated his wish that the marriage should take place on the 30th of the same month: That the drafts of the deeds were accordingly prepared, and sent, on the 18th of January, to a conveyancer, and were by him settled, and the testator was perfectly satisfied with them, but desired them to be laid before his friend Mr. Tidd, for his perusal, and they were accordingly sent to Mr. Tidd on the 24th of January, and he approved of them; and they were about to be engrossed and made ready for execution, but the testator died on the 27th day of the same month.

The bill—after stating the solemnization of the marriage of the plaintiffs, and the execution, previously thereto, of indentures by Lord Glengall, charging his estates with £1200, £2000, and £20,000, in pursuance of his agreement with the testator, and also the execution of a deed by Miss Mellish, with Lord Glengall's consent, assigning to Mr. Tooke all the share and interest to which she should become entitled during the joint lives of her and Lord Glengall, in the rents of the real estate and in the personal estate devised and bequeathed by the will of her father, upon trust as in the bill mentioned (see 1 Keen, p. 779)—insisted that the agreement or understanding on the part of Mr. Mellish, to settle the £100,000, £3 per cent. Bank Annuities upon Lady Glengall and the issue of the marriage, was a good and valid undertaking on his part, more especially as Lord [140] Glengall had, on the faith thereof, executed his part of the agreement; and that such sum of £100,000 Bank Annuities ought, under the circumstances, to be considered a debt due from Mr. Mellish at the time of his death, and ought to be paid out of his personal estate, and settled and secured for the separate use of Lady Glengall, and for the benefit of her and her children, upon the same trusts as were stipulated for and agreed upon between Mr. Mellish and Lord Glengall, as set forth in the before-stated memorandum of settlement, and in the said drafts thereof prepared in Mr. Mellish's lifetime. And the bill further submitted and insisted that, if the Court should be of opinion that the plaintiffs were not entitled to have the said sum of £100,000 Bank Annuities so raised as aforesaid, the disposition made by Mr. Mellish's will for the appellant and her children, if any she might have, should be considered to operate as a satisfaction of the bond given by him on her marriage; the provisions made by the will for the appellant and her children being of far greater amount and value than the money secured by the bond.

The bill prayed, among other things, that the trusts of the will might be carried

into execution ; that the usual accounts might be taken, and that it might be declared that, under the circumstances aforesaid, the sum of £100,000 Bank Annuities, so agreed by Mr. Mellish to be secured and settled for the benefit of Lady Glengall and her children, constituted a debt against his estate, and that the same ought to be raised out of his personal estate, and settled for the separate use of Lady Glengall, and for the benefit of her and her children, upon the trusts agreed upon between Lord Glengall and Mr. Mellish as aforesaid ; but in case the [141] Court should be of opinion that the plaintiffs were not entitled to have the said sum so raised, then that it might be declared that the aforesaid provision made by Mr. Mellish's will for the appellant and her children was a satisfaction of the said bond.

The appellant, in her answer, submitted that the alleged agreement or undertaking of Mr. Mellish to settle the said sum of £100,000 Bank Annuities upon Lady Glengall and her children was not a valid undertaking ; that the aforesaid memorandum thereof was intended for his consideration, and not conclusive or binding on his part ; that the same could not be enforced against him in his lifetime, and consequently ought not to be considered as a debt due from him at his decease ; and the answer also submitted that the provision made by Mr. Mellish's will for the appellant and her children, if any she might have, ought not to be considered as a satisfaction of the said bond, and the monies thereby secured ; and the appellant claimed to be entitled to both provisions.

There was yet no issue of the marriage of the appellant and Lord Edward Thynne. Lord and Lady Glengall had children, and they were made parties to the cause by supplemental bills.

The causes were heard by the Master of the Rolls, who, by his decree, dated the 7th of November, 1836, after referring it to the Master to take the accounts prayed by the bill, dismissed so much thereof as prayed a declaration that the sum of £100,000 Bank Annuities, proposed by Mr. Mellish to be settled for the benefit of Lady Glengall and her children, constituted a debt against his estate ; and his Lordship declared that the appellant and her issue (if any such she might thereafter have) were not entitled with [142] Lady Glengall and her issue to an equal share in the residue of the testator's personal estate, in addition to the benefits secured to them by his bond, but that one moiety of the residue bequeathed by the testator, to or in trust for the appellant and her issue, was to be considered as in satisfaction or in lieu of the provision made for them by the bond ; and it was referred to the Master to inquire, and state whether it would be for the benefit of the appellant and her issue (if any she might have) to elect to take under the provisions of the bond, or of the will.

The Master, by his report, made in December 1841, certified, among other things, that the clear residue of the testator's estate consisted of £4965 due from B. Barnard ; £58,767 £3 per cent. Bank Annuities ; £12,000 East India Stock ; £100,000 £3 per cent. reduced Annuities ; and £10,000 Bank of England Stock ; and he found that it would be for the benefit of the appellant and her issue (if any such she might have) to elect to take under the provisions of the will, and not of the bond.

The causes came again to be heard by the Master of the Rolls for further directions on the 23d of March, 1842, when his Lordship, by his decretal order of that date, declared, that as it appeared by the report that it was for the benefit of the appellant and her issue (if any she might have) to elect to take under the will, and not under the bond, she ought so to elect ; and that she and her issue (if any) were entitled to the provisions of the will, and not of the bond.

Several orders were afterwards made by his Lordship consequential on the decree and on this order.

Lady Edward Thynne appealed against so much of the decree of November 1836 as declared her and her [143] issue (if any) not entitled to a moiety of the residue of the testator's personal estate, in addition to the benefits secured to them by his bond ; and as directed the Master to inquire which of the two provisions would be more beneficial to them ; and also against the declaration contained in the decretal order of March 1842, that she should elect to take under the provisions of the will, as being found to be more beneficial.

The second, or cross appeal, was brought by Lord and Lady Glengall against part of the decree dismissing their bill, so far as it prayed a declaration that the £100,000 Bank Annuities, proposed to be settled by Mr. Mellish on his daughter and the issue of

her then intended marriage with Lord Glengall, constituted a debt against Mr. Melish's estate; and against corresponding parts of the consequential orders.

Mr. Stuart and Mr. Hallett for Lady E. Thynne:

The doctrine and leaning of Courts of Equity against double portions are not applicable to the provisions made for the appellant by her father. In the first place, it has never yet been decided that a testamentary gift of an unascertained residue of personal estate is an ademption or satisfaction of a previously settled portion; on the contrary, there are numerous cases in which the most eminent judges have expressly decided, or intimated strong opinions, that a gift of residue, an unliquidated and uncertain sum, cannot operate as a satisfaction of a definite sum. In *Fremantle v. Bankes* (5 Ves. 79), Lord Rosslyn held it to be settled by the case of *Watson v. The Earl of Lincoln* (Blunt's Amb. 325), that a portion, which, *ex vi termini*, is a definite sum, could not be satisfied by a gift of residue of indefinite amount, and he [144] distinguished the case before him from that of *Rickman v. Morgan* (1 Bro. C. C. 63; and 2 Bro. C. C. 394)—which, as well as *Smith v. Duffield* (2 Vern. 177, 258), and *Bengough v. Walker* (15 Ves. 507), will probably be cited for the respondents, although they are not at all similar to this case. In *Farnham v. Phillips* (2 Atk. 215), a freeman of London having advanced his daughter with a portion, after having given her by his will an equal share of a residue, Lord Hardwicke held her entitled to both, saying that there was no instance of a devise of residue being adeemed by a subsequent portion. That was the converse of this case. In *Devese v. Pontet* (1 Cox, 188), Sir Lloyd Kenyon, M. R.—after reviewing the cases of *Blandy v. Widmore* (2 Vern. 709; and 1 P. Wms. 323), *Lee v. D'Aranda* (3 Atk. 419; and 1 Ves., sen. 1), and *Barrett v. Beckford* (1 Ves., sen. 519), which have been considered rather cases of actual performance of covenants than of satisfaction—held that a gift of an uncertain residue was never considered as a satisfaction of a certain provision made for a wife on marriage, although the residue may turn out to be more beneficial. In *Smith v. Strong* (4 Bro. C. C. 493), Lord Thurlow held, that portions given by a father to his daughters were not to be in satisfaction, even *pro tanto*, of shares of residue given by his will. The rule to be collected from these cases is that, when a portion of a *certain* amount is secured to a child, it is not satisfied or adeemed by a gift by will of an *uncertain* amount, the uncertainty of residue making all the difference; and that appears to have been Lord Cottenham's [145] opinion in the case of *Pym v. Lockyer* (5 Myl. and C. 45), which is not cited as in any other respect bearing on the present case.

There is an additional feature in the appellant's case. The two-thirds of her portion—about the one-third, which was transferred to the trustees of the marriage-settlement, there is no question—were secured to the trustees by her father's bond, and thereby became a debt against his estate; and a debt, though it may, as a portion also may, be held to be satisfied by a specific legacy, never can be discharged or satisfied by a share of residue, the amount of which depends on so many contingencies. In *Goodfellow v. Burchett* (2 Vern. 298), one of the earliest cases on this subject, and of unquestionable authority, a father, on the marriage of his daughter, gave his bond for her portion to her husband, and afterwards by his will devised lands of much greater value to the husband and wife and their heirs. The devise was held not to be a satisfaction of the bond debt, even though there was a deficiency of assets to pay the testator's other debts. In *Forsight v. Grant* (4 Ves. 289), a wife was entitled by bond, given by her husband on their marriage, to a sum payable on his death for her life, then for the children, and if none, for herself absolutely; the husband, by his will, gave her his real and personal estates for life, to be after her death divided among her children, and, if none, over; there were no children; the wife was declared entitled to both provisions. In *Tolson v. Collins* (1d. 483)—which was not cited at the Rolls—Lord Alvanley held, as to the presumed satisfaction of a debt, even by a legacy, [146] and not by an uncertain residue as in this case, that circumstances of difference are laid hold of to prevent the application of the rule of satisfaction. That was only stating the doctrine of Courts of Equity, which is, that if a testator makes a gift to his creditor, the slightest difference is sufficient to repel the presumption that the debt is satisfied by the gift.

Another rule of Equity applicable to this case is, that when a testamentary gift is to be a satisfaction of a portion previously provided, or the latter to be an ademption of the former, both provisions must be *ejusdem generis*, attended with the same

certainly, and applicable to the same objects, and equally beneficial to them; *Bellaris v. Uthwatt* (1 Atk. 426), *Barrett v. Beckford* (1 Ves. sen. 520), *Bengough v. Walker* (15 Ves. 507), *Adams v. Lavender* (1 McCle. and You. 41). The two provisions in the present case were essentially different, one being a sum certain, the other uncertain; and they were given to different persons, the portion, or bond debt, being payable to the four trustees of the appellant's marriage settlement, while the moiety of the residue was given to only two of them, in effect, different persons. The limitations and trusts of the two provisions were also different; those of the testamentary gift being for the benefit of appellant and her children generally, and subject to her own appointment; while the trusts of the unpaid portion were declared by the bond and marriage settlement to be for the children of that marriage only, and subject to the joint appointment of the parents (*supra*, p. 132-135).

The case of *Weall v. Rice* (2 Russ. and Myl. 251), on which the Master of the Rolls' judgment proceeded, was, if not ill-decided, [147] at least different from the present case in many material particulars. His Lordship's attention was confined to the principal question argued before him, which was, whether Lady Glengall should have the £100,000 under the alleged agreement between her father and her husband previous to the marriage. His Lordship, after deciding that she had no right to that sum, and dismissing so much of the bill as applied to that point, proceeded as to the minor part of its prayer to declare that the moiety of the residue, given for the benefit of the appellant and her children, was a satisfaction of the bond; and by the order of March 1842, the appellant was compelled to elect to take under the provisions of the will. The material difference,—that the gift by the will was to be in trust for the children of the appellant by any husband, and subject to her own appointment, whereas the provisions under the bond were for the children of her marriage with Lord Edward Thynne, and subject to their joint appointment,—was not taken into consideration. From that and other differences between the limitations and trusts of the two provisions, the necessary inference arises that the testator did not intend the gift of residue to be in lieu of that secured by the bond.

Mr. Bethell (with whom was Mr. Cairns), was alone heard for the Earl and Countess of Glengall; and Mr. Teed (with whom was Mr. Schomberg), was alone heard for their children:

Most of the arguments used, and of the authorities cited for the appellant, were applicable to the one point, that a gift of residue, or of part of residue, of a testator's personal estate, has never been held to be a satisfaction of a debt. But the question in this [148] case is whether the two provisions made by Mr. Mellish for Lady Edward Thynne are not in the nature of portions? They undoubtedly are; and therefore, upon all the authorities on the subject, one of them must be considered to be—as it was intended by Mr. Mellish to be—a satisfaction of the other. That proposition was supported by the cases of *Smith v. Duffield*, and *Duffield v. Smith* (2 Vern. 177, 258), which latter was cited for the appellant, but it is stated in a note to the report to have been reversed in the House of Lords (15 Lords' Journ. 158. The case of *Farnham v. Phillips* (2 Atk. 215) depended, in some respect, on the custom of London, and was in other respects distinguishable from the present case; as was also the case of *Alleyne v. Alleyne* (2 Ves., sen. 37), which was not a case of portions at all, the question being whether a testamentary gift for life only was a satisfaction for an estate in fee to which children were entitled under their mother's marriage articles. The next case, of *Smith v. Strong* (4 Bro. C. C. 493), cited and relied on for the appellant, was wholly inapplicable, being a provision by a father for natural children, to whom he is not considered a parent, or in *loco parentis*, *Ex parte Dubost* (18 Ves. 147, 152). The case of *Barrett v. Beckford* (1 Ves. sen. 519), was equally inapplicable, the question being whether a gift of residue for the benefit of two persons was a satisfaction, not of a portion, but of an annuity, to one of them, who was not a child, but an aunt. Lord Hardwicke's judgment in that case expresses the leaning of the Court to be against double portions. The case of *Fremantle v. Bankes* (5 Ves. 79) appears, by the report, [149] to have been disposed of without consideration, and it is hardly credible that Lord Rosslyn laid down the doctrine in the language there attributed to him. *Tolson v. Collins* (4 Ves. 483), one of the last cases cited on the other side, was not a case of parent and child, and is beside the question in the present case; but so far as it is applicable, it supports the argument for the respondents.

Most of those cases were examined by Sir W. Grant in his judgment in *Bengough*



v. *Walker* (15 Ves. 512), and he says, "They are all cases, in which the testator, without reference to the pecuniary value of the thing he was giving, has given it; and the question was, whether, as upon entering into a computation of the value of the thing given, it turned out equal to the portion or legacy, it should be taken as a satisfaction, the testator not having indicated any idea of his own, as to the value. These cases, therefore, would not precisely apply."

The objection to the substitution of a gift of residue for a portion, is the uncertainty of the residue, which, it is said, "makes all the difference" (per Lord Hardwicke, in *Bellasis v. Uthwatt*, 1 Atk. 426). But, however contingent and uncertain residue may be, the testator may be, and generally is, aware of the general amount. The residuary gift was made by Mr. Mellish in such form as makes it quite clear that he knew the amount, and intended it to be in lieu of the portion. It is a rule that when indications are found in the will, of the testator's intention that his bequest is to be in substitution of a portion, the Court is to presume at once against a double portion (per Lord Eldon, in *Ex parte Dubost*, 18 Ves. 150). When the intention is so [150] indicated, and the two conditions, first, that the provisions by settlement and by will are *ejusdem generis*, secondly, that the residue is not liable to be defeated by any contingency, are found concurring, the presumption of satisfaction of the portion by the gift of residue is complete. In *Rickman v. Morgan* (2 Bro. C. C. 396), Lord Thurlow ridicules the notion that a gift of residue could not, on account of its uncertainty, be a satisfaction of a portion.

The principle, for the application of which the respondents contend, is laid down in the fifth section of the Statute of Distributions (22 and 23 Car. II. c. 10), which directs the residue of an intestate's estate to be distributed among his children in equal portions, "other than such child or children (not being heir-at-law), who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions, equal to the share which shall by such distribution be allotted to the other children;" "and in case any child, (other than the heir-at-law) who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his life-time by portions not equal to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage, etc., to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated." Why should not the principle of ademption *pro tanto* there stated, and which was acted upon by Lord Cottenham in *Pym v. Lockyer* (5 Myl. and Cr. 29; see pp. 38, 46, 48-9), be applied to this case? [151] The slight differences in the limitations and trusts of the two provisions claimed by the appellant cannot be regarded as of any importance after the decision of the House in the case of the *Earl of Durham v. Wharton* (3 Clark and Fin. 146).

Lord Brougham said he did not concur in that decision, being absent at that time; but it was the judgment of the House, and must be followed.

Mr. Bethell: Lord Cottenham expressed his full concurrence in it, in his judgment in *Powys v. Mansfield* (3 Myl. and Cr. p. 374).

Mr. Stuart, in reply, insisted that the respondents had not met his proposition comprised in his opening argument, viz.: that where a parent has provided a portion of a definite amount for his child on marriage, and afterwards leaves that child the residue, or part of the residue, of his personal estate, which is of uncertain amount, the bequest is not to be considered as a satisfaction of the portion. The uncertainty of the residue prevents the Courts from holding it to be a substitution for the definite portion. Not one testator in a hundred can know, or even guess, the amount of the residue of his *personal* estate: it may be large to-day, and nothing to-morrow. It is different as to real estate. There was no similarity between this case and that of *Earl of Durham v. Wharton*. The judgment of the House there rested on the declaration contained in the marriage settlement, that the sum of £15,000, settled as portion, was in satisfaction of the sums to which the lady was entitled under her uncle's will.

He again referred to most of the cases before cited on either side; they were—besides these already men-[152]-tioned—*Clark v. Sewell* (3 Atk. 96), *Haynes v. Mico* (1 Bro. C. C. 129), *Jeacock v. Falkner* (*Id.* 295), *Hanbury v. Hanbury* (2 Bro.

C. C. 352), *Powel v. Cleaver* (*Id.* 500), *Holmes v. Holmes* (1 Cox, 39), and *Hall v. Hill* (1 Dru. and War. 111), against satisfaction of debt, bond, covenant, or portion by legacy, or against ademption of legacy by portion or advancement in a testator's lifetime.

The cases, cited in favour of such satisfaction, or ademption, were *Jesson v. Jesson* (2 Vern. 255), *Hinchcliffe v. Hinchcliffe* (3 Ves. 516), *Sparkes v. Cator* (3 Ves. 530), *Trimmer v. Bayne* (7 Ves. 508, 514), *Garthshore v. Chalie* (10 Ves. 1), *Leake v. Leake* (10 Ves. 477), *Onslow v. Michell* (18 Ves. 490), *Goldsmid v. Goldsmid* (1 Swanst. 211), and *Carver v. Bowles* (2 Rus. and Myl. 301).

There was no argument on the cross appeal (see 2 Keen, p. 780).

The Lord Chancellor (August 21, 1848): These appeals have stood over for consideration since 1847. Upon Lord Glengall's appeal I think that there is no doubt as to the decree being right. There clearly was no concluded contract at the time of Mr. Mellish's death; and if there had been, there was no part performance, his death having taken place before the marriage. That appeal must therefore, in my opinion, be dismissed, the necessity for which would be a grievous hardship, if the House should think it necessary to reverse the decree of the Master of the Rolls upon the appeal of Lady Edward Thynne. But if the decree shall be affirmed so far as it is questioned [153] by the latter appeal, the result will be to divide the property equally between the two daughters of Mr. Mellish, which, it is certain, was his object and intention.

No case can more satisfactorily exemplify the wisdom of the rule of Equity, leaning against double portions, than the present; for if Lady E. Thynne were to succeed in the object of her appeal, and so become entitled to the provision secured to her and her family by her marriage settlement, and also to the one half of the residue of her father's property, she would be entitled, not to one half as he intended, but probably to something like three fourths. Fortunately, the rule of Equity prevents these consequences.

Before I consider the authorities as applicable to the facts of this case, I think it expedient to throw out of consideration all the cases which have been cited, in which questions have arisen as to legacies being or not being held to be in satisfaction of debt; for, however similar the two cases may at first sight appear to be, the rules of Equity as applicable to each are absolutely opposed, the one to the other. Equity leans against legacies being taken in satisfaction of debt, but leans in favour of a provision by will being in satisfaction of a portion by contract, feeling the great improbability of a parent intending a double portion for one child, to the prejudice generally, as in the present case, of other children. In the case of debt, therefore, small circumstances of difference between the debt and the legacy are held to negative any presumption of satisfaction; whereas in the case of portions, small circumstances are disregarded. So in the case of debt, a smaller legacy is not held to be in satisfaction of part of a [154] larger debt; but in the case of portions it may be satisfaction *pro tanto*. It has been decided that in the case of a debt, a gift of the whole or part of the residue cannot be considered as satisfaction, because it is said that, the amount being uncertain, it may prove to be less than the debt.

In considering whether this rule applies to portions, which is the only question in this case, the reason of the rule as applicable to debts must not be lost sight of; because as a portion may be satisfied *pro tanto* by a smaller legacy, the reason given for the rule as applicable to debts cannot apply as to portions. And, on the contrary, as the residue must be supposed to have been considered by the testator as of some value, it would appear upon principle that it ought to be considered as satisfaction altogether, or *pro tanto* according to the amount. For why should £1000, given as residue, not have the same effect upon a larger portion as £1000, given as a money legacy?

All reasoning seems to be in favour of the satisfaction, but the authorities, if direct to the point, must decide. *Blandy v. Widmore* (1 P. Williams, 324) was a case of intestacy and performance of a contract: so was *Lee v. Cox and D'Aranda* (3 Atk. 419; 1 Ves. sen. 1); so was *Goldsmid v. Goldsmid* (1 Swanst. 211).

If there are not cases raising and deciding this question in terms, there are several from which the rule of the court may be deduced. In *Linguen v. Souray* (Pre. in Ch. 400) a provision for a wife, contracted for, of a life interest in £1400

was held to be satisfied by a gift by will of the residue, the interest from which exceeded the interest upon the £1400.

[155] In *Barrett v. Beckford* (1 Ves. sen. 519) the gift of the residue was held not to be a satisfaction, upon the ground of the claim being a debt; and Lord Hardwicke drew the distinction between that case and double portions, seeming to imply that in the latter case the decision would be otherwise.

In *Rickman v. Morgan* (1 Bro. C. C. 63) there was a proviso as to advancement in the settlement. But Lord Thurlow says (2 Bro. C. C. 396), "It would be ridiculous to insist that the residue would not have been satisfaction for the £8000; it is strange to say that the gift of the whole residue being uncertain, shall not be a satisfaction, when a moiety of that very residue, given as a legacy, will."

In *Weall v. Rice* (2 Russ. and M. 267) Sir John Leach lays down the rule as to portions generally, making no distinction between money legacies and gifts of residue; saying, "If a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he did not mean a double provision."

It is satisfactory to find the doctrine in these cases so consistent with and so conformable to principle; they leave no doubt as to the general rule, and it only remains to consider how far the facts of this case bring it within that general rule.

The obligation upon the appellant's marriage was by bond, dated March 1830, to transfer to four trustees (two of whom, those named by Mr. Mellish, are also trustees and executors under the will) after Mr. Mellish's death, £66,666 13s. 4d., £3 per cent. Consolidated Annuities, to be by them held upon the trusts of the settlement; and by his will, dated Nov. 1833, he gave to the same two individuals half the residue of his personal estate for the benefit of Lady Edward Thynne and her children; the difference between the two being that by the settlement the appointment amongst the children was to be joint by the husband and wife, and under the will by the wife alone; and that, under the settlement, the children of the marriage were the only objects of the appointment, and under the will, the children of the daughter generally—differences which, according to the rule applicable to double portions, do not negative the presumption of satisfaction. But the case is one of election, which has been disposed of by the Master's report. It appears to me therefore that the Master of the Rolls came to the right conclusion, and that both the appeals ought to be dismissed, with costs.

Lord Brougham.—I have come to the same conclusion as my noble and learned friend. As he has argued chiefly the point upon the original appeal of *Lady Edward Thynne v. Lord Glengall*, and has addressed himself less to the cross appeal of *Lord Glengall v. Lady Edward Thynne*, I shall perhaps be excused for entering a little more at large into that, in which I entirely agree with the Court below, and with my noble and learned friend.

In this case I think that the agreement, stated in the bill and referred to in the rest of the pleadings, namely, respecting £100,000 £3 per cent, reduced annuities, was never completed; that Mr. Mellish's consent to, and concurrence in it, rested wholly in parol; that neither he, nor Mr. Tooke for him, ever signed it; not only that, but that it was not completed, even by parol; that after the draft had been prepared, read to him, and [157] approved of by him, it was submitted to Mr. Bellenden Ker, and he having settled it, Mr. Mellish was apprised of the state of the draft, and though Mr. Tooke, in his answer to the fourth interrogatory, says he approved, yet it is evident he desired something further to be done; for he made Mr. Tooke submit the draft to his (Mr. Mellish's) old friend, Mr. Tidd, for his perusal. Accordingly Mr. Tidd perused it, and expressed his approval "in one or two interviews," says Mr. Tooke, "which I had with him." So that it was not an immediate unhesitating approval; and although Mr. Tidd returned the draft approved on the 24th of the month to Mr. Tooke, I consider that Mr. Tooke was bound to state, and probably would have stated, generally at least, to his client, what had passed with Mr. Tidd at the two interviews, what difficulties he had found, and how those difficulties were removed. Mr. Tooke does not state that he ever told Mr. Mellish anything that had passed with Mr. Tidd, in whom Mr. Mellish reposed an especial confidence. Nor did Mr. Mellish ever know (which is a material point) that Mr. Tidd ultimately did approve of the draft; for he was seized with the illness, which in three days carried him off, the

very day (the 24th) that Mr. Tooke received back the draft from Mr. Tidd; so that Mr. Mellish died without knowing that it had been approved.

I have put the case of the non-completion of an agreement or contract. But Mr. Tooke, with every disposition—and very naturally—to support Lord Glengall's claim from his (Mr. Tooke's) knowledge of his client's intentions, does not take upon himself to say (which would have made a material difference in the case) that Mr. Mellish ever said that he was to be [158] considered as assenting, provided Mr. Tidd should approve of the draft. He says no such thing. This view of the case makes the supposed part-performance, upon which all the reliance is placed, wholly immaterial; for part-performance, to take the case out of the Statute of Frauds, always suppose a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement.

The case therefore appears to me to be free from all doubt. I regard the whole as an incomplete agreement, and I agree with the Master of the Rolls, that the part of the bill which referred to it ought to be dismissed. Therefore the decree appealed from should be affirmed, as my noble and learned friend has moved.

This makes way for the consideration of the appeal, in which Lady Edward Thynne is the appellant. I entirely agree with the Master of the Rolls, and with my noble and learned friend, that the appellant must be put to her election, and that she and the issue of her marriage, if any, do elect to take under the will of Mr. Mellish, the bequests of which operate as a satisfaction of the bond of the 8th of July 1830, and not as a cumulative gift for further advancement—not as a double portion—and therefore that this part of the decree also should be affirmed. Then we give the costs of the original appeal to the Respondents therein; and the costs of the cross appeal to the Respondent in that appeal.

[The decree and orders, so far as they were complained of in the two appeals, were then affirmed with costs, respectively.]

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[159] ANN STEWART and Others,—*Appellants*; The GREENOCK MARINE INSURANCE COMPANY, and the DIRECTORS of that Company,—*Respondents*  
[June 15, 17, 1847; September 1, 1848].

[Mews' Dig. xiii. 1234, 1296, 1313, 1333. S.C. 1 Macq. 328. Commented on in *Rankin v. Potter*, 1873, L.R. 6 H.L. 130; L.R. 5 C.P. 379; *Keith v. Burrows*, 1877, 2 A.C. 657; *Midland Insurance Co. v. Smith*, 1881, 6 Q.B.D. 567; *Sea Insurance Co. v. Hadden*, 1884, 13 Q.B.D. 717; and cf. *Scottish Marine Insurance Co. of Glasgow v. Turner*, 1853, 1 Macq. 334.]

*Insurance—Freight—Abandonment.*

In all cases of insurance on ship, in which the subject is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all benefit or advantage incident to it, or rather, such property vests in the underwriters.

Freight, while the ship is in the course of earning it, is a benefit or advantage incident to the ship, and, therefore, becomes the property of the underwriters, paying for a total loss.

A vessel, in the course of a voyage, struck upon an iceberg on the 27th of July, and was considerably injured, but reached Liverpool, and while in the river there, grounded outside the docks on the 11th of August, was afterwards taken into dock, the cargo discharged, and was then surveyed, and, after the survey, namely, on the 1st of September, the owner abandoned to the underwriters on ship, and claimed as for a total loss:

Held, that the underwriter on ship was entitled, on settling as for a total loss, to have the benefit, in account, of the freight which had been received by the owner on the discharge of the cargo.

Two policies were entered into by the defenders, as underwriters, on the ship *Laurel*, of Greenock, one for £1500, the other for £500. Besides the £2000 thus

insured with the defenders, insurances were effected with other companies to the value of £4500, or £6500 in all. As the vessel was valued in the policies at £7500, the pursuers stood in the position of their own insurers for the remaining £1000.

[160] The vessel was insured at and from Liverpool to New York, and thence to any other port in the United States or to Quebec, thence to a port of discharge in the United Kingdom, and thereafter, "until she hath moored at anchor in good safety at her place of destination, and for such period afterwards as she shall be there occupied in discharging her cargo, not exceeding ten days from the date of reporting at the Custom House." There was a policy on freight executed in similar terms.

The outward voyage was performed in safety. At Quebec the vessel took in a cargo, chiefly of timber, and left that port on the 14th of July, bound for Liverpool. On the 27th of July, and before it had quite completed half the passage homeward, it came in violent contact with an iceberg, which carried away the bowsprit, stove in the bows, and occasioned other serious damage. The vessel immediately filled, and became water-logged, but the cargo kept it afloat; and the weather being favourable, it was able, by great exertions on the part of the master and crew, to proceed on the voyage. Reaching Point Lynas, a short way from the river Mersey, a pilot was taken in, and the vessel then proceeded up the river to Liverpool, and arrived off the Brunswick pier-head on the 11th of August. It was flood tide at the time; and the desire of the pilot and master was, to have the vessel immediately taken into dock, but from the state it was in, the dock-master refused to allow this to be done without the order of the harbour-master. The master of the ship accordingly went to him. When the condition the vessel was in, however, was explained to him, he would not consent to its being docked, but gave directions to have it moored outside the dock gates, that it [161] might be scuttled when the tide left. These directions were accordingly followed, and the ship, instead of being taken into harbour, was laid alongside the pierhead in the open river. The consequence was, that as the water left, it grounded, and listed or fell outwards, and sustained much additional damage, many of the timbers being broken, and other injuries done. When the tide had sufficiently receded, holes were bored in the ship's bottom, and the water allowed to run out. The openings were closed before the tide returned, and the ship when floated was carried through the dock gates into the Brunswick basin, where it was moored for the remainder of the night. Next day it was moved from the basin into the dock, and then discharged, no part of the cargo having been removed till the ship was ultimately placed in the dock.

After the cargo was discharged, the vessel was put into a graving dock, and there examined by several Liverpool ship carpenters and surveyors. These gentlemen reported that it would cost £3000 to repair the injuries done to the vessel by the collision with the iceberg on the 27th July, and the grounding in the river on the 11th August. On receiving this report, the owners, on the 1st September, 1842, wrote to the defenders, intimating an abandonment. This the defenders refused to accept, on the ground that the injuries done to a vessel valued at £7500 in the policies, were not to that extent which could entitle the owners to claim for a total loss. Some further correspondence took place, the owners having, in the meantime, got additional surveys, by which the amount of damage was declared to exceed £4000.

The pursuers, in October, brought an action against the defenders, in which they claimed as for a total loss. [162] In their summons, the pursuers rested their claim solely on the injuries done to the vessel by the iceberg, which they maintained, of themselves amounted to a total loss; but afterwards amended the libel, so as to embrace also the injuries the vessel had received in the river. A record was then made up, the pursuers' first allegation being, "the pursuers are entitled, in their circumstances, to recover under the policies libelled, the full sums insured, as for a loss; and no relevant ground has been stated, or exists, in the circumstances, to exclude the claim for these sums." The defenders pleaded that "as the damage sustained by the *Laurel* did not amount, either actually or constructively, to a total, but only to a partial loss, the pursuers are not entitled to abandon and claim for a total loss;" and also, "that even supposing the pursuers entitled to abandon, and to claim a constructive total

loss, they could only do so subject to the condition of their accounting, by way of compensation, to the respondents, as abandonees of the ship, for their proportion of the amount of freight earned, after the accident or accidents through which such constructive loss was occasioned; and the respondents would be further entitled to deduction of a rateable contribution for the value of the stores expended for the general safety."

The freight actually earned and paid to the owners, amounted to £1402 2s. 2d.

The case went to trial upon the following issue: "Whether the said ship, by and through injury sustained on or about the 27th July, 1842, and on or about the 11th August, 1842, or one or other of these dates, and during the currency of the said policies, became a wreck, and was totally lost? and whether the defenders, under the said policies, are indebted and [163] resting owing to the pursuers in the sums of £1500 and £500, contained respectively in the said policies, or any part thereof, with interest thereon as libelled."

The jurors returned the following verdict:—"That in respect of the matters proven before them, they find for the pursuers, in respect that the *Laurel* was properly abandoned and not worth repairing: that the damage arose from coming in contact with an iceberg, and also from grounding at the dock at Liverpool. Also find that the ship was perfectly seaworthy; reserving for the decision of the Court the point raised by the defenders, of their title to a proportion of the freight. Also find that the vessel was a total loss, independently of the decayed timber and deficient sails."

The question of the abandonees' right to freight thus reserved for the consideration of the Court, afterwards came on to be argued in the Inner House, when a difference of opinion occurred among the Judges (cases in the Court of Session, Vol. vi., p. 359).

The Lord President and Lord Mackenzie held that abandonment transferred to the insurers all the rights of the assured as to freight: Lord Fullerton and Lord Jeffrey were of an opposite opinion, holding that the underwriters were not entitled to any part of the freight.

Under these circumstances, cases were ordered to be laid before the Lords of the Second Division, and the permanent Lords Ordinary, for their opinions. The Judges thus consulted, likewise differed among themselves (*id.*, Vol. viii., p. 323).

The Lord Justice Clerk, Lord Moncreiff, Lord Medwyn, Lord Robertson, and Lord Wood, were of opinion, that by the abandonment, the freight belonged to the underwriters; while Lord Ivory, Lord Cunninghame, [164] Lord Cockburn, and Lord Murray, were of opinion that the underwriters were not entitled to take credit for any freight, but were bound to settle as for a total loss, leaving the freight to be recovered by the owners.

The Judges of the First Division, on considering these opinions, on the 13th of January, 1846, pronounced the following interlocutor:—"The Lords, having advised the cases with the opinions of the consulted Judges, find, that the defenders, the Greenock Marine Insurance Company, with whom insurance was effected only on the ship, are entitled, in accounting with the pursuers, to have placed to their credit their due proportion of the freight, amounting to £1402 2s. 2d., subject to such deduction as may be found competent to affect their interest in said freight; and remit the cause to the Lord Ordinary, to hear parties on such deductions, and to take such steps as may be requisite for the investigation and determination of the same, and of the defenders' proportion of the freight; as also to dispose of the whole other matters remaining to be determined under the conclusions of the libel; reserving the effect of this judgment in the question between the pursuers and those of the underwriters on the ship, who are also underwriters on the freight; reserving also the expences of the discussion of the question of freight, to be disposed of along with the expences already reserved, and all other expences in the cause."

The appeal was against this decision.

Sir F. Thesiger and Mr. Watson (Mr. Anderson was with them) for the appellants:—

The judgment of the Court below must be reversed. It introduces a new principle of insurance law, entirely in contrast to those on which the rights of insurers and [165] assured have hitherto been deemed to be founded. It gives a retrospective effect to an abandonment, so as to enable an insurer to obtain an advantage such

as was never before contemplated. Here the freight was in fact earned before notice of abandonment was given, for the voyage was at an end, *Angerstein v. Bell* (Park on Ins. 54 (8th ed.); Marshall on Ins., 263), though the risk continued, yet it is contended that that notice relates back to the period of the act which occasioned the loss, and that the insurer on ship becomes, by such retroactive effect of the notice, entitled to the freight. Such a doctrine is alike unsupported by principle or authority.

Notice of abandonment is not necessary in all cases, in order to entitle an assured to recover as for a total loss; *Cambridge v. Anderton* (2 Barn. and Cress. 691); *Roux v. Salvador* (3 Bing. N. C. 266). Where the ship is really lost it is not necessary; it is so only in two cases, that of an embargo and that of a capture, for in these cases the ship exists in specie unharmed, and may still complete the voyage. The abandonment then throws the risk on the abandonee, and notice of the intention to do so must be given to him. But in ordinary cases, when the ship is very much damaged, such a notice is not required. The owner must, indeed, cede all the property insured, or all that remains of it, to the underwriter, and this cession of the thing insured is preliminary to his right to recover. But cession, and notice of abandonment, are two distinct things, and much of the error of the argument on the other side may be traced to confounding them together. When the assured abandons during the continuance of the voyage, and the underwriter accepts the abandonment, the effect of the abandonment [166] is, that the underwriter becomes the carrier of the goods, takes all the risk, and earns the freight. He earns it, in fact, with what has become, by the abandonment, his vessel. This was the principle on which all the cases known as the Russian Embargo Cases were decided. *Thomson v. Rowcroft* (4 East, 34) was the first of these, though there the question was not expressly decided, for the assured having abandoned to each set of underwriters, indorsed a memorandum on each policy, by which he stipulated that he would assign all his interest in ship or freight to the particular underwriters on the respective policies. He received from each the full amount of insurance, after which, the vessel being relieved from the embargo, completed the voyage and earned freight. The Court there held, that however the question might have been between the different sets of underwriters, litigating out of the same fund, and however the weight of argument in such a case might preponderate in favour of the underwriters on ship, yet, in that individual action which was brought by the underwriters on freight, against the assured upon his memorandum, they were entitled to recover as against him on his own memorandum. *Leatham v. Terry* (3 Bos. and P. 479) was to the same effect; so was *McCarthy v. Abel* (5 East, 388); but this last case settled the rule which had, in *Thomson v. Rowcroft*, been hinted at, namely, that an abandonment pending a voyage, carried to the underwriter on ship the right to recover the freight. All these, however, were cases in which the abandonment took place during the currency of the voyage, in which, therefore, the assured gave up everything to the underwriter on ship, who consequently became his [167] exact substitute, and who, in virtue of being the actual carrier of the goods, the person whose vessel earned the freight, was the person entitled to receive it. But these decisions do not affect the question here, for here the abandonment did not take place till after the voyage had ended, though during the continuance of the risk. This last case furnishes one observation, which is important to be attended to here, namely, that the date of the accepted abandonment is a material circumstance in settling the rights of the parties. Then came the case of *Case v. Davidson* (5 M. and Sel. 79; S. C. in Error, 5 Moore, 117; 2 Brod. and Bing. 379; 8 Price, 542), with respect to which the same observation may be made as with respect to those already cited, and which, therefore, is not applicable to the present case, for the purpose for which it has already been used, and for which it will again be relied on by the other side. In that case there had been two separate insurances on a general seeking ship, the one on the ship and the other on the freight. The vessel was captured, and the ship and freight were abandoned to the respective underwriters, who each paid a total loss. The vessel was re-captured, and ultimately performed the voyage and earned freight; and under these circumstances, it was held by the Court, that the underwriters on ship, under the abandonment of the ship to them, were entitled to such freight, for that an abandonment to underwriters on ship, transfers to

them the right to the freight earned subsequently to such abandonment, as incident to the ship. The Court then acted avowedly on this principle, that the ship, from the moment of abandonment, becomes the property of the abandoner, and the property in the ship determines the right to freight, as an incident to the right of property in the ship. In other words, it is [168] contended that the freight belongs generally to the owner of the ship, and that the owner becomes such by the act of abandonment.

Now this doctrine may be admitted by the plaintiff in error, and yet the consequence sought in this case to be drawn from it will not follow; for here the ship did not become the property of the underwriter, by abandonment to him, until after the freight had been earned. At the time of the abandonment, this vessel had become a wreck, and could not earn freight. The voyage was at an end, though the risk of the vessel still continued. That freight was not therefore earned by the vessel sailing as the underwriter's vessel, and the very principle on which *Case v. Davidson* was decided, consequently raises an argument by way of analogy against the defendant in error here. The case of *Dean v. McGhie* (2 Car. and P. 387; 12 Moore, 185; 4 Bing. 45) does not carry the argument one step further in favour of the underwriter, but shows that it is the possession of the ship during the time of earning freight, that gives the right to freight. In that case, an owner of a ship mortgaged it by bill of sale while at sea. The agents of the ship took possession of it on its homeward voyage, and before arrival in port, and afterwards received sums on account of freight, and paid seamen's wages and port charges, amounting to a larger sum than the freight received. The mortgagor became bankrupt; and it was held, that the assignees could not sue the mortgagees for money had and received by them for freight, as by the mortgage of the ship, freight accruing due passed to the mortgagee, as incident to the ship, and that he had a right to set off the charges made on account of the ship against the sums received on account of the freight.

[169] But then, it is said on the other side, that the plaintiff in error ought not, in the case of a constructive loss, to be in a better situation than if the ship had actually gone to the bottom of the sea. He will not; for if the ship had gone to the bottom while sailing on the open sea, there can be no doubt that he would have recovered on both insurances. On the other hand, the attempt now made to set up this claim for the insurer on ship, tends to place him in a much better situation than if the ship had gone to the bottom of the sea; for, whereas then he would have had to pay for a total loss, without receiving anything whatever in the way of deduction from that loss, he now has all that remains of the ship which has been abandoned to him. The law never could have intended that he should, in addition receive all the freight that the vessel had earned, and certainly never could have intended it when that freight had been earned previous to the date of the abandonment.

The freight here was so earned, and the mere fact of an abandonment having been made cannot give the insurer a right which he could not have had without it, for abandonment is not necessary. Now suppose a different state of things. Suppose the vessel in dock, but with the policy still continuing, and a fire to happen, by which the vessel was wholly destroyed, but the goods were saved, the owner would have a right to recover as for a total loss, and yet the insurer on the ship would have no right to freight. The case would have been the same if the ship had suddenly gone to pieces outside the docks, but the goods had been saved and delivered to their consignees. Taking the time of the loss here to be the grounding in the docks, there was no subsequent use of the vessel for the purpose of [170] earning freight, and consequently, it was not the vessel of these underwriters which earned the freight.

In the argument in the Court below, some American and French law authorities were relied upon as guides in this matter; but they will not assist the respondents. For, in the first place, they refer to cases of abandonment pending a risk, and, in the next place, the law of the United States as to freight is different from the law of England in a most material respect, for it admits what we refuse, namely, a calculation of freight on the principle of *pro rata itineris* (3 Kent Comm. 319, 4th ed.; 2 Phill. on Ins. 234). On another ground the French authorities are likewise



incapable of being appealed to in the argument, for the French law does not hold freight to be an insurable interest.

The only remaining question is, whether an abandonment can have a retrospective effect. It is submitted that it cannot. A notice of abandonment is unnecessary, and an unnecessary proceeding cannot have any effect on the substantive rights of parties, and least of all an effect of a retrospective kind. The use of the ship for the purpose of earning freight is the only ground on which freight can be demanded, and here, the voyage having terminated before the notice of abandonment, and no use of the ship for the purpose of earning it having taken place after that notice was given, the insurer has no title by the mere act of abandonment of ship to claim the freight.

The rights of the parties are therefore the same, so far as freight is concerned, as if the vessel had been absolutely lost by the perils of the sea, but the goods had been saved and delivered to their owners, in which case it is undoubtedly clear that the underwriters on ship would have had no claim whatever to freight.

[171] Sir F. Kelly and Mr. Wickens for the respondents:—

The decision of the Court below is correct, and cannot be questioned without overturning some of the great principles of insurance law.

The first of these principles is, that the policy is a contract of indemnity. It follows from this, that where the assured obtains from the insurer the full value of the ship, the underwriter is entitled to the ship, and all that properly is incident to it. He must be put into the situation (so far as natural events permit) in which the owner stood before the abandonment. This was in effect the decision in the case of *Case v. Davidson* (5 Maule and Sel. 79; S.C. in Error, *nom. Davidson v. Case*, 5 Moore, 117; 8 Price, 542; 2 Brod. and B. 379). If the ship had not reached its destined port in safety, but had broken up, the value of whatever remained of it would have belonged to the underwriters. By the payment of full value for it they acquired a complete right to the ship.

The facts as specially stated in this case shew that after the 11th of August the ship existed in specie, but in construction of law it was, so far as the owner was concerned, totally lost. It was abandoned by the owner to the insurer, and by that abandonment the underwriter became entitled not only to the ship but to its incidents, of which freight was one. The only question that *Case v. Davidson* can possibly be said to have left undecided is, whether in such a case as this the ship is completely vested in the underwriters at the time of the cause of the loss or of the abandonment. Here the ship, after an injury which caused a constructive total loss, carried a cargo and delivered it; and the [172] act of abandonment came between the period when that injury, the cause of the total loss, occurred, and the period when the cargo was actually delivered. The argument in Scotland was, that there was a total loss on the 11th of August, yet the fact was that the ship still existed in specie, conveyed goods, and delivered them, and so freight was earned. After all this occurred, the survey took place, and then the abandonment was made, and yet the argument of the pursuer in the Court below was, that the right to the ship and to what the ship might earn took effect from the time of the abandonment only, and not from the time of the cause of the loss. But that argument cannot be supported. The injury gives the right to abandon, and the abandonment must be referred to that event which alone gives the assured the right to abandon.

It has been contended here that abandonment is not necessary, but it must be remembered that this is not an actual, but only a constructive total loss, and that abandonment is only unnecessary in the former case.

[Lord Campbell.—A constructive total loss may be described as a total loss, with a right of salvage.]

And as a consequence of that, it may be argued that when the assured, by a notice of abandonment, converted this constructive into a total loss, everything in the ship vested in the insurers from the moment at which that constructive total loss occurred. Suppose a ship to be injured on the 1st of January at Van Dieman's Land, and the owner to hear of it in this country and to abandon, but that while the intelligence was coming to him here, the ship was repaired, and sailed, and actually arrived here on the 1st of July, it could not be contended that the title would vest only from the

moment of abandonment, it must [173] vest from the time of the happening of that matter which the owner had treated as a total loss.

[Lord Campbell.—But the ship and the freight are different subjects, and are capable of distinct insurances, and the question is, whether the total loss of ship is the total loss of freight.]

The decision in *Case v. Davidson* shews that whether there is insurance on freight or not, the underwriter on ship is entitled to receive the freight.

[Lord Brougham.—Suppose the freight and the ship insured with the same parties, what would be the consequence?]

It has been held that where the ship is lost, but not the freight, the underwriter on freight is not liable to pay. But that question does not arise here. This is a simple case of a constructive total loss of ship, in which the underwriters on ship have paid a total loss, and therefore claim that, from the moment of the constructive loss, which, by the owner's abandonment, they have been obliged to treat as an actual total loss, the vessel with all its incidents should be theirs.

The argument on the other side is, that the title of the underwriters to the ship vests, not from the time of the loss, but from the time of the abandonment. It is curious that the law on this point should not have been expressly laid down in any English authority, but is very distinctly stated in an American writer. In Phillips on Insurance (2 Phillips on Insurance, 417, 418, Boston edit., 1840), it is said, "It is the effect of a valid abandonment to transfer the property in the subject. The payment of a total loss by the insurers, or their ability to pay such a loss, in consequence of an abandonment, gives them a title to the property, or [174] what remains of it, as far as it was covered by the policy. An abandonment, considered as an assignment of property, must have reference to the time of the loss, for only that which is constructively lost can be abandoned, and to know what is lost, reference must necessarily be had to the time of the loss. From that time the insurers are, to most purposes at least, entitled to the advantages, and subject to the liabilities of ownership. This is not inconsistent with the principle, that the right of abandonment depends upon the state of the existing facts, which means, as we have seen, that the facts of which the assured is informed, and which he makes known to the underwriters as the ground of his abandonment, must constitute a total loss, and also, that the loss must not have ceased to be total in the mean time. The abandonment must be authorised by the existing facts, but, as an assignment, it has reference to the time of the loss. In France an abandonment of the ship, considered as a transfer of the property, has been construed to relate to the time of the risk. Emerigon, 223, c. 17, s. 9. But in the English cases, it seems to be taken for granted, that an abandonment of any subject relates to the time of the loss."

In France the effect of the abandonment has a still further retrospective effect, for it goes back to the time of the commencement of the risk itself. But taking the English rules here, it is clear that the abandonment must relate to the time of the loss which occasions it. If that was not so, the underwriter would not be entitled to salvage, nor be liable to repairs and expenses of voyage. He is entitled to the one, he is liable to the other; and therefore he is entitled to the freight, for his right to the vessel and its incidents is [175] complete from that time. The case of *Young v. Turing* (2 Man. and Gr. 593; 2 Scott's N.R. 752), and several others, shew, that so far as the rights of the parties are concerned, a constructive is equivalent to an actual total loss. In these cases the assured could of course recover; but there is no case of that kind where a ship remains in specie, capable of fulfilling the purposes of a ship, in which, if the owner means to treat the voyage as totally lost, he is not bound to give notice of abandonment to the underwriter. In *Hodgson v. Blackiston* (1 Park on Ins. 400 n, 8th edit.) it was held that notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received.

There is no distinction between the present case and that of *Case v. Davidson* (5 Maule and S. 79; 2 Brod. and B. 379; 5 Moore, 117; 8 Price, 542). The only question that was not there distinctly and in terms decided was, whether the ship vested in the underwriter from the time of the abandonment or from the date of the occurrence which constituted a total loss. Nothing depends on the acceptance or non-acceptance of the abandonment. If the underwriter refuses to accept the

abandonment, that will not in the least degree prevent the assured from recovering. The ground on which the appellants are compelled to insist that there is no necessity for a notice of abandonment is insufficient. The damage done to the vessel in the dock at Liverpool is not noticed in the original summons, but the damage done to it by the iceberg is alone set forth; so that as far as that summons is concerned, the underwriters would be en-[176]-titled to freight from that time, because, even on the argument now put forward, the freight would have been earned by the underwriters' vessel. It was so earned in any view of the facts of the case.

Here is a total loss, in respect of which the underwriters have been content to pay the full value of the vessel. That amounts to a sale of the ship, and the buyers of the ship are clearly entitled to all that the thing bought afterwards obtains. If the underwriters had paid the value of the ship on the 11th of August, there can be no doubt that the vessel would have been in every respect theirs from that very night. They could not do that at the moment; for neither owners nor underwriters then knew what had occurred; but they have since paid as for a total loss in respect of the injury which then took place. They are therefore in the same situation as if they had made the payment at that moment. It has been contended that at the time of the abandonment this vessel was a wreck, and could not earn freight; but the answer to that argument is, that the voyage here was not at an end till the delivery of the cargo, and that in fact the vessel, whatever description may be given to it, did, after the period when this total loss occurred, and after the time when the property passed from the owner to the underwriter, actually deliver the cargo and earn freight. A hull of a vessel, a mere wreck, may, if it can, bring the goods into port and, by delivering them, earn freight, the condition of the vessel not having any effect on the question of title to freight. At the time when the total loss happened here, the ship had not earned freight, because the goods had not been delivered, but the freight was earned when they were delivered.

[177] The ship here was abandoned, and the effect of an abandonment is thus described in Marshall on Insurance (page 612, 3rd edit.): "By the abandonment, the insured, as we have seen, yields up to the insurers all his right, title, and interest in the ship or goods insured, or what may be saved of them, which, from the notice of abandonment, become the property of the insurers. It operates as a transfer to them, in proportion to their respective subscriptions, without any regard to the priority of the policies, if more than one, even though the ship or goods should appear by the several policies to be over-insured. And this transfer has a sort of retrospective relation in reference to the insurers, who, to the extent of the sum insured, are presumed to have been, from the beginning, owners of the things insured, according to the rule of the Roman law, '*Quod repudiat, retro nostrum non fuisse palam est.*' Ff. lib. 38, tit. 5, '*Si quid in fraudem.*'" Nothing can be clearer or more conclusive, and all the rules of law, and all the decided cases justify the statement of the law, which is itself a conclusive answer to the claim of the appellants.

The right to freight could not be abandoned. It did not exist. It was not an inchoate right. The law does not recognize it. The completion of the act of carrying cargo, namely, the delivering of it, alone gives the right to freight. The moment before actual delivery, nothing can be claimed. Then how can it be said here that the shipowner did this act? that he completed the voyage with a ship which was not his property, but had become the property of the underwriters? He who is the owner of the ship during the last portion of the voyage is the owner of [178] the ship during the whole voyage, so far as the right to freight is concerned. He alone can deliver the goods, and obtain payment for the carriage of them.

The only question here on which any doubt can be raised is therefore, whether the voyage was at an end when this accident happened. It was not. The ship had not arrived at its place of destination. If the cargo had been of a perishable nature, and had been insured, and if the grounding of the ship at the docks had partially injured or wholly destroyed the cargo, there can be no question that the underwriter on cargo would have been liable to make good the damage.

It is therefore submitted that, admitting the doctrine that the freight belongs to the person whose vessel earns it, the vessel here was the vessel of the underwriter when the freight was earned. It had become so by the act of abandonment which, whenever given, related to and had effect from the loss that occasioned it. The

underwriter was substituted for and became the owner of the vessel. By him the voyage was completed, and the cargo delivered, and the freight was earned, and consequently this claim of the insurer cannot be supported, and the judgment of the Court below, by which it is negated, must be affirmed.

Sir F. Thesiger, in reply.

The doctrine that a contract of insurance is a contract of indemnity will be defeated, if the case of *Case v. Davidson* [2 Man. and Gr. 593; 2 Scott N.R. 752] can be applied to the extent to which it is now sought to be applied. For example, if the owner of the ship had insured the ship for £5000, and [179] the freight for £6000, and was compelled by some accident during the voyage to abandon the ship, the freight would be received by the underwriters on ship, and the owner would not be indemnified. The argument that the voyage continued till the cargo was discharged, is erroneous, and can only be maintained by confounding the duration of the voyage with the duration of the risk. Here the policy on freight is to continue till the ship is moored in good safety at its place of destination, and then for a period not exceeding ten days from the date of reporting at the custom house. This is not an extension of the voyage, but of the risk, and the two things are entirely different from each other. When the vessel drops its anchor at the place of destination, the voyage is at an end. The freight would then be earned though it would not be payable; and another fallacy in the argument on the other side arises from confounding the earning of freight with the payment of it. Suppose they had been obliged to put the goods into lighters to convey them to the shore. If, while on board the lighters, the goods had been lost, the completion of the voyage would have happened, but not the completion of the risk, and the freight would have been earned by the ship, but would not have been payable by the owner of the goods. This shews the distinction between the two things.

The arguments of the respondent, at the bar of this House and in their printed case, are inconsistent with each other. There they repudiate the necessity of abandonment. Here they insist upon it. *Cambridge v. Anderton* (2 Barn. and Cr. 691) and *Roux v. Salvador* (3 Bing. N.C. 266) shew that there is no necessity for abandonment in cases where, [180] as here, the facts shew that a total loss has occurred.

As to the effect of notice of abandonment, the cases of *Bainbridge v. Neilson* (10 East, 329) and *Patterson v. Ritchie* (4 Mau. and S. 393), the former of which was acted on by Lord Eldon in this House, in the case of *Smith v. Robertson* (2 Dow, 474), shew that a notice of abandonment may be rendered utterly valueless by subsequent circumstances. Such a notice cannot therefore have the retroactive effect ascribed to it in this case.

It may be admitted here that the abandonment itself applies to the time of the loss, but the argument would carry it back to the time of the damage. If that argument was true, then if a ship received an injury at sea from an iceberg, and arrived in port, and discharged its cargo, but then sank irrecoverably in the docks, the underwriter would be entitled to recover the freight. Again, if the ship while out on a voyage suffered a serious injury, but delivered its outward cargo, and the captain in ignorance of the extent of the damage set sail for home, and was then lost, the argument on the other side would go to shew that the underwriter would be entitled to the outward freight. It is impossible to maintain a doctrine that leads to such absurd consequences. But its absurdity goes still further. According to the cases of *Luke v. Lyde* (2 Burr. 882; 1 Sir W. Bl. 190, *nom. Luke v. Lloyd*), *Lutwidge v. Gray* (Molloy, p. 259, 6th ed.; Abbott on Shipping, 316, 4th edit.), and *Shipton v. Thornton* (9 Ad. and El. 314), the master is bound, if he can prudently do so, to tranship the goods, and to carry them to [181] their port of consignment. But if he did so, the argument on the other side would lead to the conclusion that the freight thus earned would become the freight of the underwriter on ship, and not of the assured. This would be a dangerous conclusion, for it would give the master an interest in allowing a loss of goods to be a total loss, instead of giving him an interest to use every means in his power to prevent its becoming so.

[Lord Campbell.—When did the title of the underwriters begin?]

At the time of the total loss. At the time when the owner, by abandoning, declared the total loss. There was no necessity for abandonment here. But if there

was, there was no acceptance of it before the 1st of September, and the acceptance is that by which the parties are bound; *Bainbridge v. Neilson* (10 East, 329), *Smith v. Robertson* (2 Dow, 474), and *Patterson v. Ritchie* (4 Maule and S. 393). The rights of the underwriter only arise from that time. The judgment of the Court below is therefore erroneous, and must be reversed.

The Lord Chancellor.—My Lords, in considering the question reserved by the jury for the decision of the Court, the facts, as found by the verdict, must be the ground upon which such consideration must proceed, and if these are properly attended to, much of the apparent difficulty of the case will, I think, disappear.

The verdict finds, first, that there was a total loss of the *Laurel*; secondly, that the *Laurel* was properly abandoned, and not worth repairing. The latter in-[182]-deed, is a consequence of the first, rather than a distinct finding. The verdict finds for the plaintiff, which involves a finding that the total loss was within the period covered by the policy.

The verdict finds the total loss to have arisen from the ship having come in contract with an iceberg, on the 27th of July, and also from its having grounded outside the docks at Liverpool, on the 11th of August.

In my view of this case, it is not material whether the total loss is to be considered as having been completed on the 27th of July, or on the 12th of August, for the voyage was not completed at either of these two dates. It was indeed argued that the voyage had been completed at the latter date, and the freight earned at that time: the freight was, in fact, subsequently earned by the delivery of the goods, but at the last date to which the total loss can be referred, namely, the 12th of August, it had not been earned. If, instead of timber, the cargo had been of a perishable quality, and therefore destroyed by the ship's filling with water on the 12th of August, could it have been contended that the freight had been earned?

The facts of this case, upon this point, are identical with those in *Samuel v. Royal Exchange Assurance Company* (8 B. and C. 119), in which a ship having been lost whilst moored near the Dock Gates at Deptford, waiting to be admitted, the owner was held entitled to recover against the underwriters for a total loss, the place where the vessel was moored not being the place of its ultimate destination. The case is the same as it would have been if the ship had ceased to exist as such on the 27th July, and the cargo had been brought home [183] and delivered by other means. This case, therefore, is one of a total loss, happening before the completion of the voyage.

Now, to constitute a total loss, the actual annihilation of the subject of the insurance is not necessary; it is sufficient if the expenses of repairs would exceed the value of the ship when repaired. In all cases in which the subject is not actually annihilated, the assured is entitled to claim, and claiming as upon a total loss, must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it, or rather, such property vests in the underwriters. Now the freight which a ship is in the course of earning, is a benefit or advantage belonging to it, and is as much to be given up to, or to become the property of the underwriters, paying for a total loss of ship, as any other matter of value belonging to or incident to the subject insured.

It cannot be of importance at what part of the voyage the accident happens, and the property in the vessel is changed by what is accounted in law to be a total loss.

In *Benson v. Chapman*\* the ship, soon after leaving the port of loading, sustained damage sufficient to entitle the owners to recover as for a total loss, but the captain had repairs done at an expense beyond what a prudent owner would have incurred, and he brought the cargo home, and the freight was earned, but the Court held that the total loss of the ship carried with it the total loss of the freight. Chief Justice Tindal says, "the assured has sustained a total loss of the [184] freight, if he abandons the ship to the underwriters on ship, and is justified in so doing, for after such abandonment he has no longer the means of earning the freight, or the possibility of ever receiving it if earned, such freight going to the underwriters on ship." The damage amounting, as between the assured and the underwriters, to a

\* 6 M. and G. 792, argued in this House upon a writ of error on July 3rd and 4th, 1848, but not decided when the judgment in this case was given.

total loss, the abandonment did not alter the relative rights of the parties, and the principle of that decision was, that the plaintiff, the owner, was entitled to recover against the underwriters on freight as for a total loss of the freight, because the total loss of the ship carried with it the total loss of the freight, and though the freight was afterwards earned, it did not belong to the owners, but to the underwriters on the ship. If, then, in that case, the freight, though actually earned by the ship after what amounted to a total loss as between the owner and the underwriters on freight, did not belong to the owner, but to the underwriters on the ship, how, in the present case, can the freight earned by the delivery of the cargo after a total loss of the ship, belong to the assured?

In *Case v. Davidson* (5 M. and S. 79, affirmed in the Exchequer Chamber, 2 Brod. and Bing. 379; 5 Moore, 117; 8 Price, 542), the ship was on its voyage, and in the course of earning freight when it was captured. It was abandoned, and by the abandonment became a total loss as between the owner and the underwriters, but that abandonment cannot have greater effect than an actual total loss. In this state of things the ship was re-captured, and earned freight, which was held to belong to the underwriters on the ship, although the owner had abandoned it to the underwriters on the freight. Lord Tenterden says, "I have never [185] heard of an instance in which the assured, after abandoning the ship to the underwriters, has stepped in and claimed the freight as against the underwriters; on the contrary, the practice has been uncontested, that the abandonee has received the freight."

Unless the title of an abandonee, in cases in which abandonment is necessary, is better than the title of an underwriter, upon an actual total loss not requiring abandonment, which cannot be (an optional total loss, made absolute by abandonment, cannot have a greater or a different effect than an actual total loss), these authorities are decisive of the present case, the jury having found an actual total loss.

In putting the case upon this ground, I must not be understood as disregarding other grounds upon which the opinions of the majority of the Judges appear to have been founded, but it is sufficient for the present purpose to rest the judgment upon the most simple principle and most unquestioned authorities; and being satisfied that these grounds are sufficient to support the judgment of the Court of Session, I think it unnecessary to enter into a discussion of points which have occasioned so much difference of opinion in the Court below. I therefore move your Lordships to affirm the interlocutor appealed from, with costs.

I have to state to your Lordships, that my noble and learned friend not now present, Lord Brougham, has communicated to me that, upon considering this case, he has come to the same conclusion that I have, that the interlocutors appealed from should be affirmed.

Interlocutors affirmed, with costs.

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[186] FRANCIS SEWELL COLE,—*Appellant*; THOMAS BIRMINGHAM DALY HENRY SEWELL, and Others,—*Respondents* [Feb. 2, 4, 22, and 23, 1847; August 21, 1848].

[*Mews' Dig.* v. 420; vii. 23, 46; x. 1013, 1015; xii. 991; xiv. 1554, 1561; S.C. 12 Jur. 927; and, below, 2 Con. and L. 344; 4 Dr. and War. 1; 6 Ir. Eq. R. 66. Considered (i) on point as to remoteness in *Abbiss v. Burney*, 1881, 17 Ch. D. 217; *In re Frost*, 1889, 43 Ch. D. 246; *Whitby v. Mitchell*, 1890, 44 Ch. D. 91; and cf. *Monypenny v. Dering*, 1852, 2 De G. M. and G. 168; (ii) as to "survivor or survivors," in *In re Palmer's Settlement Trusts*, 1875, L.R. 19 Eq. 325.]

*Deed of Settlement—Limitations—Contingent remainder—"Survivors and survivor"—Construction of Deeds—Effect of Recitals.*

Lands, held in fee simple, were, by settlement made in 1752, conveyed to trustees, to the use of the settlor for life; remainder to the use of his three daughters for their lives, as tenants in common; remainder to the use of trustees to preserve; remainder, as to the share of each daughter, to the use of her first

and other sons successively in tail male; remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor, during their or her respective lives or life, as tenants in common in case of two survivors, with remainder, in like manner as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male; remainder, in case all the daughters should die without issue male, as to the share of each, to the use of their daughters as tenants in common in tail; and in case one or two of the settlor's daughters should die *without issue*, the share or shares of such daughter or daughters, to go to the use of the daughters of the survivors or survivor, as tenants in common in tail general; and in case all three should die without issue, then remainder over, with ultimate remainder to the use of the settlor in fee. He died soon after without disposing of the reversion:—

Held, that the limitation, in case of the failure of issue, generally, of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and therefore not void for remoteness:

And also, that the words "survivors or survivor" were to be read "others or other," and, consequently, the limitation over to the daughters of one of the settlor's daughters, who had issue, was not defeated by the death of that daughter in the lifetime of another, who subsequently died without issue, but that limitation took effect as a good cross-remainder.

One only of the settlor's daughters had issue, four daughters and no son; L. E. S., one of the four, in 1779, while her sisters, mother, and aunts were living, executed a post-nuptial settlement, which recited the said deed of 1752—and another of 1749, under which she was entitled to a vested estate tail in lands called the B. estate, on the death of her father—and that she was entitled in remainder or reversion, expectant and to take effect in possession on the determination of certain prior estates, to several parts of lands in the deed of 1752 mentioned. It also recited a post-nuptial settlement of 1776, in which were recited L. E. S.'s title to certain shares in remainder or reversion expectant, etc., and her desire to limit and assure the same, and that it was thereby witnessed, that in order to bar the estates in remainder or reversion expectant and to take effect in possession as aforesaid, *then vested in her*, but without prejudice to the prior estates, she and her husband covenanted to levy fines of her said undivided shares in remainder, to enure to these uses, namely, that the trustee should, out of the hereditaments comprised in the deeds of 1749 and 1752, *first falling into possession*, take an annuity of £300, and out of those *next falling into possession*, a similar annuity, both being for L. E. S.'s separate use, and, subject thereto, to the use of her husband for life, remainder to herself in fee. It further recited that no fines were levied under the deed of 1776, and that L. E. S. was desirous of securing payment of certain debts, and, subject thereto, of settling the said remainders and reversions expectant and to take effect as aforesaid, for the benefit of her two children, and had agreed to settle the same, and all her right and interest in the premises, to the uses thereafter mentioned; and it was, by the deed of 1779, witnessed that, in order to bar the estate tail in remainder or reversion expectant upon and to take effect as aforesaid, *then vested in L. E. S.* in the hereditaments comprised in the deeds of 1749 and 1752, without prejudice to the prior estates, the said L. E. S. and her husband covenanted to levy fines of all her undivided shares in remainder or reversion expectant, and to take effect as aforesaid in the said hereditaments, to enure to trustees for 1000 years, to raise the amount of the aforesaid debts; remainder to other trustees for 1500 years, to raise £5000 for L. E. S.; remainder to other trustees for 2000 years to raise an annuity of £100 out of the lands *first falling into possession*, and a similar annuity out of those *next falling into possession* for maintenance of her only son; remainder to trustees for 3000 years, to raise £3000 for her only daughter; remainder to the use of the son and his issue, in strict settlement; remainder to the use of the daughter and her daughters in tail:—

Held; that all the estates and interests, contingent as well as vested, in the lands

to which L. E. S. was entitled under the limitations of the deed of 1752, passed and were bound by the deed of 1779, and the fines that were levied in pursuance thereof.

The settlor's three daughters died—one in 1784, *s.p.*, another, the mother of L. E. S., in 1793, the third, in 1799, *s.p.*—all intestate and without having disposed of the reversion [188] vested in them by descent. One of L. E. S.'s sisters died in 1788, intestate and without issue. In 1809 one-third of the lands comprised in the deed of 1752 was, on partition, allotted to L. E. S., and by a decree for sale made in 1820, in a suit instituted against her by the trustees of the term of 1000 years comprised in the deed of 1779, it was declared that the whole of the one-third so allotted was subject to the trusts of the term, and bound by that deed, and the fines levied in pursuance thereof. By a deed executed in 1825, it was witnessed that for barring all estates tail therein mentioned, and settling the lands therein comprised, L. E. S. and her husband and a trustee of the deed of 1779, conveyed all the said one-third part, so allotted in severalty to L. E. S. as aforesaid, and also her undivided third part of the B. estate (which had then by the death of her father come into possession) to a trustee, that recoveries might be suffered of the said lands, and it was covenanted that they should enure, as to such of the said undivided parts as were comprised in the deed of 1779, to the uses therein mentioned, and in confirmation thereof and of the term of 1000 years; and—after reciting that three specified denominations of lands of which L. E. S. was stated to be seized in tail in remainder, at the date of the deed of 1779, were not comprised therein or in the fines levied in pursuance thereof, and reciting the said suit and decree for sale therein made, and that L. E. S. had agreed to make the said denominations subject to the said term—it was further agreed and declared that the said recoveries should enure to confirm the sale of the said three denominations for the said term, and to give validity to the said decree, and, subject to the said term, to such uses as L. E. S. should appoint, and, as to the lands comprised in the deed of 1779, to such further uses as had not been thereby declared concerning the same, as L. E. S. should by deed or will appoint:—

Held, that by this deed, and the recoveries suffered in pursuance thereof, the whole of the lands allotted in severalty to L. E. S. on the partition, except the said three denominations, were made subject to the uses of the deed of 1779.

This was an appeal from a decree of Sir Edward Sugden, Lord Chancellor of Ireland (1 Drury and Warren, 1; see also 5 Irish Law Rep. 190).

Peter Daly, formerly of Quansbury, in the county of Galway, Esq., being in, and previously to, the year [189] 1752, seized in fee simple of several towns and lands called "the Quansbury" or "Daly estate," conveyed the same by lease and release, dated respectively the 4th and 5th of February, 1752, unto Thomas Lord Athenry and James Daly, and their heirs, to the use of him, Peter Daly, for his life, with remainder,—subject to a trust term thereby created and long since satisfied,—to the use of his three daughters, Honoria, wife of Viscount Kingsland, Anastasia, wife of Charles Daly, afterwards the Earl of Kerry, and Margaretta, wife of the said Thomas Lord Athenry, for their respective lives, as tenants in common, with the usual limitation to trustees to preserve contingent remainders, with remainders respectively, to the use of the respective first and other sons of the said Honoria, Anastasia, and Margaretta, severally and successively in tail male; and if any one or two of the said daughters of Peter Daly should die without issue male of her or their body or bodies, then, as to such part or parts of the said lands and premises of her or them so dying without male issue, to the use of the survivors or survivor of the said Honoria, Anastasia, and Margaretta, as tenants in common in case of two survivors, during the respective lives or life of such survivors or survivor, with the usual limitations to trustees to preserve contingent remainders, with remainders to the use of the respective first and other sons of such survivors or survivor severally and successively in tail male; and in case the said Honoria, Anastasia, and Margaretta should die without issue male, then, as to their respective shares and proportions of the said lands and premises, to the use of all and every their respective daughters, as tenants in



common in tail of the respective shares of their respective mothers: And in case [190] one or two of the said daughters of Peter Daly should die *without issue* of her or their body or bodies, then, as to the share or shares of the said lands and premise of such daughter or daughters so dying *without issue*, to the use of all and every th daughters and daughter of such survivors or survivor, as tenants in common in tail of the respective shares of such survivors, in case of two survivors, and to the use of the daughter and daughters of such survivor, in case there should be but one survivor, as tenants in common in tail;” and in case the said Honoria, Anastasia, and Margaretta should die *without issue*, then, after divers remainders over, with ultimate remainder to the right heirs of the said Peter Daly.

Peter Daly died soon after the date of the said deed, intestate, and without having, by deed or otherwise, disposed of his said reversion in fee in the Daly Estate, leaving his said three daughters his only issue and co-heiresses surviving.

Honoria, Viscountess Kingsland, and Anastasia, Countess of Kerry, never had any issue.

Margaretta, Lady Athenry,—who became Countess of Louth on the advancement of Lord Athenry to that dignity,—had four daughters, Matilda, Mary, Elizabeth, and Louisa, and no other issue.

Lady Matilda Birmingham died in 1788, in her mother’s lifetime, unmarried and intestate.

Lady Mary Birmingham married Viscount St. Lawrence, afterwards Earl of Howth, and had issue four daughters and no son.

Lady Elizabeth Birmingham was married three times, first, to Thomas Bailey Heath Sewell, by whom she had one son, Thomas Birmingham Daly Henry Sewell (the respondent), and one daughter, [191] Elizabeth Blake Sewell (mother of the appellant). Lady Elizabeth married secondly Michael Duffield, and thirdly, Joseph Russell, but had no issue by either of them.

Lady Louisa Birmingham was twice married, first to Lord Wallscourt, afterwards to James Daly, but had no issue by either.

By a deed, dated the 23d of February, 1779, and made between the said T. B. H. Sewell and Lady Elizabeth his wife, of the first part, and several sets of trustees, of the other parts—after reciting certain indentures, dated respectively the 29th and 30th of December, 1742, and made on the marriage of Thomas Lord Athenry, afterwards Earl of Louth, with the said Margaretta, daughter of Peter Daly, by which certain estates, called the “Birmingham Estate,” stood, in the events which happened, limited to the said daughters of the said Thomas and Margaretta, Earl and Countess of Louth, as tenants in common in tail; and that by virtue thereof and of the herein-before stated indentures of the 4th and 5th of February, 1752, and other assurances in the law, the said Lady Elizabeth Sewell was seised or entitled in remainder or reversion expectant upon and to take effect in possession, after the determination of certain prior uses, estates, and limitations, of or to several parts, shares, and pur parties of and in the towns, lands, and hereditaments thereafter particularly mentioned, (being the said Birmingham and Daly estates respectively); and also reciting that by an indenture, dated the 15th of June, 1776, and made between the said T. B. H. Sewell and Lady Elizabeth his wife, of the one part, and M. Lewis of the other,—which [192] recited the said title of Lady Elizabeth, and her desire to settle and assure her said parts or shares in remainder or reversion in the said lands,—it was witnessed that for carrying the said desire into execution, and in order to bar the estate in remainder or reversion expectant and to take effect as aforesaid, then vested in her, of the said shares of the said hereditaments, but without prejudice to the uses or limitations precedent to the said remainders or reversions, the said T. B. H. Sewell and Lady Elizabeth covenanted to levy a fine or fines of her said parts or shares in remainder or reversion, and that such fine or fines should enure to these uses, viz., that so soon as the hereditaments comprised in the said settlements of 1749 and 1752 should fall into possession by the determination of the prior estates therein respectively mentioned, Lewis (the trustee of the inheritance), his heirs and assigns, should yearly, during the joint lives of the said T. B. H. Sewell and Lady Elizabeth, take out of the hereditaments which should first fall into possession a rent charge of £300 per annum, and also out of the other hereditaments which should next fall into possession, the further rent charge of £300 per annum, to be paid to Lady Elizabeth for her separate use, and, subject to said annuities, to the use of T. B. H.

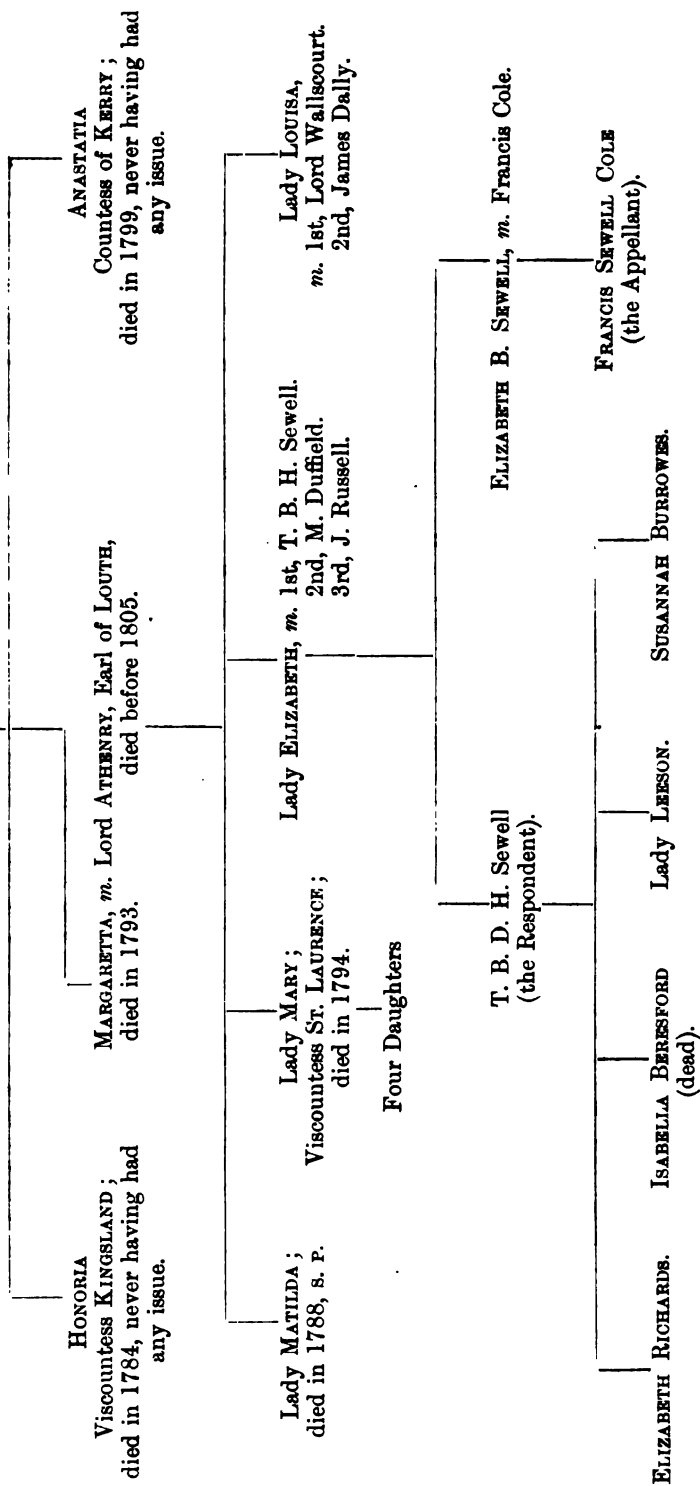
Sewell for his life, with remainder to the use of Lady Elizabeth and the heirs of her body; and further reciting that no fine had been levied in pursuance of the said indenture; and then reciting that Lady Elizabeth Sewell, being desirous to secure payment of certain scheduled debts of T. B. H. Sewell, the greater part of which had been contracted on her own account, and to make some provision for her said son and daughter, and, subject thereto, to settle and [193] assure the said remainders or reversions expectant and to take effect as aforesaid, of her said parts, shares, and purparties of and in the said estates, for the benefit of her said children, and such other children as she might thereafter have, she therefore, with the consent of her said husband, proposed and agreed to settle and assure the same, and all her right and interest in the premises, to the uses thereafter declared—it was witnessed, that in order to carry such intention into execution, and to bar the estate tail in remainder or reversion expectant upon and to take effect as aforesaid, *then vested in her* (Lady Elizabeth) in the hereditaments comprised in the said deeds of 1749 and 1752, without prejudice to the uses, limitations, or charges precedent to the said *remainder or reversion expectant or to take effect as aforesaid, then vested in her* (except the uses of the deed 1776, which were thereby relinquished), and to the intent that the said remainders or reversions expectant upon, and to take effect as aforesaid, of or belonging to the said Lady Elizabeth, in the said lands, but subject and without prejudice as aforesaid, might be limited and assured to the uses, and subject to the agreements thereafter declared, the said Thomas B. H. Sewell and Lady Elizabeth Sewell covenanted to levy fines of all her undivided shares in remainder or reversion expectant and to take effect as aforesaid, and all the rights, estates, and interests of her, Lady Elizabeth, and of the said T. B. H. Sewell, in her right, in the said Birmingham and Daly estates; and it was declared that the said fines and other assurances then had, or thereafter to be had, should, as to the parts, shares, estates, and interests of Lady Elizabeth in remainder or reversion, expectant and to take effect in [194] possession as aforesaid of and in the said hereditaments and premises thereinbefore particularly mentioned, enure to the use of trustees for a term of 1000 years, upon trust to raise £6547, to be applied in the payment of the said scheduled debts of T. B. H. Sewell, and, subject thereto, to the use of other trustees for a term of 1500 years, to raise £5000 for Lady Elizabeth Sewell, for her separate use, and, subject thereto, to the use of other trustees for a term of 2000 years, to raise an annuity of £100 out of the lands which should first fall into possession, and a further annuity of £100 out of the lands which should next fall into possession, to be payable during the joint lives of T. B. H. Sewell and Lady Elizabeth, for maintenance of their son T. B. D. H. Sewell during his minority; and, subject to the said three terms and the trusts thereof, to the use of Edward Nicholas, his heirs and assigns, during the life, and in trust for the separate use of, Lady Elizabeth Sewell, with remainder to the use of other trustees, for a term of 3000 years from her decease, upon trusts to raise £3000 for the portion of Elizabeth Blake Sewell, and £4000 for any other younger children of Lady Elizabeth Sewell; and subject thereto to the use of T. B. D. H. Sewell (the said son), for his life, with remainder to a trustee to preserve, etc.; remainder to the use of the first and other sons of the said T. B. D. H. Sewell severally and successively, in tail, with remainder to the use of all his daughters as tenants in common in tail, with cross-remainders between them, and remainders over. And T. B. H. Sewell covenanted that in case Lady Elizabeth Sewell and her said two children, and all other children whom she might thereafter have, should die without issue, before the [195] said Earl of Louth, or before the death of the survivor of the said Margaretta, Honoria, and Anastasia, so that the term of 1000 years could not vest in possession in the trustees thereof, then he (T. B. H. Sewell) should pay the said scheduled debts.

In the term next after the execution of this indenture, fines were levied in pursuance thereof by T. B. H. Sewell and Lady Elizabeth, his wife, of all the lands comprised in the deeds of 1749 and 1752.

Honoria Viscountess Kingsland died in 1784; Margaretta Countess of Louth died in 1793; and Anastasia Countess of Kerry died in 1799; all intestate, and without having made any disposition of the reversion in fee in the Daly Estate, vested in them by descent as before mentioned, which, consequently, upon the death of the survivor of the three, vested in Lady Elizabeth Sewell, and in her then sole sur-

[196]

Peter Daly.



Two daughters.—[These five are respondents.]

viving sister, Lady Wallscourt, and in the four daughters of Lady St. Lawrence, Countess of Howth, who died in 1794, as co-parceners in fee simple and the then co-heiresses of the said Peter Daly, and also of his three daughters. (See pedigree, p. 196.)

A suit having been instituted in 1805 for a partition of the Daly Estate, a decree was accordingly made therein, and by an indenture dated the 30th of September, 1809, one third part thereof, decreed and allotted to Lady Elizabeth (then Duffield) in severalty, was conveyed to a trustee, to hold upon the same trusts and purposes, on which her undivided third part of the same estate theretofore stood limited.

A bill was filed in 1812 by T. Lancray and others, representatives of the surviving trustee of the term of [197] 1000 years, created by the deed of 1779, against Lady Elizabeth (then Duffield) and her son (the respondent) and his children and others, for sale of the lands comprised in that term, for payment of the scheduled debts thereby secured. The plaintiffs made claim to the whole of the lands allotted to Lady Elizabeth in severalty, as comprised in the said term. Lady Elizabeth, by her answer, insisted that one-fourth only of the one-third of the Daly Estate was affected by the trusts of the deed of 1779, but the Master, in pursuance of an inquiry directed before him, reported that the said trust term extended over the whole of the one-third. That report, unexcepted to, was confirmed, and a decree was pronounced in July 1820, for the sale of the whole, or a competent part, of the one-third of the Daly Estate which had been allotted to Lady Elizabeth, and parts thereof were accordingly sold for the residue of the said term, for the purposes of the trusts thereof.

Doubts having arisen whether the town lands of Clooncony, Cloonfagny, and Dereen, which were among the lands sold, were included in the deed of 1779 and in the term of 1000 years, by a deed dated January 1825, Lady Elizabeth and her then husband Joseph Russell, conveyed the whole of Lady Elizabeth's one-third part of the Daly Estate allotted to her in the partition, and also her one undivided third part of the Birmingham Estate, to Henry Maxwell Miller, as tenant to the *precipe*, in order that recoveries might be suffered, and it was thereby declared that such recoveries should enure, as to such of the said several divided and undivided parts, shares, purparties, lands, hereditaments and premises as were com-[198]-prised in the deed of 1779, to the uses and for the estates therein declared and in confirmation thereof and of the term of 1000 years in particular; and after reciting that the said three town lands, of which Lady Elizabeth was, at the time of the execution of the indenture of 1779, seised or entitled unto in tail, in remainder, or otherwise, were not comprised therein; and reciting the proceedings in the said suit of *Lancray v. Duffield* and others, and that Lady Elizabeth had agreed to make the said three town lands subject to the said term; it was (by the deed of 1825) further declared that the said recoveries should enure, as to the said town lands, to the use of the trustees of the said term, for the trusts and purposes of raising payment of the said scheduled debts pursuant to the decree in the said suit, and to give effect thereto and to the proceedings thereunder and to any sale that had taken place; and from the determination of the said term, and subject thereto, to such further uses, as to the said town lands, as Lady Elizabeth should by deed or will appoint; and as to all the lands and hereditaments comprised in the deed of 1779, to such further uses as had not been thereby declared concerning the same, as the said Lady Elizabeth should by deed or will appoint.

Two recoveries were, in pursuance of this deed, duly suffered by Lady Elizabeth and Joseph Russell. The monies produced by the lands sold were applied in discharging the said scheduled debts, and the term of 1000 years was determined as to the other lands comprised in the deed of 1779.

A partition was made of the Birmingham Estate in 1834, and one third part thereof, the share of Lady Elizabeth Russell, was conveyed to the uses of the deed of 1779.

[199] Lady Elizabeth, having survived her husband, J. Russell, died in 1838, having, by her will, dated August 1834, devised all her real estates in fee to her grandson, Francis Sewell Cole (the appellant), the only child of Elizabeth Blake Sewell.

In 1840, F. S. Cole filed his bill in Chancery in Ireland, claiming under the said devise three fourths of the whole of Lady Elizabeth Russell's one third share of the Daly Estate, against the respondents, namely, T. B. D. H. Sewell and his three daughters, and the children of a deceased daughter (see pedigree, *supra*, p. 196).

and other persons who were interested under the trusts of the terms of 1500 years and 3000 years created by the deed of 1779.

The bill stated, among other things, the deeds of 1752 and 1779, and that the latter and the fines levied in pursuance thereof did not affect any other interests in the said estates than such as were then vested in Lady Elizabeth Sewell, namely, one fourth of her mother's one third share; that in consequence of the deaths of persons, as before mentioned, Lady Elizabeth was, at the time of the execution of the deed of partition, in 1809, entitled to one-third of the land comprised in the deed of 1752, and the estate and interest which she had in the entirety of the one-third allotted to her by the partition and previous to the sale under the decree in *Lancray v. Duffield and others*, was three fourth parts thereof in fee simple, the remaining fourth part being subject to the term of 1000 years, and the other trusts of the deed of 1779; that the part sold under the said decree was considerably more than one fourth of the share of the Daly estate allotted to Lady Elizabeth, and, consequently, part of her undivided three-fourths of a third share was sold in exoneration of a competent part of the Birmingham estate from the trusts of the said term, the said three-fourths not being at all subject thereto. The bill, after submitting that Lady Elizabeth, at the time and in consequence of the said sale, became entitled to the residue of the one-third of the Daly estate allotted to her in the partition, and the same passed to the plaintiff under her will, prayed that the will might be established, and that directions might be given to ascertain what portion (if any) beyond the one fourth of the one third of the Daly estate, was sold under the said decree, and that the plaintiff might be declared entitled, as devisee of Lady Elizabeth, to an estate in fee simple, in severalty, in an equivalent portion of certain lands, part of the Daly estate, comprised in the decree for sale, but remaining unsold, and that he might be declared entitled in fee simple to and be put in possession of three fourth parts of the whole one third of the Daly estate.

The respondents, by their answers, submitted that the whole of the one third of the Daly estate, allotted in severalty to Lady Elizabeth, was comprised in the settlement of 1779, and that she had no disposing power at her death over any of the lands that remained unsold, and they referred to the proceedings and decrees in the partition suit and in the cause of *Lancray v. Duffield and others*, and to the deed of January 1825, and the recoveries then settled as conclusive against the appellant's case.

Upon the hearing of the cause in June 1842, an order was made by Lord Chancellor Sugden, for sending a case for the opinion of the Judges of the Court of Common Pleas, upon three questions therein stated. [201] These learned Judges, after hearing the case argued, certified their opinions (see 5 Ir. Law Rep. 190):

*First*, that at the time of the execution of the settlement of the 23d of February, 1779, Lady Elizabeth Sewell was entitled, under and by virtue of the limitations of the settlement of the 5th of February, 1752, to a vested remainder in tail in one fourth of her mother Lady Louth's one third of the Daly estate, expectant upon the decease of her mother without issue male, and of her aunts, without issue, and to a contingent remainder in tail in one fourth of each of the respective one thirds of her aunts Lady Kerry and Lady Kingsland of the said Daly estate, expectant upon their decease respectively without issue, and the decease of Lady Louth without issue male.

*Secondly*, having regard to the settlements of the 30th of December 1749, and the 5th of February, 1752, they were of opinion that all the estates and interests, to which the said Lady Elizabeth was so entitled under the limitations of the settlement of 1752, passed under and were bound by the settlement of 23d February, 1779, and the fines levied in pursuance thereof.

*Thirdly*, that the whole of the one third of the Daly Estate, which was allotted in severalty to Lady Elizabeth by partition (save only the three omitted town lands) was limited and made subject to the uses of the settlement of the 23d of February, 1779, by the deed of the 1st of January, 1825, and the recoveries suffered in pursuance thereof.

The cause was again heard before the Lord Chancellor, on this certificate and for further directions, in April 1843, when his Lordship, adopting the opinions of the Judges, decreed that the bill be dismissed (4 Dru. and War. 1).

[202] The appeal was brought against that decree.

Mr. Turner and Mr. Malins for the appellant:

The appellant claims, as general devisee of Lady Elizabeth Sewell, to be entitled in fee simple to three fourths of a third of the Daly estate; another one fourth of one-third, in which she took, under the valid limitations of the settlement of 1752, a vested estate tail in remainder, expectant on the determination of prior estates, passed and was bound by the deed of 1779, and the fines that were then levied. There is no dispute about that part; but, as to the other parts or shares of Lady Elizabeth in the Daly estate, the appellant has to contend that she took them by descent as one of the co-heiresses of Peter Daly, and of his three daughters, and not by virtue of the limitations of the settlement of 1752.

The first question is, as to the validity of those limitations. It is admitted that they are valid down to the limitation over, "and in case one or two of the said daughters of Peter Daly," etc. (*vide supra*, pp. 189 and 190), "and in case" all of them died *without issue*, which is void, as tending to a perpetuity; because the preceding valid limitations to the first and other sons of the daughters and the heirs male of their respective bodies, might be exhausted, without exhausting their issue; as, for instance, the first and other sons might have daughters, who or whose descendants could not take under the preceding limitation, yet while they or their descendants lived, the limitation over, on general failure of issue, could not take effect, and therefore it was void for remoteness. It is no answer to say that, in the [203] events which happened, there was no infringement on the rule against remoteness; the limitation must be valid in its creation, and not because the event has accidentally happened (*Tollemache v. Coventry*, 2 Cl. and Fin. 626); as Lord Lyndhurst said in the late case of *Lord Dungannon v. Smith* (12 Cl. and Fin. 623), "unless it is absolutely certain that the event must happen within the period prescribed, it is quite clear that the rule of remoteness applies."

It will be argued here, as it was in the Courts of Chancery and Common Pleas in Ireland, that this limitation over was not a springing or secondary use, as the appellant contends, but a contingent remainder, and therefore there was no violation of the rule against perpetuities, because such remainders may be barred by the tenants of the preceding particular estates. The only authority in support of that argument is the case of *Jack v. Fetherstone* (2 Huds. and B. 320), which certainly resembles this in some respects; but which appears, from the report of Chief Justice Bush's judgment, to have been determined on the particular expressions found in the instrument. The Court of Common Pleas would not permit that decision to be questioned on the argument in this case, considering themselves bound by it as the decision of a Superior Court (the Exchequer Chamber in Ireland); but no such effect can be attributed to it here; in fact it is under appeal in the present case. Sir Edward Sugden, in his judgment, expressed much surprise to hear the objection of remoteness pressed on him, and observed that before the rule against perpetuities was established, "while contingent remainders were the only species of executory estate known, and [204] springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder; but since the establishment of the rule as to perpetuities, no question ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting, or secondary use, not depending on an estate tail, and it is so limited that it may go beyond a life or lives in being, and twenty-one years and a few months, equal to gestation, then it is absolutely void" (4 Dru. and War. p. 28).

That is the position for which the appellant contends in this case. But Sir E. Sugden holds this limitation not to be a springing, shifting, or secondary use, but "one of the most regular technical contingent remainders that can be conceived," and that it falls under Mr. Fearne's second class of contingent remainders (p. 6 (8th ed.)). The process of reasoning by which he arrives at this conclusion is not very clear or satisfactory. The validity or invalidity of a contingent remainder depends on the event on which it is limited; if the event be too remote, the limitation, though taken as a contingent remainder, is void. Mr. Fearne in another part of his book says (p. 502), "that any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold so as to take it out of the description of an executory devise, is by our Courts considered as void in its creation; as in the case of a limita-

tion of lands in succession, first to a person *in esse*, and after his decease to his unborn children, and afterwards the children of such unborn children, this last remainder is absolutely void." [205] Here are limitations first to the daughters for life, then to their sons in *tail male*—under which no daughter of a son could take—next, to the daughters of the daughters in *tail general*, and then, on failure of issue generally of any or all of the daughters, comes this limitation, which might be indefinitely postponed, because it could not take effect while any daughter of a son or any issue of such daughter existed. All the preceding limitations might fail, without general failure of issue. What can remoteness or perpetuity be if that limitation be not one? Such limitation might be got over in wills, but not in deeds. One of the circumstances stated by Fearn, on account of which a limitation intended as a contingent remainder might fail, is "the remote possibility of the contingent event" (Cont. Rem. pp. 248, 250). "It is requisite that the possibility on which a remainder is to depend should be a common possibility, and *potentia propinqua* at death, or death without issue, or coverture, or the like. Therefore, a remainder to a corporation, which is not in being at the time of the limitation, is void, although it be created during the particular estate. So if there be a lease for life, remainder to the heirs of J. S., though this remainder is good, because by common possibility J. S. may die during the particular estate, yet if there be no such person as J. S. at the time of the limitation, notwithstanding that such a person should afterwards be born, and die during the life of the tenant for life, his heir shall not take by virtue of such limitation, because the possibility on which it is to take effect is too remote; for it amounts to the concurrence of two several contingencies not independent and collateral, but the one requiring the [206] previous existence of the other, and yet not necessarily arising out of it." These passages in Fearn apply strictly to the limitation in this case.

The position laid down by the Lord Chancellor of Ireland, that a contingent remainder can never be affected with the vice of remoteness (4 Dru. and War. 28), is not sustainable without qualification; that matter has never received direct judicial adjudication; it is not within the rule of remoteness when it is preceded by a vested estate tail, because that may be barred, and thereby the contingent remainder is destroyed; *Gulliver v. Ashby* (4 Burr. 1929). The rules of law, that no limitation is to be construed to be a shifting or springing use, if it can take effect as a remainder *Carwardine v. Carwardine* (1 Eden, 27); and that a remainder must vest, if at all, during the continuance of the preceding freehold estate, or at the moment of its determination, are not denied; but attempts have been frequently made to limit remainders after several preceding freehold estates, including limitations to persons unborn, so that, as to some of these, the remainders must be too remote; *Hopkins v. Hopkins* (Cas. temp. Talbot, 44; 1 Atk. 580); *Seaward v. Willcock* (5 East, 198). Several examples of the sort are given by Mr. Fearn (Cont. Rem. 251; Ex. Dev. 502), Mr. Preston (2 Abs. 114, 147), Mr. Jarman (On Wills, pp. 226, etc.), and other text writers (Lewis on Perp. 408). The ground on which the Lord Chancellor of Ireland held the limitation in this case to be a good contingent remainder was, that it was supported by an estate tail. But contingent remainders may be created without [207] estates tail to support them. Cases may be put, without end, to shew that the correct rule for judging of the validity of limitations is by looking to the terms of them. When a contingent remainder is created by deed, it is necessary that some time be pointed out by the terms of it when it would take effect, in order to prevent a perpetuity. The instrument creating the contingent remainder should point out the event on which the contingency would depend.

The limitation in this case, depending on the general failure of issue of any of the daughters of Peter Daly, transgresses the rule against perpetuity as much as any of the common examples given to illustrate void limitations: As, if you give an estate for life or in tail to A., and if B. die without issue, then over, which is a void limitation; but if to the words "without issue," be added, "in the lifetime of A.," or other words restrictive of issue, so that the gift over may take effect during the continuance of the estate to A., then it is valid. Even in wills, limitations over, after failure of issue, must be read in the restrictive sense, as by prefixing the word "such" to "issue," to denote the issue before mentioned in the will; *Morse v. Lord Ormonde* (5 Maddock, 99; and 1 Russ. 382), *Ellicombe v. Gompertz* (3 Myl. and Cr. 127). But

there is no case in which such a construction has been put on a similar limitation in a deed, in which not a word can be added or altered. In *Bristow v. Boothby* (2 Sim. and Stu. 465), it was held, that a power created by deed, to take effect after a general failure of issue, the previous limitations not exhausting the whole issue,—just like the present case,—was void for remoteness; and so was a limitation of rents of real estate, after failure of issue of a [208] stranger to the preceding limitations, and behind them; *Hartopp v. Lord Carbery* (1 Sand. Uses, 197); and so is any estate or charge, limited after an indefinite failure of issue, not inheritable under the preceding limitations in the deed; *Lady Lanesborough v. Fox* (Cases temp. Talbot, 262; and Fearn's Ex. Dev. 447 (8th edit.)), *Jones v. Morgan* (Fearn's Ex. Dev. p. 451; and Appendix, No. iii.; also, 7 Bro. P. C. 130), *Lytton v. Lytton* (4 Bro. C. C. 441).

The mistake in the judgment of Lord Chancellor Sugden arose from his attending more to the events that happened than to the terms creating the limitations. An estate is limited, after the life estates of the daughters of Peter Daly, to their first and other sons in tail male, no estate being given to the sons' female issue; but it must have been assumed at the date of the settlement that there would be female issue of the sons, yet, while such issue, or their descendants, male or female, existed, the event,—the failure of issue of Peter Daly's daughters,—on which the limitation over was to take effect, could not possibly happen.

If, for those reasons, the limitation over be void for remoteness, the appellant's right to one-fourth of the Daly estate is perfectly clear, having arisen in this way:—The fee simple of the whole estate, subject to the valid limitations, was reserved to the settlor, on whose death it descended to his three daughters, as co-parceners. On the death of Lady Kingsland, in 1784, without issue, the two survivors took her third share, for their lives, as tenants in common, by virtue of the valid limitations, and they then had the descended reversion in fee in the entirety. The Countess of Louth, one of [209] the survivors, had four daughters, each of whom was entitled, under the settlement, to a vested estate tail in remainder, expectant on their mother's death, in a fourth part of her original third share; but not in the moiety of the other one-third, which accrued to the mother in 1784, and vested in her in fee, in case the limitation over, and the cross-remainders under it, were void. On the death, in 1788, of Lady Louth's eldest daughter without issue, her remainder in one-fourth of the one-third, equal to one-twelfth of the whole Daly estate, vested in Lady Louth, in fee; who therefore, besides having a life estate in a moiety, or six-twelfths, of the whole estate under the settlement of 1752, had also the fee of three-twelfths, which, upon her death in 1793, without disposing of the same, descended to her three surviving daughters, as co-heiresses of her and of Peter Daly, each of them taking one-twelfth in fee. In 1799, upon the death of the countess of Kerry, intestate and without issue, the moiety, or six-twelfths, held by her for life, descended to the three co-heiresses, share and share alike, so that Lady Elizabeth Sewell, one of them, then took three-twelfths altogether, or one-fourth of the Daly estate, in fee simple, which she afterwards devised to the appellant; the other one-twelfth, in which she had a vested remainder in the year 1779, passed by the settlement of that date.

But supposing, without admitting, the limitation, "in case one or two of the daughters of Peter Daly," etc., died "without issue," to be a good contingent remainder, and also to carry cross-remainders in Lady Kingsland's share of the estate among Lady Louth's daughters, still the appellant submits that they could not, under that limitation to the issue of "survivors or survivor," take remainders in the share of Lady [210] Kerry, who was herself the last survivor, there being no gift of the share of a surviving daughter, dying without issue, to the issue of a pre-deceased daughter. Cross remainders are not to be raised in a deed by implication; *Doe v. Dorvell* (5 T. Rep. 518), *Edwards v. Alliston* (4 Russ. 78).

But it may be argued here, as it was argued and decided in the Court below (4 Dru. and War. 22, 23), on the authority of *Doe v. Wainwright* (5 T. Rep. 427), that "survivors and survivor" must be read "others and other." In that case, which is distinguishable from this, the sequel and context of the will and clear indication of the testator's intention required that meaning to be put on the words; they are here manifestly used in their primary and natural sense, the same sense which they naturally bear in the prior limitations to the male issue of the daughters, and which must govern the construction of them in the subsequent limitation. The other is a forced construction, and repugnant to the current of authorities; *Milson v. Audry*



(5 Ves. 465), *Davidson v. Dallas* (14 Ves. 578), *Crowder v. Stone* (3 Russ. 223), *Cromek v. Lumb* (3 You. and C. 565) *Leeming v. Sherratt* (2 Hare, 14). The dictum in *Barlow v. Salter* (17 Ves. 482), holding "survivors" to be "others," does not affect the authority of those cases.

The whole therefore of Lady Kerry's original third share, and also the one-twelfth, which accrued on the death of Lady Matilda Birmingham, in 1788, dropped into the reversion, and all the parts that Lady Elizabeth Sewell took, as co-heiress of her mother and Lady Kerry, were well devised to the appellant.

[211] The next question, in case the limitation over was not void, is as to the effect of the deed of 1779, and the fines that were then levied. That deed, and the fines, could not affect any contingent estate of Lady Elizabeth Sewell. The recitals in the deed expressly referred to the remainder and reversion then vested in her. Her only vested estate at the time being the one-fourth of her mother's share, that was all that was bound by the deed. The fines operated on her vested remainder, but not on her contingent interests in the shares of her aunts. Those interests, although assignable in equity, *Wright v. Wright* (1 Ves. sen. 409); and devisable, *Roe dem. Perry v. Jones* (1 H. Bl. 30), are incapable of alienation in law, *Weale v. Lower* (Pollexf. 54). Mr. Fearne's statement, "that a contingent remainder may, before it vests, be passed by fine, by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency" (Cont. Rem. 365), must be taken in a restricted sense, as in the examples of leases put in Coke's Commentary (Co. Litt. 45 a, 47 b). The Court of Common Pleas in Ireland (5 Ir. L. Rep. 190), and Sir E. Sugden (4 Dru. and War. 19), felt coerced on this point by the case of *Doe v. Oliver* (10 Barn. and Cr. 181). That case was very different from the present case, for in that the party levying the fine had no other interest but the contingent remainder. Where an interest actually passes by fine, estoppel does not apply; *Bensley v. Burdon* (2 Sim. and Stu. 526), *Right v. Bucknell* (2 Barn. and Ad. 278), *Helps v. Hereford* (2 Barn. and Ald. 242), *Doe v. Musgrave* (1 Mann. and Gr. 625). And so where, as here, there was a [212] vested estate tail for the fine to operate upon, the contingent remainders could not pass nor be affected by estoppel—

[The Lord Chancellor.—Notwithstanding that the parties intended to bind all their interests?]

It does not appear that these parties did intend to pass contingent interests. In the recitals in the deed, Lady Elizabeth Sewell's remainder is described, more than once (*supra*, p. 192), as "vested in her;" first, in the recital of the relinquished indenture of 1776, it was witnessed that, "in order to bar the estate in remainder or reversion expectant, and to take effect as aforesaid, then vested in her" (*supra*, p. 192). And in the subsequent recital, that description of her estate is twice used, and it is preserved in the operative part by the words of reference "as aforesaid," which, following "remainder or reversion expectant and to take effect," must be taken to refer to the remainder "then vested in her." The word "vested" was used in contra-distinction to "contingent;" *Russell v. Buchanan* (7 Sim. 628; 2 Cro. and M. 561). The latter word alone would describe Lady Elizabeth's expectant interests in the shares held by her aunts. It is therefore submitted, that one-fourth only of one-third, that is, one-twelfth of the entirety, of the Daly estate, was made subject to the trusts of the deed of 1779.

The next and last question is, what was the effect of the deed of 1825 upon the whole of Lady Elizabeth Sewell's one-third share, then actually vested in her in severalty, in possession. The appellant submits that it did not extend to, or bring within the uses of, the deed of 1779 any estate or interest or possibility that was not comprised in that deed, except the three denominations [213] of land, which were omitted from the enumeration of the hereditaments therein mentioned. The express object of the deed was to correct that omission. They were sold under the decree in *Lancray v. Duffield*, and in order to give the purchaser a clear title, Lady Elizabeth and her then husband conveyed, first, her whole third share, not only of the Daly, but also of the Birmingham estate, to a tenant to the *praecipe*, for the purpose of suffering recoveries to enure "as to such only of the undivided parts or shares as were comprised in the deed of 1779, to the uses thereof, and particularly of the trusts of the term of 1000 years." How can it be contended that, so far the deed of 1825 affected, in the least degree, any other lands or interests of Lady Elizabeth than were

previously subject to the trusts of the term? The deed then recites that three town lands, of which Lady Elizabeth was seised in remainder in tail in 1779, were not comprised in the deed of that date, and that she agreed to make them subject to the trusts of the said term; and it was declared accordingly that the recoveries should, as to those town lands, also enure to the use of the trustees of the term; and subject thereto to such further uses, as to these lands and all the lands comprised in the deed of 1779, as Lady Elizabeth should by deed or will declare. It is quite clear, upon the face of the deed, that it was not the intention of the parties to do more than subject the three omitted denominations of lands to the trusts of the term, and it cannot be construed to operate upon any property that was not before subject to the uses of the deed of 1779. Sir E. Sugden himself expressed, in his judgment (4 Dru. and War. 36), considerable doubt whether any of the [214] deeds affected Lady Elizabeth's portion of her sister Lady Matilda's one-fourth of her mother's third share. It was impossible to comprise that in the deed of 1779, for Matilda was then living, and on her death in 1788, her one-fourth fell into the inheritance. Lady Elizabeth Sewell's portion of that part,—which was one-thirty-sixth part of the Daly estate,—remained unaffected by any of the deeds executed by her, and therefore passed by her will to the appellant; if there were no good cross-remainders created by the limitation over “on the death of any of the settlor's daughters without issue,” in favour of daughters of one, who was not the last survivor, as the appellant contends, then one-twelfth more of the estate passed to him by the will; if the limitation over was void, then one-fourth of the estate passed to him. He would have brought his action, and established his title at law, were it not for the outstanding terms, which compelled him to resort to a Court of Equity.

Mr. Tinney and Mr. Shapter for the respondents.—The claim of the respondents to the whole of Lady Elizabeth Sewell's one-third of the Daly estate has been affirmed by the Court of Common Pleas and the Lord Chancellor of Ireland, both holding that the limitation over in the deed of 1752, was a good contingent remainder; that cross-remainders had been created, not by implication, but by legal construction, and that all the interests Lady Elizabeth had in 1779, contingent as well as vested, were bound by the deed of that date. Supposing that the one-thirty-sixth part, which ultimately devolved on her as her share of her sister Matilda's vested remainder in one-fourth of the one-third, in which her mother had a life estate, [215] was not comprised in the deed of 1779, as Matilda was then living; yet it is submitted, that upon the true construction of the deed of 1825, this part also was made subject to the trusts of the deed of 1779. That was certainly Lord Chancellor Sugden's opinion, although doubtfully expressed in his judgment (4 Dru. and War. 36-7).

The first question raised on the appeal is, whether, after the limitations to the sons and daughters of Peter Daly's daughters,—which did not exhaust their whole issue,—the limitation over, upon the death of any of them without issue, was valid as a contingent remainder. It falls within the second class of contingent remainders as defined by Fearn (Cont. Rem. p. 6), “where some uncertain event, unconnected with and collateral to the preceding estate is, by the nature of the limitation, to precede the remainder.” That definition he illustrates by examples, first, from Coke (Co. Litt. 378), “as if a lease be made to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life; here the event of B.'s dying before A. does not in the least affect the determination of the particular estate; nevertheless it must precede and give effect to C.'s remainder; but such event is dubious; it may or may not happen, and the remainder depending on it is therefore contingent.” Then follows another example taken from Leonard (4 Leon. 237), and equally applicable here.

The contingency, on which the limitation over in this case depends, is the death of the daughters without issue, an event which may or may not happen. That limitation does not derogate from, or in the least de-[216]-gree affect, the prior estates limited to the particular class of issue of the daughters; they continue until their natural determination; the remainder over is to take effect on an event collateral to their determination, viz., death without issue; but the nature of the event is immaterial. The point was decided in the case of *Jack v. Fetherstone* (2 Huds. and Br. 320. Judgment affirmed in this House, 3 Cl. and Fin. 67), in the Irish Courts of King's Bench and Exchequer Chamber, where it was held, that a limitation depending on

a general failure of issue, was a good contingent remainder, and that case is quite in point here. If a limitation, contingent on a collateral event, may take effect as a remainder, it shall operate as a remainder, and not as a shifting use or executory devise; if it can vest in possession during the continuance of the particular estate, or immediately on its termination, it is a good remainder, if not, it fails; *Carwardine v. Carwardine* (1 Eden, 27, 34), Gilbert on Uses (page 173, Sugd. ed.), *Doe v. Morgan* (3 Term Rep. 763).

If this limitation then be a contingent remainder, there is no ground for the objection of remoteness; because, admitting it to be a positive rule of law that an estate cannot be limited to the child of a person unborn, as a purchaser,—which was not attempted in this case,—the rule against remoteness or perpetuity does not apply limitations by way of particular estate and remainder at common law, so as to limit the event on which a legal remainder may be made to depend. Death, therefore, without issue of a person whose male issue only is included in prior limitations, is an event on which a remainder may be made to depend. The limitation over in this case, depending on [217] a general failure of issue of one or more of the daughters of the settlor, was on the execution of the deed creating it a contingent remainder, which would necessarily become vested within the period prescribed by the rule against perpetuity, or would have been preceded by an estate tail vesting in possession within that period. In the former event, the remainder would have become vested within the lawful period in the owners thereof, who might then immediately alienate it, or would have become liable, within the same period, to be barred by the tenant in possession of the preceding estate tail. Mr. Butler, in his edition of Fearn, observes, (p. 523), “that when Mr. Fearn mentions executory limitations being limited to take effect at too remote a period, he must be understood to have in view such executory limitations as are limited on estates in fee simple or terms for years; for, speaking generally, *no period is too remote for the limitation of an executory estate or interest, engrafted on an estate tail previously limited.*” After giving examples of a void limitation of the former kind, and a good limitation of the latter, he says, “the reason is, that a common recovery by a tenant in fee simple will not discharge his estate from an executory limitation engrafted upon it, but an executory limitation engrafted on an estate tail is discharged by the recovery of the tenant in tail; so that where an executory limitation is engrafted on an estate tail, it is always liable to be defeated by the recovery of the tenant in tail, and therefore the remoteness of the event on which it depends does not suspend the absolute ownership of the property so as to effect a perpetuity.” That this was the doctrine of Fearn, is apparent from various other parts of his book; and in that doctrine not only Butler, but other text writers, [218] as Preston (2 On Abstracts, 170), Sanders (1 On Uses, p. 196), Jarman (1 On Wills, p. 223), Lewis (On Perpetuities), concur,—all conveyancers, to whose practice the courts both of law and equity pay great respect,—and to the same effect is the decision in *Nicholls v. Sheffield* (2 Bro. C. C. 215). *Hartopp v. Lord Carbery* (1 Sand. Uses, p. 197), *Tregonwell v. Sydenham* (3 Dow. 194), *Bristow v. Boothby* (2 Sim. and Stu. 465), and *Morse v. Lord Ormonde* (1 Russ. 382), all of which turned on the same point, are distinguishable from the present case. *Hopkins v. Hopkins* (Cas. temp. Hard. 606), does not at all apply. The point there in which Lord Hardwicke erred, was corrected by Mr. Fearn, pointing out the distinction between estates executory and estates executed. Although there is no direct judicial decision that limitations, taken as remainders at common law, may be destroyed by suffering recoveries, it is now too late to struggle against the unanimous opinions, not only of distinguished text writers, but also of eminent Judges, from Lord Nottingham, in the Duke of Norfolk's Case (2 Swanst. 254) called “the case of perpetuities.”\* to Sir Edward Sugden in the present case. [The following cases, and others before mentioned, were cited on this point:—*Burton v. Nichols* (Litt. R. 315; Cro. C. 363), *Doe v. Perryn* (3 T. Rep. 470), *Doe v. Morgan* (id. 763), *Mogg v. Mogg* (1 Meriv. 654), *Phillips v. Deakin* (1 Mau. and S. 744).

[219] The limitation over being valid as a contingent remainder, cross-remainders were thereby well limited among the daughters of Lady Louth, not only as to her original share; but also in the accruing shares of her sisters. The words are, “in

\* For the origin and history of Perpetuities, Lord Bacon's Law Tracts, 145; Co. Litt. 124; Gilb. on Uses, 301; 2 Harg. Jur. Arg., 27; and Lew. Perp., were cited.

case one or two of the daughters of P. Daly" should die without issue, "then, as to the share or shares of such daughter or daughters so dying without issue, to the use of all and every the daughters and daughter of such survivors or survivor, share and share alike, as tenants in common in tail of the respective shares of such survivors in case of two survivors, and to the daughter and daughters of such survivor, in case there be but one." The only objection to that limitation carrying cross-remainders to the daughters of Lady Louth is, that as Lady Kerry was the last survivor, her share could not pass to the daughters of her pre-deceased sister, under the words "survivors and survivor." But it is plain, on the true construction of the deed, and regard being had to the intention of the settlor, and to the manner in which the same words are introduced in a preceding limitation, that these words were not intended to make the contingency of one sister surviving another, a condition essential to the children of that sister taking by way of cross-remainders. The words "survivors and survivor" meant simply "others and other;" they have been so construed in all cases in which such construction became necessary to support the intention of the settlor or testator; *Doe v. Wainwright* (5 T. Rep. 427), *Davidson v. Dallas* (14 Ves. 578), *Barlow v. Salter* (17 Ves. 482), *Curshaw v. Newland* (2 Beav. 145).

The next question is, whether the whole of Lady [220] Elizabeth Sewell's interest in the Daly estate, under the deed of 1752, was bound by the deed of 1779, and the fines levied in pursuance of it. The difficulty, if any there be, on this point, arises from the confusion in the recitals, and from the use of the word "vested." The deed recites, that by virtue of the deeds of 1749 and 1752, Lady Elizabeth Sewell was "seized or entitled in remainder or reversion, expectant and to take effect in possession, after the determination of certain prior uses," etc., of and in both the estates comprised in those deeds. Then follows a recital of the relinquished deed of 1776, and that she being desirous to secure payment of certain debts, and subject thereto to provide for her son and daughter, "and subject thereto to settle and assure the said remainders or recoveries expectant and to take effect as aforesaid, of her said parts, etc., for the benefit of her said children," she therefore proposed and agreed to settle and assure the said parts, etc., "and all her right and interest in the premises, to the uses" after mentioned. These recitals demonstrate an intention to settle all her estates and interests, contingent as well as vested. The use of the word "vested," in the next recital, cannot be held to restrict the generality of the words before used, "in order to carry such intention into execution, and to bar the estate tail in remainder or reversion *expectant* upon and to take effect as aforesaid, *then vested in her.*" Then comes the operative part, by which she and her husband covenanted to levy fines of all her undivided shares in remainder or reversion, expectant and to take effect as aforesaid, and all the rights, estates, and interests of her, Lady Elizabeth, etc. These comprehensive terms, corresponding with the recitals, instead of limiting the operation of the deed to the vested remainder in tail, [221] in the one-fourth of her mother's one-third share, extended to all Lady Elizabeth's interests. The term "vested" has not acquired a technical meaning,—it has been construed to mean "payable;" *Sillick v. Booth* (1 You. and Coll. 124). It is sometimes applied in contra-distinction to contingent, but seems to be used here in apposition to "expectant," to which, when omitted, the word "aforesaid" refers. The word is here used to express "over which she had power of disposing." The remainders of Lady Elizabeth having afterwards fallen into her possession, must be held to have been bound by the fines by way of estoppel; *Weale v. Lower* (Pollexfen, 44); *Vick v. Edwards* (3 P. Wms. 372); *Gilman v. Hoare* (1 Salk. 275); *Doe v. Oliver* (10 Barn. and Cr. 11); 4 Bacon's Abr. (Tit. "Leases (O.)"); Co. Litt. (pages 45 a, 47 b, 252 b); *Binsley v. Burdon* (2 Sim. and Stu. 519), *Right v. Bucknell* (2 Barn. and Ad. 278). The covenant by Mr. Sewell, at the foot of the deed of 1779, shows that he and Lady Elizabeth were dealing with interests not then vested in her (*supra*, p. 194).

It is therefore submitted, that not only Lady Elizabeth Sewell's vested remainder in one-fourth of her mother's one-third share, but also her contingent remainders and interests in two other fourth parts of her two aunts' two-thirds, were bound by the deed of 1779. So that three-twelfths, at least, of the Daly estate, now represented by three-fourths of the third part allotted to Lady Elizabeth in severalty in 1809,—excepting only therefrom her share of what fell in upon the death of her sister Matilda in 1788,—was, upon the [222] execution of the settlement of 1779, bound

thereby. If her contingent interest in the one-twelfth which fell in on Matilda's death, did not also pass under that deed and the fines, it was unquestionably included, together with the other three-twelfths, in the new settlement and declaration of uses made by the deed of 1825, and the recoveries suffered in pursuance thereof. Upon the partition made between Lady Elizabeth and her surviving sisters, under the decree made in 1809, the one-third of the whole estate was allotted to her in severalty, and by indentures then executed, the same was conveyed to trustees, upon the same trusts as her undivided third part of the same estate had before stood limited. In the suit of *Lancray v. Duffield*, instituted in 1812 by the representatives of the trustees of the term in the deed of 1779, for payment of the scheduled debts, they claimed title to the whole of the one-third so allotted to Lady Elizabeth as comprised in that term. She, in her answer, submitted that one-fourth only of the one-third was affected by that deed, but the Master, under an order of reference in that suit, found that the whole of the one-third was subject to the trusts of the term. That report was not excepted to, whence it must be inferred that she acquiesced. The report was accordingly confirmed, and under the decree then made, parts of the one-third were sold. Then came the deed of January 1825, which has been said to have for its object, only to subject to the trusts of the term of 1000 years, and thereby to make a good title to the purchaser of, three town-lands, that were not expressly mentioned in the deed of 1779. But though these were not expressly named in that deed, they were included in other towns lands that were named, and were bound accordingly. Whatever was [223] the object of the deed of 1825, it is plain, from its recitals, and from its peculiar expressions and structure, that it was the intention of the parties to comprise in it two classes of lands, first, the three omitted town-lands, supposed to be unaffected by the deed of 1779, and, secondly, all the rest of the lands which were assumed or intended to be subject to the trusts of that deed, and which were in fact conveyed by this deed of 1825 to the uses of the settlement of 1779. The whole therefore of Lady Elizabeth Sewell's share and interests in the Daly estate, including her share of the part that fell in on Matilda's death, passed to the respondents under that settlement, and nothing remained to be disposed of by her will.

Mr. Turner, in reply.—The argument for the respondents, founded on the cases of *Burton v. Nicholls* (Cro. Car. 363), and *Jack v. Fetherstone* (2 Huds. and Br. 320), and on passages in Preston's Abstracts, and on Butler's note to Fearné (*supra*, pp. 217, 221), "that the limitation over being behind, or engrafted on, an estate tail, previously limited, was a contingent remainder, and therefore not void for remoteness," is answered by the unquestioned authority laid down in Fearné's text before mentioned (*supra*, p. 204), "that any limitation in future or by way of remainder of lands of inheritance, which in its nature tends to a perpetuity, even though there be a preceding vested freehold, etc., is considered as void in its creation." It must have been assumed at the creation of the limitation in the deed of 1752, that the sons of the settlor's daughters would have issue female as well as male, but there was no gift to [224] their female issue, yet while such issue existed, though for centuries, the limitation over, being on the failure of issue generally, could not take effect. This point did not rest on Fearné's authority only, but on numerous decisions, as *Bankes v. Holme* (1 Russ. 394, note) and *Morse v. Lord Ormonde*, *Bristow v. Boothby*, and *Hartopp v. Lord Carbery*, before cited, to which no answer has been given—

[The Lord Chancellor.—Yes; that they are not cases of remainders at all.]

The principle of the decisions, as appeared from the observations of the Judges, is, that unless a limitation be, on the face of the deed, so expressed that it cannot possibly transgress the rule against perpetuities, it is void; it cannot be made good by the happening of the event which is a mere accident, as was said by Lord Lyndhurst in *Lord Dungannon v. Smith* (12 Cl. and Fin. 623).

The appellant never contended that, supposing the limitation to be good, there were not cross-remainders thereby created as to the original shares of the settlor's daughters among their daughters; his position was, that there was no cross-remainders as to the accruing shares, and that the daughters of Lady Louth took no interest by way of cross-remainders in the moiety of a third of the whole estate, in which Lady Kerry, the last survivor, had a life interest, from the time of Lady Kingsland's death, but that it fell into the inheritance. To read "survivor" as "other"

was a forced construction, not warranted by the context of the deed nor by any just inference of the intention of the settlor.

The recitals in the deed of 1779 did not warrant the construction that Lady Elizabeth intended to convey any interests beyond the one-fourth of the one-third, [225] that is, the one-twelfth "then vested" in her. The word "seised," which was also used in the recitals, could not be construed, in a deed, to apply to contingent interests. The argument that her contingent interests also passed by the fines, by way of estoppel, was not sustained by the cases that were cited, of *Lower v. Weale* (Pollexf. 54), and *Vick v. Edwards* (3 P. Wms. 372), according to Fearn's statement of those cases (pages 356, 365). The case of *Rowe v. Power* (2 Bos. and P. 1), in this House, is applicable. There it was held that a contingent interest was not barred by a recovery.

At all events, the appellant must be held entitled to one-thirty-sixth part of the estate which was Lady Elizabeth Sewell's share of the one-twelfth that fell in on the death of Lady Matilda in 1788. That could not be comprised in the deed of 1779, nor in the deed of 1825, as no interest was included in the latter that was not comprised in the former deed, except the three town-lands that were omitted therefrom.

[Mr. Turner, in the course of his reply, again referred to the cases that were cited on the principal points of the case, including some which have not been before mentioned, as *Wilmot v. Wilmot* (8 Ves. 10), and *Winterton v. Crawford* (1 Russ. and Myl. 407), on the word "survivors;" *Doe v. The Earl of Scarborough* (2 Adol. and El. 2 and 41), on the operation of a fine on contingent remainders; *Bagshaw v. Spencer* (2 Atk. 570, 578), on the effect of a recovery suffered; *Vanderplank v. King* (3 Hare, 1), on survivors and on cross-remainders. The reply to the arguments on the effect of es-[226]-toppel is omitted, and the arguments themselves are only touched on in the report, as they were not at all noticed in the judgment.]

The Lord Chancellor (August 21).—In this case the first question is, whether the gift over upon failure of issue of the daughters is too remote.

On the 5th of February, 1752, Peter Daly settled estates upon his three daughters for life, as tenants in common, with remainder to their first and other sons in tail male, respectively; if there were no such heir male to any, then life estates in those shares were given to the survivors, with remainder to their first and other sons in tail male; if all died without issue male, the estates were given to the daughters respectively, as tenants in common in tail general; if any died without issue, they were given to the daughters of the survivors, as tenants in common in tail general; if all died without issue, remainder over.

It is said that this last limitation is too remote, because, there being no previous limitation to issue generally, there might be a failure of all the prior limitations, and yet issue, as in the case of a son of a daughter, might exist, so that this last limitation would not take effect. But if this be a remainder, it would be barrable, and the objection, therefore, would not arise.

The rule is to construe the limitation as a remainder, if possible; *Carwardine v. Carwardine* (1 Eden, 27). What then prevents this being a remainder? Assuming the words to receive their strict construction, the limitation would be this: to each daughter for life, with re-[227]-mainder to the sons of each daughter, if any, in tail male; then, if no sons, to other daughters for life; remainder, if no sons of any, to daughters of the daughters in tail general; remainder to daughters of surviving daughters in tail general. But to this last is added a condition that it is to take place only if there be no issue of the daughters, and not only a failure of sons and daughters. But does the interposing of this condition convert this remainder into a shifting use? In the case of *Jack v. Fetherstone* (2 Hud. and B. 320), decided by the Courts of Common Pleas and Exchequer Chamber in Ireland, it was held that it was a remainder, and rightly so held. The whole is a series of gifts to take effect upon the death of each daughter, or upon the failure of the prior limitations, all of which are estates tail; but the last has a particular contingency attached to it. So had the cases referred to by Sir Edward Sugden in *Fearne* (page 6) and in *Leonard* (vol. 4, page 237). It is therefore a contingent remainder, and barrable; *Nicolls v. Sheffield* (2 Bro. C. C. 215) is in point.

The next question is, whether the daughters of Margaretta, who died in 1793, became entitled under the deed to the share of Anastatia, who died in 1799 without issue; the gift over, in the event of any daughter dying without issue, being to the

use or behoof of the daughter or daughters of such survivor or survivors of the daughters. This is not a question of cross-remainders being implied, for cross-remainders are distinctly given, but the question is, whether upon the construction of such gift, the word "survivor" is not to be construed "other," and I think it is such a case, [228] the intention being clear, that all daughters of any daughter should take the share of any other daughter dying without issue. *Doe v. Wainwright* (5 T. Rep. 427) is directly in point.

Upon the second point I think it clear, that all the estates and interests to which Lady Elizabeth Sewell was entitled under the limitations of the settlement of 1752, passed under and were bound by the settlement of the 23d of February, 1779, and the fines levied in pursuance thereof. The case of *Doe v. Oliver* (10 Barn. and Cr. 181) is decisive.

The last question, as to the effect of the deed and recoveries of 1825, upon the interest in the property, which at the date of the deed of 1779 belonged to Matilda, who did not die till 1788, is certainly one of some difficulty, arising from the fact that in 1825 the true state of Lady Elizabeth Sewell's (then Russell) title does not appear to have been distinctly understood.

In 1809 there was a partition of the Daly Estate, and one-third was decreed to belong to Lady Elizabeth, which was correct, and in 1812 the trustees of a term created by the deed of 1779, filed a bill for raising the money charged upon such term; and upon a reference to the Master to inquire what lands were comprised in that term, the Master reported, in 1820, that the term applied to the whole of the one-third, and a decree accordingly was made for the sale of a sufficient part of such one-third.

With this decision, as to the state of her title to the one-third of the Daly Estate, namely, that it was all comprised in the deed of 1779, Lady Elizabeth, in [229] 1825, suffered recoveries of the property, described in terms comprehending the interest in question, but with the additional description of being comprised in the deed of 1779; and the question now is, whether the share which was vested in Lady Matilda, at the date of the deed of 1779, and was therefore not included in that deed, was affected by the deed of 1825. Upon this subject, I concur in the judgment of Sir Edward Sugden, and with less doubt than he expressed.

The description of the property in the deed is large enough to include every interest therein, and is expressed to be "as to Lady Elizabeth's estate and interest therein," and at that time the estate and interest now in question was in her, and she had been told, by the decree in the partition suit, that the whole of such estate and interest was comprised in the deed of 1779; and this deed of 1825, therefore, so describes it, in addition to the more general description, but that inaccurate description cannot take out of the operation of the deed an estate and interest comprehended in the general description, and which, it is clear, she intended to include in it.

Upon all the points, therefore, I think that the Judges of the Court of Common Pleas in Ireland and Sir Edward Sugden, came to a just conclusion, and that the appeal must be dismissed, with costs.

Lord Brougham.—I entirely agree with my noble and learned friend in the view which he has taken of this case, and I agree also in the certificate of the Court of Common Pleas upon the case sent to them, and in the judgment that was afterwards come to by the learned Lord Chancellor of [230] Ireland upon that certificate being returned, in which the learned Judges expressed their opinion upon the three points referred to them by the Lord Chancellor.

On looking at the learned and able arguments in the Court below, as reported (4 Dru. and War. 1), which I have read carefully, I was a good deal surprised to find that there was a question raised about the remoteness of the limitation. Now, whatever doubt may have arisen in the earlier periods of the learning of the law of contingent uses, whatever confusion of expression, perhaps, rather than of substance, may be found in the reports, giving rise to an impression that there is in such a case a rule similar to the rule with respect to perpetuities in the case of springing uses and executory devises, which, on account of the law respecting perpetuities, may be too remote; whatever difficulty, confusion, or doubt may have arisen in earlier cases as to this, I am quite confident that for upwards of a hundred years the rule has been settled, as will be clearly seen if you search through the

authorities. I have been led to do so from the curiosity of the case, and from seeing that the learned gentlemen, particularly Mr. Serjeant Warren, who argued this case below, raised the point, and, therefore, we would suppose that there must be some foundation for it; I wished, therefore, to trace what that foundation was, because it opened to my mind a new and a strange view of the law, applying that to contingent remainders which I had always understood must be, from the very nature of the thing, confined to springing uses and executory devises: and why? In the case of a contingent remainder, if the limitation is to operate by way of remainder, it must be supported [231] by a preceding particular estate of freehold, an estate for life or an estate tail, and it is absolutely useless unless it is to take effect *eo instanti* that the preceding estate determines; that is the very nature of it, the bond of the existence, if I may so speak, of a contingent remainder.

But then, if I have an estate limited upon a fee, that is to say, an estate to A. and his heirs, and upon the determination of that estate in fee, that is, when the heirs shall cease, then over; that cannot operate by way of remainder; it is quite clear that that is void as a remainder, and it is quite clear that if that is to take effect by way of executory devise or springing use (the only way in which it can take effect) there is no end of it. It may be a perpetuity to all intents and purposes, because if the fee is first limited to A. and his heirs, then, as long as there are heirs, the contingent use, the springing use, or, in the case of a will, the executory devise, cannot come into possession, cannot exist, and cannot be available; consequently, there might be a perpetuity created from the condition of a former use not coming into *esse*, that condition being the general failure of heirs. What is the consequence then? That the law has said, "to prevent the possibility of this perpetuity, we will fix certain bounds, beyond which the limitation shall not take effect." Therefore, there may be an estate given to A. and his heirs; that is a fee; but you cannot limit a remainder upon that. If you give an estate to A. and his heirs, and for want of such issue, or if A. shall die without heirs during the life of B., then over, that will do, that will operate by way of springing use or executory devise, because the life of B. limits the period during which that shall be held *in suspensio*, and that is the origin of the rule. In the same [232] way, I will take the ordinary case of a fee limited upon a fee, that is, a fee to come into use, to come into possession upon the determination of the estate of A. and his heirs, living B.; that prevents the perpetuity, because it limits the period to dying during the life of B.

But suppose another instance of an executory devise or springing use; suppose I give an estate to commence *in futuro* (and a case of that kind is to be found in the books); if there is an estate for life given to A., and one year after to B.; the Courts say, "No; you cannot do that;" and this was the origin of the application of the rule, because if it may be one year after the life estate of A. terminates, it may be a thousand years, and so it might end in a perpetuity. But, however the law has settled that, it must be only for a life or lives in being, and twenty-one years after, and no more. That has been found to be the law first, I think, properly and justly recognised in the Duke of Norfolk's Case (3 Chan. Cas. 1), in the end of the century before the last, but subsequently more effectually recognised in a case which I heard here, when I held the Great Seal. The famous case of *Cadell v. Palmer* (1 Clark and F. 372), in which we had the benefit of the attendance of the learned Judges, and in which, for the first time, it was authoritatively laid down, that without regard to the origin of the rule against perpetuities, you may tie up a bequest by way of executory devise,—and consequently a limitation in a settlement by way of springing use,—for a life or lives in being, and for twenty-one years longer. And as I had often heard ventilated the notion that there could be no such thing as a term in gross, at all, [233] of twenty-one years, I put the question expressly to the learned Judges (and in the judgment I gave in the case, I argued it upon that ground), namely, can there, without the least regard being had to the fact out of which the rule arose (for that is the origin of the rule), without the least regard being had to the fact of the heir of A., the life or last of the lives in being, not being able to cut off or to bar the remainder, by suffering a recovery or levying a fine, till he is twenty-one,—without any regard to that, but supposing there to be no question of the heir at all; supposing there to be no question of levying a fine or suffering a recovery, or barring the remainder over at all, can by law the life or lives in being have the addition of



a term in gross of twenty-one years? The Judges held that that is now the law, whatever may have been its origin. It most clearly arises from a mistake. The law never meant to give a further term of twenty-one years, much less any period of gestation. The law never meant to say that there shall be twenty-one years added to the life or lives in being, and that within those limits you may entail the estate, but what the law meant to say was this: until the heir of the last of the lives in being attains twenty-one, by law a recovery cannot be suffered, and consequently the discontinuance of the estate cannot be effected, and for that reason, says the law, you shall have the twenty-one years added, because that is the fact and not the law, namely, that till a person reached the age of twenty-one he could not cut off the entail. For that reason and in that way it has crept in by degrees; *Communis error facit jus*; and that rule never was applied more accurately than in *Cadell v. Palmer*.

I have said this much upon the ground, and the [234] only ground, upon which this case has been argued. But, my Lords, this is not the case of an executory devise in which any argument against perpetuity on the ground of remoteness can be raised, and the doctrine of remoteness has been therefore, I think, most erroneously imported into this case, with which it can have nothing whatever to do, because it cannot be an executory devise, if it can operate by way of contingent remainder; and there cannot be remoteness created here, because the preceding estates tail are all barable; at all events, you have the most perfect security against a perpetuity ever creeping into it, because if it is a contingent remainder, it must take effect on being barable, and it is gone for ever *eo instanti* that the particular estate arises. The law upon that subject is not confined to the case of *Carwardine v. Carwardine* (1 Eden, 27), which was only decided in 1757 by the very able judgment of Lord Northington, but long before that, it had been understood, and a great deal of learning upon the subject is to be found in former cases; if I recollect rightly, they are mentioned in Saunders, but certainly in Mr. Serjeant Williams' notes to Saunders; and in various cases it has been held, and that is now a great landmark of the law, that whatever use can operate by way of remainder shall never be held to operate by way of executory devise.

My noble and learned friend also called your Lordships' attention to the other point in the case, that is, with respect to the expression "survivor or survivors." Now, certainly I am of opinion that there is no ground for saying, for I have watched it very narrowly, that Lord Eldon threw any discredit upon the doctrine which has been laid down in other cases, viz., that "survivor or survivors" may, regard being had to the circumstances, operate as the word "other" or "others." I find that Lord Eldon, in *Davidson v. Dallas* (14 Ves. 576), is supposed by the learned reporter (but I think most erroneously supposed) to have thrown discredit upon that principle. Sir E. Sugden very justly observes that, though Lord Eldon may have had doubts upon it, he always decided according to it,—he always adopted it,—a thing which I have not unfrequently known to happen to that most able and learned Judge, that though he might carp at a principle which had been recognized, he was very slow in overruling it if it had been once adopted. But on looking into that case I find that what Lord Eldon says, is this, "The Judges of the Court have, under the necessity of construction, had recourse to the reading of "survivors" as "others" instead of "survivors," where the parties have not survived at the time in question, under the pressure of construction, to effectuate the plain meaning of the parties, and that there might not be a complete failure of the accomplishment of that purpose." That is what his Lordship says; but he does not anywhere say that he disapproves of the principle. Now, my Lords, I never saw a case in which that was more completely carried into effect than in the present case, and I entirely agree with my noble and learned friend, who is more clear upon this subject than the learned Lord Chancellor of Ireland. I do not see any reason for the doubt and hesitation with which he seems to have arrived [236] at that conclusion. The only point which I had any doubt about was upon the one-fourth of the one-third, Lady Matilda's portion, but when I come to look at that, it is evident that it would clearly defeat the very design and object and frame of the instrument if you were to open it.

Then it is said in the Court below that this is a settlement and not a will, and what signifies the intention in a settlement? My Lords, there never was a greater fallacy, and I think I must take this opportunity of reprehending the fallacy, of

saying that we are not to construe a settlement or any other instrument *inter viros* in the same way as we should construe a will, but that we are to adopt a totally different rule of construction in the two cases; in other words, that we are to attend to the intention in the case of a will, and not to care for the intention in the case of a settlement. If there are not certain words used which have acquired a technical meaning, it is a different thing; for example, if there are no words of limitation used, you are not to say, there is an estate tail created, but only an estate for life. But it cannot be said that if I give an estate in Blackacre to A., in a settlement, that will not do to carry a fee, that will only be an estate for life, because there are no words of inheritance; but if I give all my estate in Blackacre to A. in a will, that will do to carry the fee. If any one had gone so far as to contend for that proposition, we should have found no great difficulty in disposing of it. But when a man says in his will, "I give all the estate I have to A., now being in the occupation of John Noakes" (which is clearly demonstrative of the nature of the limitation, and is a clear description [237] of the particular property that he meant to give), it is too late to deny or to doubt, and the Courts have so held; and that is now the law, that in a will that carries the fee, without the assistance of words of inheritance, that a fee would pass by "all my estate in Blackacre, farmed by J. Noakes." That would, no doubt, be the case, because there are certain words which have, by technical construction (for it is merely technical), in the case of a will, a certain meaning given to them, which meaning is not given to them in the case of a settlement. I recollect when I was arguing a case before Lord Ellenborough, happening to use the argument of the difference between a deed and a will, and Lord Ellenborough's observation was this, "What? Are we not to look at the meaning of the parties? Are we to make nonsense of the words that they use? Are not we rather to take a construction which effectuates their purpose and accomplishes their object, than a construction which defeats it? Most certainly you are to do so, admitting at the same time the technical difference of the rules in the one case and in the other." You are clearly, said his Lordship, to get at the intention of parties in a deed as well as in a will, though rules have been adopted for getting at their intention differently in a will.

Upon the whole, I entirely agree with my noble and learned friend, that there is no reason for doubt in this case; that the Judges of the Court of Common Pleas, in their certificate, took a sound view of the question, and that your Lordships ought to affirm the judgment of the Court below, which judgment appears to have been given with some hesitation, and with more reluctance, I might say, than my noble and learned friend seemed to entertain, and that hesitation on the part of [238] the Lord Chancellor of Ireland I could not quite understand, and I wanted to look into his edition of Saunders to see whether he had ever committed himself by any opinion he had there expressed; for when persons come upon the Bench, they sometimes feel a little remains of the author about them, as we have seen in more Judges than one, in one case in particular of a late most learned Judge upon Bills of Exchange, who has frequently shown instances of remembering his former statements, perhaps more than we should have wished to have seen, and that, I thought, might have been the case here, but I have not found anything to warrant that impression.

The decree was affirmed, with costs.

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[239] GEORGE BENJAMIN THORNEYCROFT,—*Appellant*; ROBERT CROCKETT. THOMAS GARNIER, and Others, and CHARLES EDWARD RADCLYFFE. and Others,—*Respondents* [March 18, 22, 1847; August 21, 1848].

[*Mews* Dig. iv. 435; ix. 1516, 1748. S.C. 7 Jur. 712; 16 Sim. 445. Followed on point as to account in *Hood v. Easton*, 1856, 2 Giff. 699; and see *Jennings v. Jordan*, 1881, 6 A.C. 705; and as to form of judgment, *Simmons v. Blandy* (1897), 1 Ch. 19.]

*Mortgages; Tacking; Accounts, with rests.*

H. C. mortgaged the entirety of freehold, and part of copyhold, hereditaments

to secure payment of £6500. M. C., who was the owner of two-thirds of the freeholds, received two-thirds of the £6500, and he and his wife joined in collateral securities for payment of the whole sum. H. C. afterwards paid £500 of the mortgage debt, and, subject thereto, conveyed his one-third of the freeholds to secure payment of £1200. M. C. subsequently mortgaged his two-thirds of the freehold hereditaments to secure payment of £2106. The first and last mortgages were assigned to G. B. T., who filed his bill for redemption or foreclosure:—

Held,—affirming the decree of the Vice-Chancellor of England—

1st. That G. B. T. was not entitled to tack the last mortgage to the first:

2nd. That the accounts of the rents and profits of the mortgaged premises, possessed by G. B. T., should be taken against him, with annual rests, if they should be found to have exceeded the interest on the mortgages.

For form of a decree directing successive redemptions or foreclosures, and also splitting the equity of redemption, see p. 245, *infra*.

The separate estate of M. C.'s wife was not affected by her joining in the securities.

Henry Crockett, by an indenture of demise for one thousand years, dated the 11th of December, 1821, mortgaged a freehold estate at Willenhall, in the county of Stafford, to Messrs. Legge, Lloyd, and Woolley, bankers in Birmingham, to secure payment of a loan of £6500, with interest at £5 per cent.; [240] and for further security, he covenanted to surrender to their use his undivided third part of a copyhold estate at Willenhall, subject to redemption on payment of the said sum and interest. By another indenture, of the same date, made between John Murhall Crockett and Frances his wife, and the trustees of their marriage settlement, of the first and second parts, and Legge, Lloyd, and Woolley, of the third part, an annuity of £200, to which the said Frances was entitled for her separate use, during the joint lives of her and her said husband, and their equitable interests in two undivided third parts of the said copyhold estate, limited in their marriage settlement on trust to the husband for life, with remainder to the wife for her life, were assigned and conveyed to Legge, Lloyd, and Woolley, as a collateral security for the repayment of the said sum and interest.

By an indenture, dated the 6th of February, 1822, and made between the said Henry and Murhall Crockett, the former declared that he, his heirs and assigns, did and would stand seised of two third parts of the freehold estate comprised in the said indenture of demise, in trust for the latter, his heirs and assigns, subject to the mortgage and payment of the two thirds of the principal and interest thereby secured: And Murhall Crockett acknowledged that £4333 6s. 8d., being two thirds of the said sum of £6500, had been received by him for his own use and benefit.

In November 1826, Henry Crockett paid £500 of the mortgage debt, and by an indenture of that date, Legge, Lloyd, and Woolley, in consideration thereof, and of £6000 paid to them by Thomas Baldwin, assigned the demised premises to him, his executors, administrators, and assigns, for the residue of the said term; and Henry Crockett covenanted to surrender [241] to the use of him, and his heirs, the copyhold premises comprised in the first mortgage deed of 1821, subject as to both freeholds and copyholds, to redemption, on payment to Baldwin, his executors, etc., of the £6000, with interest at the aforesaid rate. By another indenture of the same date, Mrs. Frances Crockett's annuity, and the equitable life interests of her and her husband, comprised in the said second deed of 1821, were transferred to Baldwin and his heirs for like collateral security, subject to redemption as aforesaid.

By indentures of lease and release, dated respectively the 20th and 21st of May, 1831, and made previous to the marriage of the respondents, Charles Edward Radcliffe, the elder, and Laura, his wife, Henry Crockett's one undivided third part in the freehold premises, comprised in the mortgage deed of 1821, was conveyed, subject to the residue of the term of 1000 years, and to the mortgage debt, to Thomas Garnier, William Garnier, and Antony Chester, and their heirs, in trust to permit Henry Crockett to receive the rents and profits during the life of the said C. E. Radcliffe, and after his death, to raise, by sale or mortgage, such sum of money as, together with the sum that might be actually recovered or received upon three bonds,—one by Henry Crockett, for £3000, the second by him and his brother,

Robert Crockett, for £1999, and the third by Murhall Crockett and his son, for £1000,—and with the sum that would arise from the sale of certain leasehold property of the said C. E. Radclyffe, should make up the principal sum of £12,000; and after such sum should be raised, together with the costs incurred therein, and in the mean time subject to the trusts thereof, in trust for Henry Crockett, his heirs and assigns.

[242] By a memorandum indorsed on the deed of release, and of even date therewith, under the hands and seals of the said Henry Crockett, C. E. Radclyffe, and Laura, and of the Reverend William Garnier, her father, it was declared that it should be lawful for Henry Crockett, his heirs, executors, etc., at any time thereafter, to sell, lease, and dispose of the said one undivided third part, or any part thereof, either in fee simple or for a term of years, the said trustees (the respondents, Thomas Garnier, and others), receiving a moiety of the net proceeds arising from such sale, lease, etc., to be held by them on the trusts of the last-stated indenture of release, and of another indenture of even date, whereby it was declared, that the said trustees were to hold the said sum of £12,000, when recovered, together with the other sums therein mentioned, for the benefit of the respondents, C. E. Radclyffe and Laura his wife, respectively, and after the death of the survivor of them, for the benefit of the child or children of the marriage.

By an indenture of release, dated the 29th of January, 1833 (founded on a lease for a year), to which Henry Crockett, Murhall Crockett, and Frances, his wife, and their eldest son, Molineux Crockett, were parties; and by a recovery suffered in pursuance thereof, Murhall Crockett's two undivided third parts of the freehold premises, comprised in the deed of 1821, were conveyed to George Capes, his heirs and assigns, to hold the same, subject to the residue of the term of 1000 years, and the payment of the said sum of £6000 and interest, to such uses as Murhall Crockett and his said son should, during their joint lives, appoint, as therein mentioned; and in default of such appointment, to the use of Murhall Crockett, [243] for his life, remainder to the uses of the said Molineux Crockett, for his life, with remainder to his heirs and assigns for ever.

Henry Crockett, in April 1833, died intestate and without issue, leaving the respondent, Robert Crockett, his eldest brother, his heir at law and customary heir.

In July 1833, the said trustees (Garnier and others) caused several actions to be brought against Murhall and Molineux Crockett, upon their said bond for £1000, and against Robert Crockett on the bond for £1999, and judgments were obtained, in January 1834, to the amount of the penalties of the bonds. These judgments were registered according to the act 1 and 2 Vict., c. 110, s. 19.

By indentures of lease and release, dated the 7th and 8th of August, 1833, Robert Crockett, as heir of Henry Crockett, and the said Murhall and Molineux Crockett, conveyed Murhall Crockett's said two undivided third parts of the freehold premises, comprised in the first mortgage transferred to Baldwin, subject thereto, to the use of Messrs. Attwood and Spooner, bankers in Birmingham, their heirs and assigns, subject to redemption on payment of £2106 7s. 7d., stated therein to be due to them from Murhall Crockett, with £5 per cent. interest.

This mortgage was, by an indenture of the 16th of January, 1838, assigned to the appellant, his heirs and assigns, in consideration of £800; and by an indenture dated the 18th of the same January, Baldwin, in consideration of £6990 11s. 8d., assigned to the appellant, his heirs and assigns, the principal sum of £6000, due to him on the security of the indenture of November 1826, and £990 11s. 8d., due for interest and costs up to May 1834, and all the covenants of [244] Henry Crockett and others, comprised in the said indenture, for better securing the payment of the said sum. And by another indenture of the same date, Mrs. Frances Crockett's annuity of £200, and her and her husband's equitable life estates in the premises mentioned in the second indenture of the 11th of December, 1821, which had been transferred to Baldwin, were by him assigned to the appellant.

The appellant filed his bill against Robert Crockett, Murhall Crockett, and Frances, his wife, and their son Molineux Crockett, and against the respondents Thomas Garnier and his co-trustees, and their *cestuis que trust*, Mr. and Mrs. Radclyffe and their only child,—and against several others, as against whom the bill was afterwards dismissed with costs, as disclaiming all interest.

The bill, after stating the various indentures and matters before stated, and that Murhall Crockett had been declared an insolvent, and his real and personal estates were vested in assignees, defendants thereto, prayed that accounts might be taken of the principal and interest due on the two mortgages comprised in the indentures of the 16th and 18th of January, 1838, and that what should be found due to the appellant might be paid by the defendants, or some of them, and that in default thereof, they might be foreclosed from all equity of redemption in the mortgaged premises.

The respondent, Robert Crockett, and the defendants Murhall Crockett (who died soon afterwards) and Frances, his wife, and Molineux Crockett, by their answers, admitted the several mortgages and transfers, and that the principal sums of £6000 and £2106, with arrears of interest, were due to the appellant.

The respondents, Thomas Garnier and his co-trus-[245]-tees (except Richard Crockett) and the *cestuis que trust*, E. C. Radclyffe and wife, and their only child, by their answer, after stating the indentures of May 1831, and that they were strangers to the mortgage to Attwood and Spooner in 1833, and also stating the said judgments obtained against Robert, Murhall, and Molineux Crockett, claimed such rights and interests as they might appear entitled to by virtue of the said indentures.

The said Richard Crockett, by his answer, stated that he neither executed nor acted under the indentures of May 1831. (It appeared, by an indorsement on them, that he had formally renounced the trusts.)

The question raised on the hearing of the cause before the Vice-Chancellor of England, in 1842, was, whether the appellant was, as his counsel contended, entitled to tack the mortgage for £2106 to the mortgage for £6000. The respondents Garnier and others, contended that they were entitled to redeem the mortgage for £6000, as the only charge prior to their own on the one-third of the freeholds, without redeeming the mortgage for £2106, which affected the other two-thirds only; and of that opinion was the Vice-Chancellor, by whose decree,—the minutes of which were much discussed before him,—it was ordered that the bill should be dismissed as against Richard Crockett, with costs; and after declaring that the life interest of Mrs. Frances Crockett in the copyholds comprised in the second indenture of December 1831, and her annuity of £200, also comprised therein, were not charged or affected thereby, and that the annuity determined by the death of Murhall Crockett—

IT WAS ORDERED to be referred to the Master, to take an account of what was due to the appellant for principal and in-[246]-terest, in respect of the two mortgage securities, dated the 11th of December, 1821, including so much of a sum of £137 paid by him to the solicitor of Thomas Baldwin, upon the transfer of the mortgage securities, as should appear to have been chargeable on the mortgaged premises: And to take an account of the rents and profits of the premises comprised in the first of the said mortgage securities, and of the said annuity comprised in the second, received by the appellant, or which, without his wilful default, might have been received: And in case the Master should find that the appellant had been in the occupation of the said mortgaged premises, or any part thereof, then it was ordered that he should set a value by way of annual rent thereon, and that the appellant should be charged therewith: And it was ordered that the Master should enquire and state whether the appellant had expended any and what sums in necessary repairs and improvements on the mortgaged premises; and that what he should find to have been so expended should be deducted from what should be coming from the appellant on account of the rents and profits, and annuity and occupation rent; and in case the annual rents and profits, and annuity received by the appellant, after such deduction, and the occupation rent, if any, to be charged, exceeded the interest due on the mortgage securities of December 1821, it was ordered that the Master should make annual rests in taking the said accounts; and that what he should find to be coming from the appellant on account of such rents and profits, annuity and occupation rent, be applied, first, in payment of the interest due on the said mortgage securities, and then in sinking the principal: And it was ordered that the Master should state what should be found due to the appellant for such principal, interest, and costs, after such deduction as aforesaid; and upon the respondents, Thomas Garnier and his co-trustees under the in-

indentures dated the 20th and 21st of May, 1831, and the respondents, C. E. Radclyffe the elder, and Laura, his wife, and E. Radclyffe the younger, or any of them, paying to the appellant what the Master should find due to him for his principal and interest on the said two mortgage securities of December 1821, together with his costs of suit in respect of the same; then it was ordered, that the appellant should convey all [247] the mortgaged premises comprised in the first indenture of December 1821 unto the last named respondents, or such of them as should redeem the appellant; but in default of the respondents, Garnier and his co-trustees, and E. Radclyffe the elder, and his wife, and E. Radclyffe the younger, or some of them, paying the appellant what should be found due to him as aforesaid, together with such costs (by a time mentioned), then it was ordered that the last named respondents should be foreclosed, and in that case, that the Master should compute the appellant his subsequent interest, and take an account of subsequent rents and profits received by him, or which, without his wilful default, might have been received by him, or which, without his wilful default, might have been received, and of occupation rent, and also of what was due to him for principal and interest in respect of his mortgage security of the 7th and 8th of August, 1833: And it was ordered that the Master should distinguish what should be found due to the appellant for principal, interest and costs, in respect of the mortgage securities of December 1821, and divide the same into three equal parts; and upon the respondent, Robert Crockett, paying the appellant what the Master should certify to be one of such third parts; and upon the respondent, Molyneux Crockett, paying him the remaining two third parts, and also what the Master should find due to the appellant for his principal and interest and costs, in respect of the mortgage security of August 1833, then it was ordered that the appellant should convey and surrender the one equal undivided third part of the said freehold premises and the whole of the one-third part of the said copyhold premises, comprised in the mortgage security of 1821, to the respondent, R. Crockett, and the remaining two-third parts, comprised in the mortgaged securities of December 1821 and of August 1833, unto the respondent, Molyneux Crockett, free from incumbrances, and deliver all deeds and writings relating thereto, to the respondents Robert and Molyneux Crockett: but in default of the respondent Robert Crockett paying the appellant such one-third part of the principal, interest, and costs, it was ordered that he should stand foreclosed of all equity of redemption in the mortgaged premises; and in default of the respondent Molyneux Crockett paying to the appellant such two remaining third parts and costs, due in respect of the mortgage securities [248] of December 1821, and what the Master should find due for principal, interest, and costs, in respect of the mortgage security of August 1833, it was ordered that he, Molyneux Crockett, should be foreclosed: But in case the respondents, Garnier and his co-trustees, and C. E. Radclyffe the elder and Laura his wife, and C. E. Radclyffe the younger, or any of them, should redeem the appellant, it was ordered that the Master should take an account of what was due to them for principal and interest on the indentures of May 1831, and compute subsequent interest on what they should pay to the appellant; and upon the appellant paying to the last named respondents what should be due to them, for principal, interest, and costs, it was ordered that the last named respondents should surrender and re-convey the mortgaged premises unto the appellant, free from incumbrances, and deliver up to him all deeds and writings, etc.; but in default of the appellant redeeming them, it was ordered that he should be foreclosed, etc.

The decree then provided for redemption by Robert Crockett and Molyneux Crockett respectively, and, on their default, for foreclosure of them respectively, in similar terms, *mutatis mutandis*, as before stated, having regard to their respective shares and interest in the mortgaged premises; but in case the appellant should redeem Garnier and co-trustees, and Mr. and Mrs. Radclyffe and their son, then it was ordered that the Master should take an account of what might be due to the appellant for principal and interest in respect of the mortgage security of August 1833, and compute subsequent interest on what he should pay the last-named respondents, and take an account of the subsequent rents and profits received by the appellant, or which, without his wilful default, might have been received, and of occupation rent (if any): and the decree thereupon provided for redemption by Robert Crockett and Molyneux Crockett respectively, and on their default, for foreclosure of them respectively, in similar terms, *mutatis mutandis*, as hereinbefore stated, having regard to their re-

spective shares and interests in the mortgaged premises: And in the said decree were contained corresponding directions for taxation of costs, and the usual directions for the production before the Master of all deeds and writings, and for the examination of the parties, and for making them all just [249] allowances, with liberty to apply: And the decree was declared to be binding upon the infant, C. E. Radclyffe the younger, unless he should show cause against the same within six months after he should attain the age of twenty-one.

The appeal was against that decree.

Mr. Turner and Mr. Faber for the appellant:

The decree is erroneous, in the first place, in directing an account to be taken of what the appellant received, or, without wilful default, might have received, of Mrs. Crockett's annuity, inasmuch as it was not averred in the pleadings that he was ever in the receipt of it; and that being only a collateral security, the appellant was not guilty of any default in not recovering it.

The next and principal objection to the decree is, that it lets in the respondents, the Radclyffes, and their trustees under the deed of May 1831,—which constituted a charge only on one undivided third part of the freehold property,—to redeem the appellant's first mortgage, created by the indenture of December 1821, which comprised the entirety of that property, without also redeeming the appellant's second mortgage of December 1833, which comprised the other two undivided parts. The appellant's bill stated a case clearly entitling him to a decree of foreclosure against all the parties interested, unless they, or some of them, paid the principal and interest due on both his mortgages, with his costs of suit. At all events, the respondents, the Radclyffes and their trustees, whose share was confined to the one-third part of the freehold estate, ought not to be admitted to redeem more than that part. The successive redemptions in this very [250] complicated case, should have been directed on the principle of the decree in *Sambroke v. Hanbury and Hollingworth*, splitting the equity of redemption in the first mortgage (Seton's Forms, 162). The case of *Titley v. Davies* (2 Y. and Col. C. C. 399), often referred to as a guide in questions like the present, is quite applicable.

Should this decree however appear right in form, it ought, at all events, to be varied in respect to the direction to take the accounts against the appellant, with annual rests, a direction which is seldom given against a mortgagee in possession, and never except under very special circumstances. There were large arrears of interest due on these mortgages when the appellant got possession. *Davis v. May* (19 Ves. 383), *Latter v. Dashwood* (6 Simons, 462), *Finch v. Brown* (3 Beavan, 70), and *Wilson v. Cluer* (*id.* 136), were cited against the direction.

Mr. Stuart and Mr. T. W. Greene for the respondents, the Garniers and Radclyffes.

Of the points now made by the appellant, one only was argued in the Vice-Chancellor's Court, and that is raised in the appeal case. The decree was drawn up on minutes settled and agreed to after much discussion. The point, as to rests in the accounts, is not raised in the appeal—

[The Lord Chancellor.—Unless it can be shewn that the minutes were settled by consent, there must be something extraordinary in directing an account with annual rests. The appeal however being against the whole decree is large enough to comprise this point.]

Appeals cannot be properly argued, if the points to [251] be made are not put forth openly and fairly in the appeal cases. Besides, this point was not made before the Vice-Chancellor. There was no discussion whatsoever upon it. The registrar drew up the decree in the usual form. The appellant not having drawn the attention of the Court below to this point, ought not to be allowed to raise it now.

The only substantial question between the parties was, and is now, whether the Radclyffes have not a right to redeem the appellant's first mortgage, which is the only charge on the one-third of the estate prior to their own. The appellant has not made any case for tacking, as against these respondents, the mortgage of 1833 to that of December 1821, so as to exclude their intervening security of 1831. That security, although affecting only one undivided third part of the property, is made by the same mortgagor, under the same title as the first mortgage, and as the first mortgagee might have wished that second could not compel him to allow a redemption of one-third of the first mortgage, so the decree properly orders the second mortgage to redeem

the whole first mortgage, and then authorises the appellant to redeem them on payment by him of what should be due on the £6000 and £1200, and the interest respectively: *Bovey v. Skipwith* (1 Ch. Cas. 201), *Ireson v. Denn* (2 Cox, 425), *Palk v. Clinton* (12 Ves. 48, 59). *Tidley v. Davies* (2 You. and Coll. 309), cited for the appellant, is an authority in favour of these respondents.

Mr. Turner, in reply, observed upon the cases cited, saying that *Bovey v. Skipwith* and *Ireson v. Denn* were distinguishable in their circumstances from the [252] present case, and therefore inapplicable; that *Palk v. Lord Clinton*, as far as it had any bearing on that, was an authority in favour of the appellant; and as to *Tidley v. Davies*, it was not only applicable, but decisive of the substantial question in the appeal. The appellant, owner of the first mortgage, comprising the whole freehold estate, should not be compelled to convey the entirety without being paid the principal and interest, with his costs of suit in respect to the second mortgage, which affected two-thirds of the same estate. The Vice-Chancellor's decree proceeded on the very principle for which the appellant contends; for the Radclyffes and their trustees are thereby declared entitled, on paying the first mortgage, to tack to it their charge of £12,000, and to hold the entire estate until payment be made to them of that sum, together with what they should pay in redemption of the first mortgage, and so postpone the appellant's second mortgage on the two-thirds of their charge, which does not affect the two-thirds at all. The principle of the cases is, that the mortgages should be redeemed entire, but if the redemption be split, it should be done by making the Radclyffes redeem one-third of the first mortgage, and then directing Murhall Crockett's representatives to pay what should be still due to him on the first, and the whole of the second mortgage, or be foreclosed as to the two-thirds of the estate.

The Lord Chancellor (August 21).—The result of the several deeds brought under the consideration of the House in this case, appears to be this: that in December 1811. Henry Crockett held one-third of the freeholds for himself, and two-thirds in trust for John Murhall Crockett. Henry Crockett [253] held also one-third of the copyholds: the other two-thirds were settled on John Murhall Crockett by marriage settlement, and subject to an annuity of £200 for Frances his wife, during their joint lives.

On the 11th of December, 1821, there was a mortgage of the whole of the freeholds for one thousand years, and of Henry Crockett's one-third of the copyholds by covenant to surrender, and of the £200 annuity, to secure £6500 to Legge, Lloyd, and Woolley. Of that sum of £6500, £500 was afterwards repaid. On the 11th of November, 1826, Legge, Lloyd, and Woolley transferred the mortgage of £6000, and the other securities, to Thomas Baldwin. On the 18th of January, 1838, the debt then due for principal and interest, amounting to the sum of £6990 16s. 8d., and the securities, were transferred by Baldwin to the appellant, G. B. Thorneycroft.

As to the two-thirds of the freehold which belonged to John Murhall Crockett; on the 29th of January, 1833, he settled these two-thirds, subject to the £6000 mortgage, upon himself and his son, John Molineux Crockett, subject to their joint appointment. On the 24th of August, 1833, an appointment was made under the last deed, to secure £2106 7s. 8d. to Spooner and Attwood, in fee, subject to the £6000 mortgage. On the 16th of January, 1838, Spooner and Attwood assigned their £2106 7s. 8d., and their securities, to the appellant Thorneycroft.

As to Henry Crockett's one third; on the 21st of May, 1831, a marriage settlement of Mr. and Mrs. Radclyffe was executed, by which Henry Crockett conveyed his one-third to Thomas Garnier and others, in fee, upon trust by sale, mortgage, or other disposition thereof, to raise sufficient to make up £12,000 upon [254] the trusts of the settlement. In 1833 Henry Crockett died, and Robert Crockett was his heir.

The appellant, Thorneycroft, being so entitled to the two mortgages of £6000 on the entirety of the freeholds, and of £2106 upon the two-thirds thereof belonging to John Murhall Crockett, by his bill, prayed a foreclosure against all the defendants, as well those who claimed under John Murhall Crockett as those who claimed under Henry Crockett, upon non-payment of what was then due upon both the mortgages; and in support of this claim, he contended that he was entitled to tack the £2106 mortgage to the £6000 mortgage, so as to postpone the charge of £12,000 made upon the one-third of Henry Crockett.

The decree gives preference and priority to the £12,000 charged upon the one-



third of Henry's, and, I think, properly so. The two competing charges of £12,000 and £2106 are not, in fact, charges upon the same property, the first affecting the one-third of Henry, and the second the two-thirds of John Murhall Crockett, and the deed of the 28th of August, 1833, creating the mortgage for £2106, recites the instruments showing that Henry and John Murhall Crockett were interested in the estates mortgaged for the £6000 in the share of one-third and two-thirds, and had received the mortgage money in those proportions, and charges the two-thirds only, and reserves the equity of redemption to John Murhall Crockett and his son. There does not therefore appear to be any ground for the claim to tack this mortgage to the first mortgage of £6000. And the parties interested in the £12,000 charged upon Henry Crockett's one-third, being so far entitled to a portion of the equity of redemption reserved upon the mortgage for £6000, are [255] clearly entitled to redeem the whole of it; for they cannot redeem one-third of it only, as was decided in *Palk v. Lord Clinton* (12 Ves. 48; see p. 59), and if they shall so redeem the £6000 mortgage, or shall not do so, the directions in the decree as to redemption and foreclosure are, I think, according to the course of the Court.

It was indeed said that as the latter parts of the decree provide for redemption and foreclosure in three parts, the first part of the decree ought to have contained a similar provision. But the reason for the difference is obvious. The mortgage for £6000 affected the whole estate, whereas the subsequent charges affected only portions of the interest in the estate which belonged to Henry and Murhall Crockett in thirds.

It was objected that the bill ought not to have been dismissed with costs as against Richard Crockett. But he, by his answer, says that he never executed or acted under the deed of the 21st of May 1831, and it appeared, by an indorsement on the deed under date of the 20th March, 1839, that he had formally renounced. That provision in the decree was therefore perfectly right.

It was further objected that the decree treats the appellant as having been in receipt of the annuity of £200, and directs the account against him accordingly; and it was argued, in support of this objection, that the charge upon the annuity was collateral only. This is not supported by reference to the deed creating the charge; for, on the contrary, it appears to have been a primary charge, and equally so as the other property. And although there may not have been any distinct allegation or proof that any payment of the annuity [256] was received by the mortgagee, yet possession of part, at least, of the property in mortgage by the mortgagee, is not disputed. It was said that this objection was not raised before the Vice-Chancellor, although the minutes of the decree were prepared by the plaintiff, and much discussed in Court: and this applies also to the objection now made to the decree for directing the accounts of receipts by the mortgagee, with annual rests. But such rests are only to be made if the receipts shall be found to exceed the interest due. This is certainly the justice of the case, and is no more than what is done by the decree in another form, by directing that the receipts to be applied should be applied, first, in payment of the interest, and then in sinking the principal. The objection to this direction as to rests is not to be found amongst the reasons for the appeal, and if the plaintiff himself prepared these minutes, and did not raise the question before the Vice-Chancellor, this House would be very reluctant to entertain it now, seeing that the direction does no more than justice between the parties. *Davis v. May* (19 Ves. 383) was cited by the appellant, but it does not appear what were the facts of that case.

I move your Lordship, therefore, that this decree be affirmed, with costs.

The decree was affirmed accordingly, with costs.

[257] ROBERT COLE BOWEN, a Minor, by his Mother and Next Friend,—*Appellant*; JOHN EVANS and Others,—*Respondents* [July 21, 23, 27, 28; August 3, 4, 6, 1846. Sept. 21, 1848].

[*Mews'* Dig. vii. 379; xiv. 1411. S.C., below, 1 Jo. and Lat. 178; 6 Ir. Eq. R. 569. Cited, on point as to purchase under decree, in *Beioley v. Carter*, 1869, L.R. 4 Ch. 238.]

*Purchase under a decree, impeached for fraud, not proved—Lapse of Time—Principles of Equity in case of fraud.*

Upon a bill filed by a remainderman in tail, to set aside a sale of lands, made nearly fifty years before under a decree—in a suit by a judgment creditor, to carry the trusts of a will into execution, and for the administration of the testator's estate—on the ground of irregularities and error in the proceedings, and fraud in the sale:

Held, by the Lords, affirming the decree complained of, that, in the absence of proof of fraud on the part of the purchaser, or that the estate was sold under the value by reason of any corrupt bargain, the sale was not impeachable.

A purchase under a decree, not impeachable when made, cannot become so from any irregularities in the subsequent conduct of the cause, or errors in dealing with the purchase money.

After a long lapse of time since the transactions complained of, there having been parties in *esse* competent to impeach them, fraud is not to be assumed on doubtful evidence; but if it be clearly proved, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of a Court of Equity, and in that case it is immaterial by what machinery or contrivance the fraudulent transactions may have been effected, whether by a decree in equity, or judgment at law, or otherwise.

But in proportion as such jurisdiction is powerful, so ought the caution of the Court to be anxiously exercised, lest, in its zeal to do equity, the reverse may be effected.

This was an appeal from a decree of Sir Edward Sugden, Lord Chancellor of Ireland (see 1 Jones and La Touche, 178, and 6 Ir. Eq. Rep. 569.)

[258] Henry Cole Bowen, by his will, dated in July 1785, devised his real estates,—including the lands of Kilbolane, Bowensford, Meadstown, Carhue, and Garrandrolane, in the county of Cork, and Kilmurry, in the county of Limerick, of all which he was seised in fee simple, and also his freehold estate, held for lives renewable for ever, in the lands of Kilcummer in the county of Cork,—to four persons in the will named, and their heirs, to the use of his eldest son, Henry Cole Bowen, for life, remainder to his first and other sons in tail male, and in default of such issue, to the use of the testator's fourth son, Robert Cole Bowen, for life, with remainder to his first and other sons in tail male; with similar remainders to the fifth, sixth, seventh, eighth and third sons of the testator, and their issue male; and in default of issue male of the sons, to the use of the testator's six daughters (by name), as tenants in common in tail, with an ultimate remainder to his own right heirs.

The testator charged all his estates with portions for his younger children, to be paid to his sons at their respective ages of twenty-one years, and to his daughters upon their attaining that age or marriage, the portions to bear interest at the rate of five per cent. per annum, and no more; and he empowered his trustees to raise the portions, as they should become payable, by sale or mortgage of the estates, or of competent parts thereof; and to raise by like means a sum sufficient to discharge his just debts (which amounted to about £33,000), and he appointed his wife, and the four trustees, executrix and executors of his will.

The testator died in 1788, leaving his wife, and all his fourteen children mentioned in his will, him surviving.

[259] The widow alone proved the will. H. C. Bowen, the eldest son, entered on the receipt of the rents of the devised estates, which were worth £3800 a-year.

Shortly after the testator's death, his eldest son caused the estates to be advertized

for sale, to raise money for payment of the debts, and he entered into agreements for the sale of some of them. Kilbolane producing a rental of £880, he agreed to sell for £19,025, to Mr. George Evans Bruce.

In 1789, Mrs. Catherine Grove, a judgment creditor of the testator for £3500, filed a creditors' bill in the Equity Exchequer in Ireland, for the general administration of his real and personal estates. The testator's eldest son, the widow and executrix, and the younger children, and other persons, including the trustees, who refused to act in the trusts, were made defendants. The bill prayed that, in case the personal property of the testator should not be sufficient to pay his debts, the real estates, or a competent part thereof, might be sold or mortgaged; and that the trustees might be ordered to execute the trusts of the will, or assign the same to trustees to be appointed by the Court.

Answers were put in for all the defendants by one solicitor, Charles Martin, brother of Richard Martin, who was solicitor for the plaintiff, and also law agent for H. C. Bowen, the tenant for life of the estates. An answer was put in for the testator's adult younger children, without oath, by consent of the plaintiff's solicitor, but without leave of the Court. Their names to the answers were not in their handwriting, and one of them, Robert, next remainder man for life, was serving in the army in India at the time, a fact which the bill did not disclose. The answer of such of the children as were minors was put in by their mother and guardian.

[260] In 1793 a decree was made in the cause for carrying the trusts of the will into execution, and it was referred to the Chief Remembrancer to take the usual accounts, and to inquire as to the persons to be appointed new trustees, in the place of those named in the will.

Pending these inquiries and before, Mr. Bruce bought up several of the judgments affecting the estate of Kilbolane, for purchase of which he had previously agreed; and by further agreement with the tenant for life, he allowed the interest on them to fall considerably in arrear. All the incumbrances so bought up by him amounted to £13,000, and Richard Martin, as his solicitor, filed charges to that amount in his name, before the Chief Remembrancer, who reported the sums due for specialty and simple contract debts and legacies. The amount so reported, due to G. E. Bruce and his trustee, Jonathan Bruce, exceeded £15,000, which included £3400 due for interest. The entire sum reported due for interest, on all the specialty debts affecting the estates, amounted to about £7500.

The report was confirmed the 18th of July, 1794; and by the decree, pronounced on the 21st of July, it was ordered that Mr. William Galway, who was land agent of the tenant for life, and the Reverend William King, should be appointed trustees of the testator's will, in room of those therein named, who were ordered to assign the trusts to Galway and King; and the registrar was directed to tot up interest at £6 per cent., on the several principal sums therein mentioned, including those due to Bruce; and it was decreed that H. C. Bowen, the tenant for life, should, within three months, pay the several persons in the decree named the sums so totted up, with interest on the several consolidated sums of principal and interest, from [261] the 18th of July, 1794, at the rate of £6 per cent., until paid, with the costs of plaintiffs and defendants, and in default thereof, that he, and all persons deriving under him, should be foreclosed; and that the Remembrancer should set up and sell, by public auction, to the highest bidder, the mortgaged premises, and all the real estates of the testator, or a competent part thereof, and that out of the proceeds the plaintiffs and defendants, legatees and creditors, should be paid the sums reported due to them, with interest and costs.

In November 1794, a sale of the lands was advertised to take place, under the decree, on the 5th of the then following month; and on that day the lands were put up for sale in distinct lots, in the Remembrancer's Office, by whose books it appeared that there were three bidders only for each and all the lots, namely, the said Richard Martin, and a Mr. Nash, and a Mr. Breton, both attornies and friends of Richard Martin, who appeared to be the highest bidder. He purchased Kilbolane for £19,025, as a trustee for G. E. Bruce; and the other estates,—except Bowensford and Carhue,—for other persons who had entered into previous agreements for them with him and Mr. Galway. The sales of Kilbolane, Meadstown, Kilcummer, Kilmurry, and

Garrandrolane were confirmed in February 1795, but no purchase monies were paid into Court.

Mr. Bruce entered into possession of the rents and profits of Kilbolane in September 1795. Against the purchase money he set-off the payments made by him up to that period to the judgment creditors, and sums advanced to the younger children of the testator, with compound interest on them, making altogether £16,542, which, being deducted from the purchase-money, left less than £2500 due from him, and on that sum he paid into [262]-rest to Mr. Galway, as agent for the tenant for life, and for his use, instead of paying it into Court for the relief of the inheritance.

By a deed of conveyance, dated in September 1797, purporting to be made between the Chief Remembrancer of the first part, but never executed by him, the newly appointed trustees of the second part, and Henry C. Bowen, the tenant for life, the widow and executrix of the testator, R. Martin and G. E. Bruce, of the third, fourth, fifth, and sixth parts, after reciting the will, the decree in *Grove v. Bowen*, and the sale in the Remembrancer's Office to Martin, as trustee for Bruce, and stating (falsely) that the £19,025 had been paid into the Bank of Ireland, for the purposes in the decree mentioned, the lands of Kilbolane were conveyed to G. E. Bruce, his heirs and assigns. From that time he ceased to pay any interest on the balance of the purchase-money, and never afterwards made any payment of the balance or interest thereon.

A negotiation was soon afterwards opened between the same parties, for the purchase of Bowsford by Bruce, who agreed to give £6200 for it, and articles were executed in 1802, by which H. C. Bowen and the said trustees covenanted, in consideration of that sum, to convey the said estate to Bruce and his heirs, free from incumbrances; and he thereby covenanted to pay, in discharge of the debts of H. C. Bowen, or of the debts and incumbrances affecting the said estate, the said sum at the time of the conveyance, for the absolute purchase thereof. And he paid to Galway, at the execution of these articles, £2000, in part of the purchase-money. He was then let into possession of the lands of Bowsford, and continued in possession of them, and of the lands of Kilbolane, to the time of his death.

[263] Various proceedings were taken in the cause of *Grove v. Bowen*, between the years 1802 and 1810, although Mrs. Grove, the plaintiff, had died in 1795, and there was no bill of revivor or supplement. By an order made the 21st of February 1810, upon motion on behalf of G. E. Bruce, and upon reading the decree in the said cause, a consent and release by certain judgment creditors, and a certificate of the Remembrancer of the receipts of the several amounts of their judgments, etc., it was ordered, that the Remembrancer should execute a proper deed of conveyance of Kilbolane to Bruce, or to Richard Martin, as his trustee. Receipts for the judgment debts having been signed in the Chief Remembrancer's book, according to directions contained in that order, a deed of conveyance was perfected in that officer's name, by his deputy, on the 20th of June, 1810. By that deed, after reciting the testator's will, the decree in the said cause, the assignment to the new trustees in 1794, the purchase of Kilbolane by Martin, in trust for Bruce, for £19,025, and the confirmation of the sale, it was witnessed, that in consideration of the said sum, and other considerations therein mentioned, the said R. Martin, W. Galway, and H. C. Bowen granted, released, and confirmed to G. E. Bruce and his heirs, all the lands of Kilbolane.

There was no settlement of the purchase money of Bowsford, nor was there any conveyance of that estate ever made or demanded.

G. E. Bruce died in 1837, having by his will, dated in June 1832, given all his estates in Ireland,—subject to an annuity of three hundred pounds, for five hundred years, which he had charged on Kilbolane in 1795, and which is now vested in his nephew, the respondent George Bruce, and others—upon certain [264] trusts therein mentioned, and subject thereto, to the use of his nephews, the respondents, George Evans and John Evans, their heirs and assigns, as joint tenants.

Henry Cole Bowen, the eldest son of the testator, and first tenant for life of his estates, died in 1837, without having ever had issue. Robert Cole Bowen, fourth son of the testator, and second tenant for life of the devised estates, married, in 1806, a daughter of Mr. W. Galway, before mentioned, and died in 1827, leaving Henry Cole Bowen (the third), his eldest son, born in 1808, who was then first tenant

in tail under the limitations in the will. He married, in 1828, a grand-daughter of the said Mr. Galway, and died in 1841, leaving the appellant, his eldest son, born in 1830, and other children.

The guardians of the appellant having had their attention directed to the sales of the estates in question, caused inquiries to be made on the subject, and in consequence of the discoveries they made, chiefly from letters and documents in the possession of the Galway family, they filed a bill in the appellant's name, in the Court of Chancery in Ireland, in February 1843, against the said George Bruce, George Evans, and John Evans, and others, claiming interests under the will of G. E. Bruce, for the purpose of setting aside the sales of Kilbolane and Bowsford, for fraud.

The bill, after stating the will and death of Henry C. Bowen, the testator, and other matters before mentioned, further stated that, in 1788, G. E. Bruce, then residing in Limerick, and having command of considerable sums of money, entered into a treaty with H. C. Bowen, the testator's eldest son, for the purchase of Kilbolane, and offered the sum of £19,025, to which offer H. [265] C. Bowen agreed, but the trustees named in the will refused to execute the power of sale therein given, or to act in the trusts, whereupon it was agreed between H. C. Bowen, G. E. Bruce, and W. Galway, then land agent of the former, that a suit should be instituted on the equity side of the Court of Exchequer in Ireland, by some friend of H. C. Bowen, having a charge on the estates, in order to raise payment of the same and have a general administration of the testator's real and personal estate, and to have new trustees appointed, and to get a decree for the sale of the estates, but that no receiver should be appointed against H. C. Bowen's possession: that it was further agreed that Richard Martin, then law agent of H. C. Bowen, should be the attorney for him and for the plaintiff in the proposed suit, and also for the younger children of the testator, and should so manage the proceedings that W. Galway, and some other friend of H. C. Bowen, might be appointed trustees, instead of those named in the will, and that G. E. Bruce and Roger Sheehy might be declared purchasers of Kilbolane and Bowsford respectively, for the sums previously agreed upon: that in pursuance of such arrangement, the suit of *Grove v. Bowen* was instituted, Mrs. Grove the plaintiff, being a near relative and friend of H. C. Bowen, and claiming, as executrix of James Grove, to be entitled to a judgment debt affecting the estates.

The bill then alleged several irregularities in the suit, as the absence of Robert Cole Bowen, a defendant in the East Indies, without that fact being disclosed to the Court, the putting in of a joint answer by Charles Martin, brother of Richard, for him and other children of the testator, with [266] forged signatures, the purchasing up of incumbrances on the estate of Kilbolane by G. E. Bruce, to be set off against the purchase money, etc. The bill also stated the decree made in 1793, and that the Chief Remembrancer, in taking the accounts thereby referred to him, was attended by R. Martin only, and adopted a report prepared by him, to meet the views of H. C. Bowen and G. E. Bruce; it next stated the decree on further directions, in July 1794, and the manner in which the sale of the estates was conducted, there being in fact but one bidder, R. Martin, and that the arrangement by which the conveyance of Kilbolane was made to G. E. Bruce in 1810, was improperly obtained.

The bill prayed that the several proceedings in the said suit, and the decrees and subsequent orders, and the conveyance to G. E. Bruce of Kilbolane, in June 1810, might be declared fraudulent and void as against the appellant; and that he might be declared entitled to have the lands of Kilbolane and Bowsford restored to him, upon payment of whatever might be justly due to those claiming under G. E. Bruce for principal and interest of the several incumbrances originally affecting the estates of the testator, and alleged to be vested in G. E. Bruce, or in a trustee for his use, and that accounts might be taken of these incumbrances, and of the rents and profits of the estates since the death of H. C. Bowen, the first tenant for life; and also of the several sums of money received by G. E. Bruce and those claiming under him, by way of fines for leases granted by him or them of the said lands, which leases the appellant was, in consideration of such account, willing to confirm; and that in case the rents and fines, and interest on the fines, should be found to exceed [267] the interest on the incumbrances, the amount of the latter should be deducted from the former, and the balance applied in reduction of the principal due on foot of the

incumbrances since the death of the said H. C. Bowen; and that the appellant might be at liberty to pay the balance into Court, to indemnify him against such of the defendants as should be proved to be purchasers for value, of any estate in the lands of Kilbolane and Bownsford, without notice, etc.

The respondents, John and George Evans, and their respective wives, put in a joint answer, in which they insisted and relied on the absence of all fraud in the suit of *Grove v. Bowen*, and on the completion of G. E. Bruce's title to Kilbolane under the decree and orders therein, by the conveyance of 1810, under which he held that estate undisturbed down to his death in 1837, from which time they, as his devisees, held the same, without question of their right, until 1843.

The respondent, George Bruce, in his answer, set out a deed, made in December 1795, on the marriage of his father and mother, by which G. E. Bruce, for valuable consideration, granted a rent charge of £300 a-year, for 500 years, out of the lands of Kilbolane, which rent charge was settled on the issue of that marriage, and became vested in this respondent, as the only child. He therefore claimed to be entitled as a purchaser for valuable consideration, without notice of any defect in the title of G. E. Bruce, if any such existed, or of any claim or demand of the appellant, or any other person, or of the circumstances stated in the bill impeaching that title. He also set up the general defence, as to his information and belief, that there was no fraud in the proceedings in the cause of *Grove v. [268] Bowen*, so far, at all events, as G. E. Bruce was concerned; and he rested his title on the decree and orders therein made, and on the final conveyance of the estate to G. E. Bruce in 1810.

The other defendants to the bill having put in their answers, numerous witnesses were examined, and the cause was heard in May 1844. The material parts of the evidence, and a full statement of all the circumstances relied on by the principal litigant parties, together with the elaborate judgment of the Lord Chancellor, are contained in the reports, 1 Jones and La Touche, 178, and 6 Ir. Eq. Rep. 569.

His Lordship, in the course of that judgment (a full copy of which, as taken by the short-hand writer, is printed in the appendix to the respondents' cases) appears to have considered the following irregularities as admitted on the pleadings or proved:—

That (in the cause of *Grove v. Bowen*) the answer of the appellant's grandfather, R. C. Bowen, tenant for life of the lands, next in remainder after the death of H. C. Bowen, the first tenant for life, without issue male, was filed as if signed by him; whereas he was out of the jurisdiction at the time, and the answer was not signed by him, nor any order obtained for liberty to file it without signature:

That no account was taken of the rents of the real estates due at the death of the testator, and which formed part of his personal estate; nor of the rents received since his death by the tenant for life, nor of the application of them:

That interest at the rate of £6 per cent. was reported and decreed upon incumbrances, which carried interest at the rate of £5 per cent. only; and that principal sums were reported and decreed to be paid out of the [269] produce of the sale, some of which had been paid off by the testator, and others were not his debts at all, or incumbrances upon the lands sold:

That the first tenant in tail before the Court (in the said cause), was a minor, and by consent it was decreed that the lands should be sold, in case of non-payment of the sums decreed in three months, instead of six months, the usual period; and no day was given to the minor to shew cause against the decree:

That the tenant for life had, prior to the filing of the bill in the said cause, contracted with the purchaser for the sale of the lands to him, at a stipulated price, and the bill was filed to enable the parties to carry that contract into execution:

That there was no real competition at the sales under the decree, but they were so arranged that the lands were sold to the purchaser, at the stipulated price:

That the purchaser having, pursuant to the contract with the tenant for life, bought up incumbrances affecting the estate, a report was, with his consent, taken, finding that a large arrear of interest was due to him on the incumbrances, the whole of which was decreed to be, and was, paid out of the produce of the sale, although part of it had been previously paid by the tenant for life:

That interest, reported on the incumbrances vested in the purchaser, was suffered by him, at the request of the tenant for life, to run in arrear, the tenant for life, in

consideration of such indulgence, paying interest upon interest; and that no provision was made by the decree to make the estate of the tenant for life recoup the inheritance for the interest paid out of the produce of the sale, which ought properly to have been paid by him:

That a tenant in tail, nearer than any before the [270] Court in the said cause, who came into *esse* after the sale and before the conveyance, was not made a party to the suit:

That the plaintiff (Mrs. Grove) having died before the conveyance, the purchaser bought up her demand and the benefit of the decree, but did not revive the suit, and references and reports, bearing relation to the sale of the estates were, at his instance, made in the abated cause.

His Lordship, notwithstanding those irregularities, was of opinion that there was no fraud, and by his decree (dated the 22d of May, 1844), declared that the appellant was not entitled to impeach the sale of Kilbolane;

And it was ordered and decreed, that it be referred to the Master, to take an account of the principal sums and costs paid by G. E. Bruce, for the debts and incumbrances affecting the estates of H. C. Bowen, the testator, including principal sums paid to his younger children: And it was ordered that the Master should ascertain what portion of the sum of £19,025, mentioned in the order of February, and in the deed of conveyance of June, 1810, consisted of costs properly chargeable against the inheritance, and of principal monies and interest due at the death of the testator, and what portion thereof consisted of interest which accrued after his death, or other monies which ought properly to have been paid by H. C. Bowen, the tenant for life; and also that the Master should supply a sufficient sum to make good such portion of the £19,025 as consisted of costs not properly chargeable against the inheritance, and interest which accrued since the testator's death, and other sums, if any, which were properly payable by the tenant for life out of the other principal monies and interest thereon due at the testator's death, and costs so paid or advanced as aforesaid by G. E. Bruce, not included in the said order and deed of conveyance, so as to complete the said purchase money of Kilbolane, out of principal monies and interest thereon, and costs due at the time of the death of the testator, and paid by G. E. Bruce, and properly chargeable against [271] the estate of the testator: And it was further ordered that the defendant, George Bruce, as personal representative of G. E. Bruce, do release the property of the said testator from the payment of such part of the incumbrances as the Master should so apply to the payment of the said balance of the purchase money of Kilbolane.

And with respect to the articles for the sale of Bowensford, it was ordered and decreed that the same be set aside: And it was further ordered that the Master should ascertain what sum remained due to G. E. Bruce, on foot of the incumbrances vested in him for principal money and costs, and interest which accrued in the lifetime of the testator, over and above the sum necessary for payment of the balance of the purchase money of the said lands of Kilbolane; and the court declared that the personal representative of G. E. Bruce should, on the 28th of January, 1837 (the day of the death of H. C. Bowen, the tenant for life), be considered as a creditor for that amount; and it was further ordered, that the Master do compute interest on so much of the said sum as consisted of principal monies, from that day, at the rate of £6 per cent.; and that he take an account from the said day of the rents and profits of the lands of Bowensford, which accrued due and were received after the death of the tenant for life by G. E. Bruce, or the defendants G. Evans and J. Evans respectively, since his decease; and that he do apply the said rents and profits, first in discharge of the interest, calculating interest at £6 per cent., and then in reduction of the principal of the balance of the monies so advanced by G. E. Bruce, remaining after the application of such portion thereof to the Kilbolane purchase money as before directed, making annual rests; and if it should appear after such application thereof to the Kilbolane purchase money, that any sum remained due to those claiming under G. E. Bruce, it was further ordered, that the appellant do pay the same to the defendant G. Bruce, as executor of G. E. Bruce, and if the said rents and profits so applied should be found to exceed all monies so due for principal and interest thereon and costs, the court declared that the appellant was entitled to so much of the rents and profits of Bowensford as should remain after payment of such principal [272]

and interest and costs. And it was further ordered, that such last-mentioned rents and profits be paid to the appellant by the defendants George and John Evans; and, when the balance upon taking such account was ascertained, that the appellant be restored to the possession of Bowensford, he first paying, in case the balance was against him, the sum found to be due to George Bruce, as personal representative of G. E. Bruce (and for taking the accounts, the parties were to produce before the Master all deeds, etc.) And it was further ordered, that an injunction should issue, to put the appellant in possession of Bowensford, and that the articles of June, 1802, be thereupon delivered up to him; and that the bill be dismissed, with costs, as against G. Bruce (owner of the annuity charged upon Kilbolane): And with respect to costs, it was ordered that the appellant should pay the costs of the defendants, except George and John Evans, who were to repay the said costs to the appellant, and that he and they should abide their own costs respectively.

The appellant appealed generally against that decree, except so far as the Master was thereby directed to take an account of the principal sums and costs paid by G. E. Bruce for debts and incumbrances affecting the estates of H. C. Bowen, the testator, including the principal sums paid to the younger children; and except also so far as it was thereby decreed that the articles for the sale of Bowensford should be set aside, and given up to the appellant, and that an injunction should issue to put him in possession thereof; and that he should have the said costs from the respondents George and John Evans.

Mr. Kindersley and Sir Fitzroy Kelly for the appellants:

The long lapse of time from the date of the transactions impeached in this suit, is far less disadvantageous to the respondents than to the appellant. His father [273] and grandfather might have impeached the transactions in the life-time of the tenant for life, who lived until 1837, but they were not bound to do so, nor had they the necessary evidence. That remained with the tenant for life, and the agent W. Galway, both of whom resided in England, or elsewhere out of Ireland, from 1816 to the time of their death. The evidence which has been found,—consisting chiefly of letters found in the repositories of their families in Ireland, and of the decrees, orders, and proceedings in the cause of *Grove v. Bowen*,—clearly shows that the sale of Kilbolane was made by a private agreement between the tenant for life and G. E. Bruce, which was not binding on the remainderman; and that the suit of *Grove v. Bowen* was instituted and carried on for the purpose of giving effect to that private agreement, under the apparent sanction of the Court, but really without its direction, and independently of its control. The suit, throughout its progress, was made subservient to a private course of dealing, concurrently carried on between the tenant for life and the purchaser, and not one step was taken in it further than was necessary to effect and carry out their object. The apparent sale of Kilbolane, under the decree in that cause, was preceded by an agreement for an improper application of the purchase money; to effect which, large sums were improperly charged, reported and decreed, and impositions were practised upon the Court, and on the owners of the inheritance. All the sales in Court, and the accounts also, so far as they professed to be taken by the officer of the Court, were fictitious, and were conducted without regard to the rules of the Court, or to the sums actually due, or to the directions of the decree; while the payment of the debts, the professed object of the suit, and the appli- [274]-cation of the monies advanced for the purchase money, were not at all submitted to the control or direction of the Court. By the fictitious dealings in Court, and the real transactions out of it, large sums of money were designedly and improperly thrown upon the inheritance. The purchaser was cognizant of, and a participator in, these fraudulent transactions; both he and the tenant for life, acting in concert, obtained pecuniary benefits for themselves, at the expense of the remaindermen; and by means of these several transactions, the purchaser evaded the payment of a considerable portion of his purchase money, and ultimately procured a conveyance, under the apparent sanction of the Court, by taking credit for large sums as due to him and his trustee for interest on incumbrances, which interest had been long previously discharged. No length of time or of possession nor decree of Court can protect a title obtained under such circumstances; *Giffard v. Hort* (1 Sch. and Lef. 386), *Colclough v. Bolger* (4 Dow 54), *Gore v. Stackpoole* (1 Dow 18), *Thornhill v.*



*Glover* (3 Dru. and War. 195), *Earl of Bandon v. Becher* (3 Clark and F. 479), *Mullins v. Townsend* (2 Dow and Clark, 430).

This suit also, besides not being a *bona fide* proceeding, was improperly conducted from the beginning to the end, as in not apprising the Court of the absence of Robert Cole Bowen, the then next tenant for life of the estates, out of the jurisdiction; in not having him and other defendants (one of whom, Catherine C. Bowen, was one of the owners of the first estate of inheritance), properly brought before the Court, and *bona fide* represented in the cause by a separate attor-[275]-ney; and, in filing and signing without authority, the answers for these and other adult younger children of the testator. The suit was improper and fraudulent in respect of the charges filed for G. E. Bruce, and his trustee, and other creditors, and in the report and decree consequent thereon; in the omission to report the rents of the estates due at the death of the testator, and the rents received by the tenant for life, as directed by the decree; in the biddings and sales in the Remembrancer's Office; in not bringing before the Court a tenant in tail, who was born in 1808; and in the several proceedings taken in 1809 and 1810, after the cause had abated; *Kennedy v. Daly* (1 Sch. and Lef. 355), *Hamilton v. Ball* (2 Ir. Eq. Rep. 191), *Lightburne v. Swift* (2 Ball and B. 207).

The final decree was erroneous, in point of practice, in directing a sale in three months by consent of parties, some of whom were minors representing the inheritance, six months being the usual time; in not giving the minors a day to show cause; and in decreeing several sums to various persons not entitled thereto, for principal interest and costs. Although defects of this nature, or even errors, may not affect a *bona fide* purchaser, who is no party to them, such a rule ought not to be extended to the case of a purchaser such as G. E. Bruce, who had actual notice of them both by himself and his agents; who came in under the decree and filed a charge, and thereby made himself a party in the suit; who was first a party to the proceedings by which the estate was improperly burthened, and afterwards adopted them for his own benefit; and who, by taking an assignment of the interest of the [276] plaintiff in the abated cause, and of the decree, with powers of attorney to carry the decree into execution, became entitled to carry on, and did carry on for his own benefit, the several subsequent proceedings; obtaining the consent, and order upon it, the certificate of the incumbrances, and, by himself and his trustee, signing receipts for sums not due, as the consideration for his deed of conveyance; *Colclough v. Sterum* (3 Bli. 181), *Talbot v. Minnett* (6 Ir. Eq. Rep. 83).

An agreement *a priori* for compound interest, as was made between H. C. Bowen and G. E. Bruce, is usurious in its nature and tendency, and contrary to public policy, and void; *Lord Ossulton v. Lord Yarmouth* (2 Salk. 449), *Ex parte Bevan* (9 Ves. 223), *Eaton v. Bell* (5 Barn. and Al. 34). Such an agreement could not have been enforced directly between the parties to it; and G. E. Bruce having made his apparent purchase, under the decree of the Court, which was made the means of obtaining such usurious interest, is not entitled to have his purchase upheld in a Court of Equity, as if he had been a *bona fide* purchaser without notice. He, having by means of his apparent purchase under the decree and by his dealing with the tenant for life, obtained compound interest on his advances, which he could not otherwise have enforced, derived a benefit from his concurrence in the fraudulent report of arrears of interest as due on the incumbrances vested in him and his trustees. But even if he had not thereby obtained any benefit for himself, yet, inasmuch as he deliberately and knowingly concurred in a fraud connected with his purchase, and [277] thereby enabled the tenant for life to gain great advantages, to the prejudice of the inheritance, he is as much disabled from maintaining his purchase in a Court of Equity, as if he had himself personally obtained the benefit which he enabled the tenant for life to gain.

The lapse of time in this case is no bar to the relief claimed by the appellant; because allowing to mere lapse of time the effect of throwing the burthen of proof more completely on the plaintiff, and of giving the defendant the benefit of the most favourable construction of doubtful evidence; yet that does not authorise the Court to put a construction upon the facts, when proved, different from that which would, in a recent transaction be considered the true construction, or to assume facts in the absence of proof, in order to uphold the sale. To give such an operation to mere

length of time, would amount to a denial of justice in many cases, especially where there is a continuing life estate, the pendency of which must necessarily exclude the remainderman (whose estate may never take effect, as it may be divested by the birth of a prior tenant in tail), from access to family papers, and thereby shut him out from the means of discovering the acts complained of, until his estate falls into possession. The true question is, whether by clear evidence, such a state of facts is proved as would be sufficient to set aside the sale in a recent transaction; for although clearer proof is required in a stale transaction, yet, if the facts are proved, the law is not different in such a transaction and in one of later date. Moreover, where the Statutes of Limitations do not apply, (as in cases of fraud,) time should not be permitted to operate against a party before he has discovered the circumstances on which his right depends.

[278] The note of the case of *Townsend v. Warren*, cited from Mr. Beatty's MSS., and relied on by the Lord Chancellor as an authority for refusing relief as to the purchase of Kilbolane, has been since discovered to contain an important misstatement of the facts of that case (1 Jones and La T. 221; 6 Ir. Eq. Rep. 620); and it cannot be relied on as an authority, overruling many decisions of this House, by which sales impeached on grounds similar to those proved in this case have been uniformly set aside. The Lord Chancellor himself expressly disapproved of the case, but thought he was bound by its authority.

If the appellant should not be held entitled to set aside the sale of Kilbolane, yet the accounts directed by this decree (*supra*, p. 270) are not such as he would, even in that case, be entitled to require. For, by the contract and dealing of the parties, it is clear that G. E. Bruce was bound, from the time he entered into possession in 1795, to pay interest on the unpaid balance of his purchase money, which interest should have been applied for the relief of the inheritance; yet, by the decree appealed from, establishing this contract as binding on the appellant, and professing to give him complete relief, G. E. Bruce and his representatives are held entitled to the enjoyment from 1795 to the present time, of an estate sold for payment of debts with a large balance of purchase money unpaid; and it is thereby decreed that this contract shall now be completed by payment of the principal; but the inheritor is not decreed entitled to any interest thereon. It is clear, that if the trustees named in the will had sold the estate out of Court, any interest on the purchase money should have been by them applied for payment [279] of debts; and on the purchaser taking possession, the estate of the tenant for life would have ceased, and no part of the interest of the purchase money could have been paid to him without a breach of trust. If the purchaser had paid his purchase money into Court with interest, the Court would have applied the interest as well as the principal in discharge of debts affecting the inheritance. This interest, therefore, ought to have been paid, and, if the sale be not set aside, ought now to be paid and applied for the benefit of the appellant as the owner of the inheritance.

Mr. Bethell (with whom were Mr. J. Russell and Mr. G. M. Giffard), for the respondents John and George Evans, and Mr. G. Turner, for the respondent George Bruce, denied that there was any evidence of fraud in the transactions, or that any fraud was practised or intended. There were some irregularities in the proceedings in the suit of *Grove v. Bowen*, but such irregularities or errors of the Court were not sufficient to impeach a *bona fide* purchase, which was never disputed until after all the persons, who had any personal knowledge of the circumstances connected with it, were dead. The sale was acquiesced in by all parties, from 1794, particularly by Robert C. Bowen, the grandfather, and Henry C. Bowen (the third), the father, of the appellant, both of whom,—one married to the daughter of Mr. Galway, the other to his grand-daughter,—had the means of knowing, and must have known, the circumstances connected with the sale, but with such knowledge acquiesced in all that was done. There was no proof of fraud, or that the estate was sold at an under-value; on the contrary, there was clearer proof than could have been expected, after a lapse of fifty years, of [280] the *bona fides* of the whole transaction, and every reason to infer, that a fair price was given. The only ground on which the appellant's case rested, were mere irregularities, unattended with any injury to the inheritance. They distinguished the cases before cited from this, and referred to *Aston v. Aston* (1 Ves. 267), *Lloyd v. Johns* (9 Ves. 37), *Bennett v.*

*Hamill* (2 Sch. and Lef. 566), *Loftus v. Swift* (*Ibid.* 642), *Curtis v. Price* (12 Ves. 89), *Shine v. Gough* (1 Ball and B. 436), and relied particularly on the case of *Townsend v. Warren* (1 Jones and La T. 228; and 6 Ir. Eq. Rep. 620).

The case stood over for consideration since 1846.

The Lord Chancellor (Sept. 21, 1848).—The bill in this case prayed that the purchasers of Kilbolane and Bowensford might be declared fraudulent and void, and those estates restored to the appellant, and all the other relief prayed was consequential upon such a declaration being made; but there was no alternative prayer for any relief, upon the supposition of such purchases not being set aside; there was nothing prayed to correct any alleged error or improper settling of the purchase money or interest, or of interest upon the debts or charges paid off by the purchaser.

By the decree, the purchase of Kilbolane is established, but directions are given for correcting some such supposed errors or improper modes of settlement, and from this part of the decree no appeal has been presented. It is therefore unnecessary to consider how [281] far such directions are consistent with the state of the pleadings and the case made by the bill, particularly in the absence of any personal representative of Henry Cole Bowen, the tenant for life, by whom the sale was effected, and whose personal estate must be principally interested in the result of the accounts directed to be taken.

The decree also set aside the contract for the purchase of Bowensford, but against this part of the decree no appeal has been presented.

I call the attention of the House to these circumstances, that it may be distinctly understood that, in affirming the decree upon this appeal, the House expresses no opinion as to those parts of the decree, but only as to that part of it which is the subject of appeal, namely, the declaration that the plaintiff is not entitled to impeach the sale of the lands of Kilbolane, and the refusal therefore of the relief prayed, with reference to the sale; and upon that point, I am very clearly of opinion that the decree is right.

It is true, that if a case of fraud be established, Equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of a Court of Equity, and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud. But in proportion as this jurisdiction is powerful and operative, so ought the care and caution of the Court to be anxiously exercised as to the grounds upon which it proceeds, lest in the zeal to do equity, the reverse be effected.

[282] So, when much time has elapsed since the transactions complained of, there having been parties who were competent to have complained, the Court will not, upon doubtful or ambiguous evidence, assume a case of fraud, although upon fraud clearly established, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of Equity depriving them of the effects of their plunder.

In the present case, the bill, filed in 1843, complains of a contract of purchase made in 1788, and completed in 1795; for the confirmation of the Master's report was the completion of the purchaser's title, although the conveyances were delayed until 1810. The suit in which the purchase was made was a suit properly constituted, and there were among the parties to it, the tenants in tail of the estates at the time *in esse*. This sale the bill sought to set aside as fraudulent. But in what is the fraud alleged to have consisted? The bill does not state, and certainly it is not proved, that there was any corrupt bargain between Henry Cole Bowen, the tenant for life with remainder to his sons in tail, and the purchaser. The tenant for life might have been, and indeed is proved to have been, desirous of throwing upon the inheritance some of the interest upon the incumbrances which he ought himself to have borne, but there is no allegation or proof of his having agreed, for any corrupt consideration between them, that the purchaser should have the estate for less than its real value; for although the bill alleges that the sum agreed upon was less than the real value, that is attributed not to any corrupt bargain, but to the valuation having been made without sufficient attention having been given to the probable increase of value from the drop-[283]-ping of lives. Of this probable

increase of value, however, or of the value in 1788 or 1795, having been greater than the sum agreed upon, there is no proof, but there is, on the contrary, much reason to believe that it was the fair value; for although the public were enabled, by advertisement, at both those periods, to make offers and biddings for the property, no higher sum appears to have been offered or bid. It is sufficient, however, that there is no proof of the sum agreed for being less than the true value, or that there was any corrupt or unfair agreement relative to the price.

In 1788, the encumbered state of the property made a sale indispensable; the trustees, in whom the power of sale was vested, declined acting, and the contract was made by the tenant for life with the purchaser. This was much in the usual course of such matters, and certainly no suspicion of fraud can arise from such a transaction. It was found impossible to carry this contract into effect, from the trustees not being willing to act, and from no other reason. It was therefore necessary to apply to a Court of Equity, and a suit properly constituted for that purpose was commenced in 1789, and new trustees were appointed.

With respect to the contract of purchase, two courses were open, according to the practice in Equity, the one to obtain a reference to the Master to enquire whether the contract ought to be carried into effect, and the other to procure an order for a sale, without reference to the Master. If the parties had intended a fraud, the former course would probably have been adopted, as excluding the competition which the other course was certain to invite; but the latter course was adopted, and a sale was advertised.

Whether there were any real bidders at the sale, ex-[284]-cept Mr. Bruce, who had before agreed for the purchase, does not distinctly appear, although there probably were not. But if that be so, it leaves untouched, upon the question of value and fairness, the fact that, notwithstanding the various interests connected with the property as incumbrancers and otherwise and the advertisements to the public, no one was found to offer more than Mr. Bruce had agreed to give. Mr. Martin, who had bid for Mr. Bruce, was declared to be the purchaser, and by an order of the 10th of February, 1795, that purchase was absolutely confirmed, and the question is, whether in the year 1845, when the decree appealed from was made, those who claim through Mr. Bruce were to be deprived of the purchase so made. If this purchase were not impeachable in 1795, it cannot be so from any irregularities in the subsequent conduct of the cause, or from any error or improper mode of dealing with the interest of the purchase money, or of the interest of the incumbrances, which had been bought up by Mr. Bruce, and which exceeded the purchase money he had agreed to pay. But of such subsequent transactions, the whole case made by the appellant consists,—facts which might be important as leading to a conclusion upon the question of fraud in the original contract, if that had been left in doubt, but totally ineffectual to shake the validity of a contract otherwise impeachable.

Such being the opinion I have formed, upon a careful consideration of the evidence in this case, it does not appear to me to be material, or indeed relevant, to make any observations upon the several cases which were referred to on either side at the bar. They have been fully commented upon by Sir Edward Sugden, [285] in his judgment; and I quite agree with him, that the case of *Townsend v. Warren*, affirmed in this House, not only supports the decree in this case, but goes far beyond it.

I should be sorry indeed, if, in proposing to your Lordships to affirm this decree, it should be supposed that I am, in any respect, weakening the power and jurisdiction of Courts of Equity in cases of fraud. I most certainly have no such intention, and no such inference ought to be drawn, because I form my opinion on the absence of sufficient evidence of any such fraud having been practised or attempted. I think it is not only not proved, but negatived, and I cannot but think that the decree is quite as favourable to the appellant as it ought to have been. I therefore move that the decree be affirmed, with costs.

The decree was accordingly affirmed, with costs.

[286] KENNETH MATHESON and Others,—*Appellants*; ALEXANDER ROSS,—*Respondent* [March 19, 20, 27, 1849].

[*Mews'* Dig. vi. 694, 835; xii. 369. S.C. 13 Jur. 307; 6 Bell, 374. Considered in *Evans v. Prothero*, 1850, 2 Mac. and G. 322. Followed in *Rutty v. Benthall*, 1867, L.R. 2 C.P. 488.]

*Evidence—Stamp.*

Where a paper purports to be a receipt, and, as such, requires a stamp, but also purports to be an agreed statement of accounts, which does not require a stamp, it may be given in evidence to shew the agreed state of accounts only, though it has not been previously stamped.

Its admissibility under such circumstances is restricted to this extent:—so far as it relates simply to proving the statement of account, and is not produced for the purpose of proving the receipt of money. It cannot be used for the purpose of proving the receipt of money in any way.

If a document which is unstamped, but requires a stamp, is offered in evidence, and if stamped, would be evidence to establish any point litigated between the parties, it cannot be received. If it would be of no benefit when stamped, it may, though unstamped, be received in evidence.

In an action for work and labour, there was tendered in evidence a paper containing a statement of accounts, which declared a balance of £68 9s. 4d., and at the end was an acknowledgment of the payment of that sum. In an action for work and labour this paper was offered in evidence by the defendant, not for the purpose of proving that the sum of £68 9s. 4d. had been paid, for that was not in contest between the parties, but in order to shew what was the admitted state of accounts at a particular time:

Held (reversing an interlocutor of the Court of Session), that it was admissible for that purpose.

This was an appeal against an interlocutor of the Court of Session. Ross instituted a suit for the purpose of recovering two sums of £143 and £662, which he claimed as due to him for executing certain [287] works on the Edinburgh and Glasgow Railway, for the execution of which Matheson and Co. had undertaken a contract with the Railway Company. The following were the issues framed for the decision of the jury:—

“First, whether during the years 1841 and 1842, the pursuer, upon the employment of the defenders, executed certain work, as set forth in, etc., for the defenders, upon the Edinburgh and Glasgow Railway; and whether the defenders are now due and indebted to the pursuer in the sum of £143 3s. 11d. sterling, or any part thereof, as the balance of the price or value of the said work, with interest from the 31st March, 1842.

“Second, whether during the year 1841, the pursuer, on the employment of the defenders, executed certain extra work on the railway to the value of £662 16s. 4d., as set forth in, etc.; and whether the defenders are now due and indebted to the pursuer in the said sum of £662 16s. 4d. as the price or value of such extra work, with interest from the 31st December, 1841.”

The cause came on for trial before the Lord Justice Clerk, when both parties went into evidence. On the part of the defenders (the present appellants) a witness was called, who said, “I met Mr. Ross in January 1842, to settle an account between him and my father and brother. Two papers now shewn to me, marked Nos. 19 and 20, are in my hand-writing. Mr. Ross’s signature is on No. 20. These two papers originally formed a single half-sheet. I separated them, probably to exhibit to the Railway Company the paper No. 20 with Mr. Ross’s signature, as a voucher for the sum of £68 9s. 4d.”

The document marked No. 19, being the first part [288] of the paper in question, was a long debtor and creditor account, with items on both sides, in the following form:—

Dr.				Alex. Ross.				Cr.			
1841.				£	s.	d.		1841.	£	s.	d.
Aug. 7. Cash . . . . .				240	0	0		Aug. 7. Pay-bill . . . . .			
(Then followed many other items of the same sort, and ending thus :—)								(Then followed other items of the same sort, the account ending thus :—)			
Dec. 21. Ditto . . . . .				20	0	0					
1842.											
Jan. 13. Ditto . . . . .				25	0	0					
				1181	12	0		Dec. 11. Ditto . . . . .			
Balance . . . . .				68	9	4					
				1250	1	4					
Jan. 17. To Cash . . . . .				68	9	4		Jan. 13. By Balance . . . . .			

The document No. 20, which had originally formed part of the same half-sheet of paper, contained the following words and figures:—

“Dullatur, 17th January, 1842.

“I acknowledge having received from K. Matheson £68 9s. 4d. sterling, being balance amount of pay-bills paid from 7th August to 11th December, both inclusive.

“ALEX. ROSS.”

When this paper was tendered as part of the defendant's evidence, it was objected to by the plaintiff's counsel as inadmissible for want of a receipt stamp. The defendant's counsel insisted on its admissibility, not as containing an acknowledgment of the payment of this sum of £68 9s. 4d., for the payment of that particular sum was not included in the demand made, being admitted on the plaintiff's own statement of his case, but as an acknowledgment of the correctness of the entries on the paper No. 19. The Lord Justice Clerk received the paper, subject to the objection. [289] The case was afterwards brought before the Judges of the Second Division of the Court of Session, who, having consulted the other Judges, decided by a majority that the paper ought not to have been received in evidence, and therefore ordered judgment to be entered for the pursuers. This was an appeal against that interlocutor.

Sir F. Kelly and Mr. Anderson for the appellants.—The Judges in the Court below were in error in supposing that the rule of law which makes unstamped instruments inadmissible in evidence, admitted of no qualification. Here was a paper containing two things perfectly divisible from each other, the one a statement of account, the other an acknowledgment of the payment of money. The first clearly did not require a stamp, the other only required a stamp if proposed to be used as evidence of the receipt of money; yet the Judges of the Court below thought that the latter portion of the paper made the whole inadmissible for any purpose whatever.

The principle relied on by the Court is applicable only to cases where the unstamped part is offered in evidence to prove a payment of money. Here it was offered for a totally distinct purpose. There was no question raised at the trial as to the payment of this sum of £68. That payment was admitted on the record as well as proved in a part of the plaintiff's own evidence. All therefore that the defendant had to shew was that that balance was the balance really due at a particular time. For such a purpose this paper, which shewed an agreed state of the accounts at that period of time, was clearly evidence.

In the first place, the doctrine of the law is, in Scot-[290]-land as in England, that the Stamp Acts must be strictly construed. *Pirie's Representatives v. Smith* (11 Shaw and Dun. 473) in the Court of Session, and *Wellard v. Moss* (1 Bing. 134), *Clark v. Hougham* (3 Dowl. and Ryl. 322), *Brookes v. Davies* (2 Car. and P. 186), *Grey v. Smith* (1 Camp. 387), *Horne v. Redfearn* (4 Bing. N. C. 433), and *Tebbutt v. Ambler* (9 Car. and P. 60), in the Courts here. These English cases likewise furnish instances in which an unstamped paper has been admitted in evidence for a purpose different from that in respect of which the particular stamp was required, although, if offered for the purpose in respect of which such stamp was required, it would not have been

admissible. In *Grey v. Smith* there was a paper duly stamped as a receipt, but not duly stamped as an agreement, and it was held that if the paper was sought to be put in evidence to prove the agreement, it was not admissible, but that it was admissible to prove the receipt. In *Horne v. Redfearn* the exact converse of this took place. The cases of *Perry v. Bouchier* (4 Camp. 80) and *Millen v. Dent* (16 Law Journ., Q. B. 374; 10 Q. B. Rep. 846) are to the same effect. In the second of these cases all the preceding authorities were considered, and there it was held that a bill of parcels, delivered by the plaintiff, having at the foot of it a receipt written at the same time with the bill, is nevertheless admissible without a receipt stamp for the purpose of proving that the goods mentioned were sold to a third person and not to the defendant. That case is further important as deciding expressly that, "where two separate instruments, each complete in itself, are written on the same [291] paper, one may be received in evidence without the other," although for the purposes of this case it is not necessary to insist on applying that doctrine here. In *Finney v. Tootel* (17 Law Journ., C. P., 158; 12 Jurist, 291), the defendant in an action for money had and received, put in evidence a paper which was in fact an unstamped receipt, and had been rejected on that account, and on the back of which the plaintiff had written, "Balanced up to this day, as per cash book, 19th December, 1845." The Court of Common Pleas held that this memorandum was properly admitted, notwithstanding the fact of its being like the receipt, unstamped. In *Goodyear v. Simpson* (15 Mee. and Wels. 16; 15 Law J. (Ex.) 191), the court, in like manner, admitted an unstamped statement of accounts between several coach proprietors, though, in the course of it, there were several receipts for money payments introduced. The result of these cases is, that where the paper is, as it was in this case, offered in evidence to prove something collateral to the issue of payment or no payment, it is receivable. The Court below overlooked this distinction, and improperly rejected the evidence. The judgment of that Court must therefore be reversed.

Mr. Stuart Wortley and Mr. McNeill for the respondent.—The distinction contended for on the other side is not applicable to the present case. This paper can only be contended to be admissible on the ground that it is offered in evidence for a purpose entirely collateral to that of proof of payment of a sum of money. But the circumstances of the case do not warrant that argument, nor do the cases referred to support such a [292] doctrine to the extent to which it is now sought to be applied. What is a collateral purpose within the meaning of these and other cases? It is a purpose purely collateral to, or in other words, distinct from, the issue in the cause. That was not so here; for the issue here was, indebted or not indebted. The proof of a balance at a particular time was not collateral to that issue. In the cases referred to, the purpose for which the paper was offered in evidence was in every instance collateral, or had a stamp on it, which, though of an improper sort, was of sufficient value. In *Grey v. Smith* (1 Camp. 387) the question in issue was, trespass or no trespass. In *Horne v. Redfearn* (4 Bing. N. C. 433) and in *Tebbutt v. Ambler* (9 Car. and P. 60), the paper was stamped as an agreement, and was put in evidence as such. *Brookes v. Davies* (2 Car. and Pay. 186) is not reported with sufficient fulness to be relied on, and in *Wellard v. Moss* (1 Bing. 134) no distinct issue of payment was raised. There is a reference in that case to *Jacob v. Lindsey* (1 East, 460) as "an authority for admitting the unstamped paper in evidence," which is erroneous, and in *Wellard v. Moss* itself the question was one merely of the correctness of the statement of an account. On the other hand, the authorities which establish that, where the essence of the issue cannot be proved but by the production of a written document, shewing a payment of money, that document must be stamped, are numerous. The cases of *Rippiner v. Wright* (2 Barn. and Ald. 478), *The King v. The Inhabitants of Castlemorton* (3 Barn. and Ald. 588), *Hawkins v. Warre* (3 Barn. and Cr. 690), *The King v. Hall* (3 Stark. 67), and *Jardine v. Payne* (1 Barn. and Ad. 663), all establish this doctrine. The case of *The King v. Hall* is a very strong authority; for there the Court refused to receive in evidence an unstamped acknowledgment of the payment of money, though it was tendered, not to relieve the man who had paid the money from his civil liability, but to fix on the person receiving the money and writing the acknowledgment, the guilt of having embezzled his master's property. In *Jardine v. Payne* the Court refused to look at an insufficiently stamped bill of exchange to ascertain the fact of a particular indorsement being upon it. Lord Tenterden, in

delivering the judgment of the Court in that case, said (*id.* 670), "We are of opinion that an unstamped bill, or one improperly stamped, cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues. . . . The proof of the indorsement to the plaintiff, without that of the contents of the bill, would be insufficient, as the identity of the bill, without that referred to by the defendant's letter, could not otherwise be shewn. We think therefore, that evidence of the contents of the bill was a necessary part of the defendant's title, and could not be given in evidence for want of a proper stamp." And his Lordship afterwards added, that "that decision must be considered as overruling the case of *Bishop v. Chambre* (Danson and Lloyd, 83), which had been used as an authority to shew that an unstamped bill might be referred to, to shew the amount of a debt where there had been a promise to pay." [294] The same principle had previously been acted on in *Wright v. Shawcross* (2 Barn. and Ald. 501 n.).

The paper here was to operate as an acquittance of a debt, by shewing that at a particular time the account stood in a particular manner, and a certain balance forming part of the account had been paid, and it therefore comes expressly within the spirit of the statute. It does so, even on the supposition that the payment of the £68 was established by the plaintiff's own evidence; for the proof that the sum of £68 formed, just before the date of a particular payment, the balance due, made the proof of that payment applicable to the particular sum, and operated directly on the issue in the cause. That issue was indebted or not indebted; and if the defendants could by the paper shew that at a particular time a certain sum only was due, and could by other evidence prove the payment of that or any other sum, the paper was a piece of evidence directly affecting the issue, and therefore coming within the words of the statute,—“receipt or discharge given for or upon the payment of money.” The case of *Birt v. Leigh* (14 Mee. and W. 177) shows how these words are to be construed, and the circumstances of that case very much resemble those of the present. There the plaintiff had done plasterer's work, and money was paid weekly on account, and receipts were given from time to time for the money so paid. When the work was completed, and the balance owing was paid, the following receipt was given: “1843, July 8.—Received of Mr. G. L. the sum of £2 2s., being the balance of account up to this day for houses in Wellington Road.” The Court held that this paper was an acknowledg-[295]-ment of a receipt of money in satisfaction of a debt, and so required a stamp. There, as in this case, the account itself was made up of a number of pay-bills, and the payment of the balance was declared by a “receipt or discharge.” The only difference between the two cases is the amount for which the receipt was given; the principle in both is the same, and as the paper here was sought to be used for a purpose which necessarily had a strong, if not a direct bearing on the issue between the parties, it was properly rejected, and the judgment of the Court below must be confirmed.

Sir F. Kelly, in reply.—It is not denied, on the other side, that if the paper is tendered in evidence for a purpose distinctly collateral to that of payment, it is admissible in evidence. But it is said that the purpose here is not collateral. Let this case be put on that ground. Suppose the two pieces of paper to form but one, and to contain, as this paper does, items of charge and payment in the ordinary form of an account, resulting in a balance of £68 9s. 4d., which balance is, by a memorandum signed by one of the parties, acknowledged to have been paid. Under the stamp laws, there is no doubt that this acknowledgment, being unstamped, would not be admissible to prove the receipt of the money, but it is admissible for a different purpose.

[Lord Campbell.—Was the question of payment of this sum wholly immaterial?] It was. The receipt of the money was admitted *aliunde*.

[Lord Campbell.—How was the question immaterial when, by your statement that the receipt of the money was admitted *aliunde*, you shew that it might [296] have been material evidence, and would have been so, but that it was proved by other means?]

It was proved by the allegations on the plaintiff's own record.—It was admitted on the record, and on his statement of the evidence.

[Lord Brougham.—But if it was so perfectly immaterial, how did both parties



allow the question of the admissibility of the paper to go before the Court, as if it was the pivot of the case?]

Because, though the acknowledgment of the payment of this particular sum was immaterial, the paper of the statement of the account, which shewed a particular balance existing at a particular period of time, was very material. Now it was the statement of the payment of this sum which alone required a stamp, and that payment being admitted on the record, the proof of it was wholly immaterial to the defendant's case, and the question under these circumstances is, whether the paper tendered in evidence to prove a statement of accounts, made up and acknowledged at a particular time, was not tendered for a purpose distinctly collateral to that of an acknowledgment of the fact of payment of a particular sum of money contained in that account?

[Lord Campbell.—This receipt would have been material to prove the payment of these £68 on that particular day?]

The two facts stated on this paper are distinguishable. The first is an acknowledgment that a balance exists: that does not require a stamp. The second is an acknowledgment that the sum stated as that balance is paid: that does require a stamp. But if it is merely necessary for the defendants to shew that there was an acknowledgment of the existence of a balance, they [297] may put in a paper for that purpose, although it is not stamped, and cannot be deprived of that acknowledgment of the general state of the accounts on a particular day, merely because the paper contains an acknowledgment of the payment of a sum of money which they do not want to prove.

[Lord Campbell.—It seems to me that if the receipt was admissible, it would afford material evidence on the issue raised at the trial.

Lord Brougham.—And though it might not have been wanted directly as a receipt for this money, it would have been useful to you in another way. Suppose a man says on a paper, "I acknowledge that there is a balance of £100," and then he adds a memorandum at the top of the paper, "Received £100." Suppose the top of the paper cut off. That would clearly be an acknowledgment of the payment of £100, and would require a stamp. Suppose it could be shewn, by an independent witness, that the £100 had been paid; that a bit of paper would not be necessary to one party as proof of payment of money. Still, if to the other it was important to shew that that was the sum due, surely the whole paper, and consequently that part which contained the acknowledgment of payment, would be material?]

No; it would not. The two things are entirely distinct from each other; nor does the case supposed exactly meet the circumstances of the present. This case is the same as if J. S. gave a receipt, dated "Fleet Street, 1st January, 1848," and signed by himself. The payment of the money mentioned in the receipt could not be proved, unless the receipt was stamped; but to prove that J. S. was in London on [298] the day on which the receipt bore date, it would be admissible in evidence.

One of the cases cited on the other side, that of *Shawcross v. White* (2 Barn. and A. 501 n.), exactly marks the distinction between accounts that do, and those that do not, require a stamp; for there the entries of payments were made at the time of payment, and in gradual reduction of a previously ascertained account. Of course such entries could not be receivable in evidence without a stamp. Any memorandum made at the time of payment is an acknowledgment of payment within the statute. But here the memorandum was made after the payment. The case of *Brookes v. Davies* (2 Car. and P. 186) must be overruled, if this judgment is not reversed, and that case was referred to by the Court of Queen's Bench in giving judgment in *Millen v. Dent* (16 Law J., Q.B. 374; 10 Q.B. Rep. 846), as a case of authority. *Birt v. Leigh* (14 Mee. and W. 177) has nothing to do with the present case, for the mere question there was, whether an acknowledgment of payment of a balance, made at the moment that balance was paid, was not an acknowledgment of the receipt of a sum of money "in satisfaction of a debt," and therefore liable to be considered as a receipt in full. There too the issue was payment, and acceptance in full satisfaction, and the paper was offered as the material evidence to support that issue. Here, on the contrary, the paper was tendered for no other purpose than to prove a statement of account agreed on at a particular time, and for such a purpose it was clearly admissible.

[299] The Lord Chancellor.—The question in this case was, whether a document

which was stated to be a settled account as to larger sums, leaving a balance of £68 9s. 4d., and which purported also to be a receipt for that balance, was admissible in evidence in a case where it was not tendered for the purpose of proving the payment of the £68, but for that of proving the state of the account at the time, as set out in the paper which showed such a balance to exist.

It is contended, on the one hand, that as this paper purports to be a receipt, it cannot be admitted in evidence, because it has not a proper stamp affixed to it. On the other hand, it is argued that the paper, though not admissible as a receipt, for the purpose of showing the discharge of the sum stated in it, is available for other purposes,—for purposes unconnected with the fact of the payment of that sum,—such, for instance, as the purpose of showing the state of the account as it stood before the payment of that sum. Upon a consideration of the cases that were referred to, both in the Courts of Scotland and of this country, but principally in the Courts of this country, I find that they often appear very inconsistent with one another, and they seem, in most instances, to be so little regulated by any fixed rule or principle, that it would be a hopeless task to endeavour to reconcile them. But, without absolutely reconciling them, it does seem to me that from all of them one principle may be extracted, which appears to have influenced the minds of the Judges who decided those cases, although, undoubtedly, questions may be raised upon many of them as to the mode in which that principle is to be applied.

It is obvious that there are three descriptions of documents upon which this question may be raised. [300] First: a mere simple discharge from an existing debt, which is, of course, within the stamp laws. Second: papers in cases where it becomes necessary to prove payment, not for the purpose of shewing a discharge as between debtor and creditor, but for another and a collateral purpose. I must here remark that that expression, "collateral purpose," seems to have been very much misunderstood, and to have led to a great deal of conflict and confusion to be found in the cases. If you produce a receipt, not to shew the discharge of a debtor by his creditor from a particular demand, but for the purpose of establishing some other fact different from that of payment of the debt, you may be said to produce it for a collateral purpose. There was a case of this kind where the paper was produced, not for the purpose of shewing that rent had been paid by a tenant, but that the relation of landlord and tenant had existed between the parties. That was, no doubt, a fact quite collateral to the fact of payment. But most of the cases go to shew this, that if, in a particular instance, the matter to be proved is the payment of money, and the payment is to be proved by the production of a written document, of an acknowledgment of payment, or what is called a receipt, the stamp acts immediately apply to such document so produced, and for such a purpose, whether it is for the direct purpose of proving payment as a discharge between debtor and creditor, or whether it is for an indirect and collateral purpose, as to shew some right in, or advantage belonging to, a party, in consequence of such payment; where, for instance, a matter collateral is to be proved by the proof of the fact of payment, and that fact of payment is established by a receipt, such a case is clearly within the provisions of the Stamp Acts. That however is not the present case, but this explanation [301] of the acts does, in my mind, tend very much to reconcile many of the cases which have been referred to, and which, at first sight, appear hardly to be reconcilable with each other.

The third class of cases appears to me to be that within which the present falls. Where the document purports to be, on the face of it, a receipt, and indeed is so, but also purports to be something else, as in cases where debtor and creditor accounts appear set out between the parties, making a certain balance due, and the paper contains a receipt for the supposed balance, whether that balance was paid in money or only settled in account, if the object of the parties is, not to prove the fact of that particular balance having been paid, but merely to shew that the parties to the account acknowledged the state of the account to have been such and such at a particular moment, the paper may be produced for this purpose, whether the money has been paid or not. Suppose that the account stood without any receipt or payment, that the balance existed but had not been paid, and the parties had merely agreed to ascertain how the account stood, or was to be rendered, at a particular time, and supposed that the items of the account thus rendered exactly balanced each other,

then there would be no payment, for though there might be the signature of the parties to the documents, there would be nothing like a receipt, and consequently nothing to require a stamp. That is exactly the present case, except that here we have something added, which purports to be a receipt for the balance. But I cannot find any argument for warranting the conclusion that, because a paper which purports to be a receipt cannot be used without a stamp, that paper cannot be used for another object, the purport of which is [302] equally apparent on the face of it, and for which no stamp is necessary. I cannot find this conclusion warranted by any language in the Stamp Acts or by any authority in the decided cases.

In this case we have a debtor and creditor account, which must of course have been taken, and which is sworn indeed to have been taken, from the books of the parties. If one of these parties had signed a book instead of signing a paper, acknowledging the state of the accounts, can any one doubt that that would have been evidence against the party signing it? The items of payment occurring in an account do not require a stamp; no one contends that they do. The acknowledgment of the state of the account as it stands in the book, is the same as it appears on the face of the paper which is signed, and this document thus made out, and recognised, and acted upon, and signed by the parties, is good evidence of the state of the account, and is tendered in evidence for that purpose, and for that purpose only, and for that purpose only is admissible.

Without attempting to go through the various cases which have been referred to, it appears to me that the principle I have stated will reconcile many of them (though with respect to some, that might be a difficult task), as it steers entirely clear of the Stamp Acts, which beyond all doubt, it is the duty of all courts to support, so far as the legislature intended they should be supported, but which all courts must be anxious not to stretch beyond proper limits; so as to exclude evidence which justice to the parties requires should be admitted. It does not appear to me that we shall at all infringe upon the intentions of the legislature, as declared in the provisions of the Stamp Acts, if we hold the document in this case to be admissible in evidence, so far as re-[303]-lates simply to the statement of an account, and so far as it is not produced for the purpose of proving the receipt of money. I am therefore of opinion that the paper was properly received in evidence at the trial, and that the Second Division of the Court of Session erred in rejecting it.

Lord Brougham.—I am of the same opinion. It is undoubtedly the duty of all Courts to protect the revenue, and to see that the intentions of the Legislature in that, as in other matters, are carried into effect. But it is not the duty of the Courts to strain the construction of these Stamp Acts, and, without regarding what was the real object of the Legislature, to extend their provisions, and so to deprive parties of the means of evidence, by which they might maintain, on the one side or on the other, their lawful contentions before courts of justice. To do so would be to make the courts instrumental, not only in inflicting injustice, but in levying many duties which were not intended to be imposed upon the subject, and would be adding a grievance to the grievances which, I am much afraid, we must admit that all taxes naturally occasion, be they ever so closely kept to their original intention, and be the law which imposes them ever so considerately or mildly administered. This being the rule, that we ought only to effectuate the intention of the Legislature, and not to strain it, giving a larger scope to what is enacted than the Legislature intended should be given;—this, I say, being the general rule, we come to consider whether the decision of the Court below, in the present case, has not gone to the outside of that rule, and imposed the obligation of putting a stamp upon a paper not wanted to be used as a receipt, but wanted [304] for another and an entirely different purpose. I have looked very carefully, as my noble and learned friend near me has done, into the different cases which have been cited in the argument here, and which were cited, and, I must say, diligently and carefully examined, in the Court below; and I have found it absolutely hopeless to attempt to reconcile all of them. Some of these cases are only *Nisi Prius* cases, such for instance as *The King v. Hall* (3 Stark, 67), tried before Mr. Justice Bayley, and *Brooks v. Davies* (2 Car. and P. 186), tried before Lord Wynford, and *Tebbutt v. Ambler* (9 Car. and P. 60), tried before Lord Denman; while others, such as *Horne v. Redfearn* (4 Bing. N. C. 433), *The King v. The Inhabitants of Castlemorton* (3 Barn. and Ald. 588), and *Hawkins v. Warre* (3 Barn. and

Cr. 690), and *Jardine v. Payne* (1 Bar. and Ad. 663), and *Goodyear v. Simpson* (15 Law J., Ex., 191; 15 Mee. and Wels. 16) were decided in Banc. Now all these cases I have carefully examined, and I have found it impossible altogether to reconcile them; but I agree with my noble and learned friend, that the rule which we are disposed to follow in this case, will go, as nearly as circumstances will permit, to effect that object. The rule I take to be this: that where a paper is used for the purpose of proving the receipt of money in any way, it requires a stamp, and when it is said that if it is used for a collateral purpose, it may be given in evidence without a stamp, that argument must be taken with the restriction which I now put upon it, for if it is sought to be used as evidence of the payment of money in any way, it is a receipt, and is used as a receipt, and therefore requires a receipt stamp before it can be so [305] used. Some of the cases therefore which state, as an exception to the rule, the use of a receipt for a collateral purpose, in which case they say it does not require a stamp, must be considered as stating the matter in a very vague, if not unintelligible way, because it may be for a collateral purpose, and yet if the paper is used in a way to confer on the party producing it a benefit on account of the proof of payment of money,—a benefit mixed up with the receipt or payment of money, so that upon the whole the receipt of money is the matter for which, or in respect of which, or connected with which, the paper is used, it requires, past all doubt, a stamp; because it is, in one way or another, used as a receipt. But the same document, used for a totally different purpose, is not to be regarded as a receipt. It is not then used as a receipt, and consequently need not, as a condition precedent to being admitted in evidence, bear a stamp upon it. Suppose an account is produced, in which there are, on the one side, payments made by the party tendering it, and, on the other, debits to him, and in like manner credits and debits in the account of the other party, is it to be said that that account must have a receipt stamp to every one entry of payment? Most certainly not. Then suppose the balance of the whole of this account to be stated at the end, that balance being made out by comparing the right and left hand sides together, it is not to be said, because the account states a balance against one party and in favour of the other, that is, so far as the latter is concerned, an acknowledgment of the receipt of all the money short of the balance, such as requires a stamp, nor, if the debit and credit side tally exactly with each other, so that there is no balance, there being yet many entries [306] of payment on each side of the account, can it be contended that such an account would require a stamp for each of the entries of payment. One test whether such a paper as was produced in this case is used as a receipt or not, is this: would not the paper, as a statement of account between the parties, have been a perfectly good document to prove the case? If so, was it made to that extent less so by the fact of having something else added to it? Suppose you had, with a pair of scissors, cut off the receipt altogether,—cut off the receipt and the names,—most undoubtedly it would have been admissible. Well then, here, though the receipt was produced, it was not used as a receipt, but for another and an entirely different purpose,—for a purpose which, as a statement of account between the parties, was a perfectly lawful purpose. If then it was not used as a receipt, a stamp was not necessary to render it admissible. On the whole, therefore, I am of opinion, though reluctantly, as the case was very carefully considered in the Court below, that this judgment must be reversed.

Lord Campbell.—With respect to this question of evidence, my opinion is, that if a document, purporting to be a receipt, but unstamped, is offered in evidence during a trial, if it would be evidence when stamped as a receipt to establish any point that is litigated between the parties, it cannot be received for a collateral purpose, merely because of the party's saying, "I offer it for a collateral purpose only, so you must take the receipt part as not written." I think that you cannot, in that manner, abstract a part of the document, and give the rest in evidence. The criterion, therefore, seems to me to be, not whether the party seeks to make use of it as a receipt, but whether it can be made use of to [307] settle any question of payment of credit or debit, litigated between the parties; and, in this case, had this sum of £68 9s. 4d. been in dispute, I should have thought that this document would not have been receivable in evidence for any collateral purpose. Just observe the danger that would arise from holding the reverse. Can a Judge say to the juryman.

"You are to discharge from your mind every thing that, on the face of the paper, applies to the receipt of money; it is not upon stamped paper, and it is not therefore legally in evidence, although, if stamped, it would have decided the controversy between the parties: but you may look at the other part of the paper, and that other part you must apply to another and a collateral purpose!" It would be found difficult to adopt such a course, and dangerous to rely on its success. I find no case that has gone so far as to lay down a doctrine of that kind; because, although the language of the Judges is, that the paper may be given in evidence for a collateral purpose, still, upon carefully examining the various cases that have been cited, and in which the expression has been employed, it will appear that in none of them could the paper have been used to prove any issue of debit or credit of a particular sum that had been taken between the parties. In the present case it was wholly useless for such a purpose.

I think therefore, and I am very glad to think so, that, consistently with the notions I have always entertained, and consistently with the principles to be deduced from decided cases, this paper is admissible in evidence, because it does not prove or tend to prove any issue as to the payment of a particular sum raised between these parties. It is quite clear that the justice of the case requires its admission, and I should therefore have [308] deeply regretted to feel myself under the necessity of saying that it ought not to be admitted. The learned Judge who presided at the trial states the question on the objection to the admissibility of the paper in these terms: "On the part of the defenders it was contended, that as the payment of the particular sum of £68 9s. 4d. had been admitted, and as that sum was not included in the demand made, the paper in question was in no sense whatever used to instruct payment of that sum, the payment of that sum not being a matter in dispute between the parties."

Upon this statement I come to this conclusion, that the payment of that sum was wholly immaterial; that it was not in question between the parties; and therefore, that if the receipt had been stamped, it would not have been available as a receipt. That being the case, it comes within the principle which I have before stated, and which I believe to be the sound one, that as it would have been of no benefit as a receipt if stamped, it may be, though unstamped, received in evidence. This removes the case from what seems to me the dangerous ground of resting its admissibility on the party's assertion that he produces it for a collateral purpose.

Under these circumstances, I quite concur as to what ought to be the result of this appeal. I think that this document, although it contains a receipt for this sum, the balance of £68 9s 4d., as it could not, even if stamped, have been used for any purpose respecting the payment of that sum, ought to have been received for the collateral and wholly distinct purpose of identifying the statement of the accounts made at a certain period of time between these parties.

Interlocutor reversed, and verdict in the Court below ordered to be entered up for the appellants.

[309] WILLIAM M'EWAN and SONS,—*Appellants*; JAMES and ARCHIBALD SMITH, and Others,—*Respondents* [March 13, 20, 1849].

[*Mews' Dig.* x. 123; xii. 596. S.C. 13 Jur. 265; 6 Bell, 340. Followed in *Gillman v. Carbutt*, 1889, 61 L.T. 282. Distinguished in *Pooley v. Great Eastern Railway Co.*, 1876, 34 L. T. 540; and see *Gunn v. Bolckow, Vaughan, and Co.*, 1875, L.R. 10 Ch. 497 n.; *Cole v. North-Western Bank*, 1875, L.R. 10 C.P. 373; *Melrose v. Hastie*, 1851, 13 Dunlop, 880; *Robertson v. Baxter and Inglis*, 1897, 24 Rettie 777; (1898), A.C. 616, *sub nom. Inglis v. Robertson*.]

*Sale of Goods—Delivery order—Vendor's lien.*

The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it, of his right of lien for their price, even as against the claims of a third person who has *bona fide* purchased them from the original vendee.

S., the owner of sugars, sold them to B., to whom he gave a delivery order addressed to his agent A., and took a bill of exchange in payment of the price. B. sold the sugars to M., and transferred to him the delivery order. The sugars were in the warehouse of L., in whose books they were entered as received by him from A., on account of S." The sugars were weighed and invoiced by A. upon the order of S. Neither B. nor M. took any steps to act on the delivery order, till a rumour arose of B.'s insolvency, when M. presented the order to A., and received from him a fresh order, addressed to L., the warehouse keeper. Before the sugars could be actually delivered under this order, A. removed them, under the direction of S.:

Held, affirming the judgment of the court below, that the possession of the goods had never been changed, and that S. might still enforce upon them his lien as vendor.

This was an appeal against a decree of the Court of Session, in a suit in which the appellants had claimed possession of forty-two hogsheads of sugar, under the following circumstances:—The sugars in question were originally the property of the respondents who had imported them. James Alexander acted, at Greenock, as [310] the agent for the respondents. On the sugars arriving there, in July 1843, he put them into a bonded warehouse belonging to Messrs. Little and Co., where they were entered as "received from James Alexander for J. and A. Smith." The respondents afterwards entered into a contract for the sale of these sugars to Messrs. James Bowie and Co., and gave them the usual delivery order in these terms, addressed to Mr. Alexander, their agent: "Glasgow, 15 Aug. 1843. You will please deliver to the order of Messrs. James Bowie and Co., the under-noted 42 hhds. of sugar, *ex. St. Mary*, from Jamaica, in bond." The contract for sale was alleged to have been at first for cash, with an allowance of two per cent. discount, but afterwards the respondents consented to take a bill at four months. On the 15th of September, 1843, Messrs. Smith wrote to Alexander, "we will thank you to weigh over the forty-two hogsheads of sugar, *ex. St. Mary*, sold to Messrs. James Bowie and Co., 15th ult.," to which Mr. Alexander answered, "Messrs. J. Bowie and Co.'s agent has got no order of delivery yet for the forty-two hogsheads of sugar, and cannot receive them; it would be as well for you to let these gentlemen know, that I will weigh them over on Monday or Tuesday." On the 18th of September, Smith and Co. wrote to Alexander, acknowledging this letter, and saying, "Bowie and Co. promised to forward order of delivery for the forty-two hogsheads of sugar to their agent at Greenock, on Saturday, and we hope they are by this time weighed over, as we are anxious to forward account sales as soon as possible." On the 19th of September, Alexander wrote to say, "I enclose weights of the forty-two hogsheads of sugar, Messrs. Bowie and Co.'s agent having no word about them," and together with this letter he sent his own account for [311] money paid for warehouse rent, and likewise his delivery charges. The weight note in this letter was headed, "Weights of forty-two hhds. of sugar, *ex. St. Mary*, Jamaica, delivered Messrs. James Bowie and Co., per order, 15th Aug. 1843." The respondents, on this weight note, made out their invoice to Bowie and Co., which invoice was however dated as of the 15th of August, the day of the sale. On the 25th of September, the appellants, to whom Bowie and Co. had in the meantime sold the sugars, sent to the office of Alexander, and produced the original delivery order of the respondents, which had been given by the respondents to Bowie and Co., and by Bowie and Co. transferred to the appellants, and which had been expected by Alexander as his authority for weighing the sugars. The respondents then received from Mr. Alexander's clerk the following note: "Delivered to the order of Messrs. W. M'Ewan and Sons, this date, forty-two hogsheads of sugar, *ex. St. Mary*. James Alexander, per J. Adams."

The respondents about this time heard that Bowie and Co. were in difficulties, and thereon wrote, upon the 26th of September, to Alexander, in the following terms: "I have just heard of Bowie and Co.'s failure. Take immediate steps to secure our forty-two hogsheads of sugar, *ex. St. Mary*, lately sold them, if they are still in the warehouse; take a man of business with you to attend to this without delay." In fact, although the note given by Alexander's clerk contained the word "delivered," the sugars had not been removed from the bonded warehouse of Messrs. Little, and there was some doubt whether the word had not been originally written "deliver," and the

last two letters added afterwards. Alexander, upon the receipt of this note from the respon-[312]-dents, removed the sugars from Messrs. Little's to Messrs. Kerr's warehouse, and, on the 26th of September, wrote to the respondents the following letter: "I have got all the papers passed through the Custom House for transferring the forty-two hogsheads of sugar, *ex. St. Mary*, and they will be removed immediately after 10 o'clock to-morrow. They appear now in the Custom House books as removed. I will attend to your instructions regarding these sugars, and I will take care in the meantime that no person has anything to do with them." On the morning of the 27th of September the actual removal took place, and with the sugars Alexander wrote the following note to Kerr: "I have put into your warehouse this day, on account of Messrs. J. and A. Smith and Co., Glasgow, forty-two hhds. of sugar, *ex. St. Mary*, and I request you will not deliver them to any one without my order as agent for these gentlemen." The authority to remove was obtained from the Custom House by Alexander, in his own name alone, and the entry of the sugars in the books of the new warehouse was in the same form. On the 27th of September he wrote to the appellants the following account of the transaction:

"The forty-two hogsheads sugar have been removed to another warehouse, and I have intimated to the proprietor of said warehouse that he is to hold them to your order.

"The order for these sugars was presented on the evening of the 25th inst., in the usual way; but the young man that came with it from the agents of Messrs. William M'Ewan, Sons, and Co., said that he wished them put in my books as delivered to these gentlemen; and from the order of delivery being transferred to them, my young man (for I was not [313] within at the time) noted in the little book in which the weights are taken when weighing over, 'delivered to Messrs. William M'Ewan, Sons, and Co., per order of 25th September, 1843,' and at their request he gave them a slip of paper to this effect:—

" 'Greenock, 25th September, 1843.

" 'Delivered to Messrs. William M'Ewan, Sons, and Co., this date,

" 'W  
" 'WH 12 } 42 hhds. sugar, *ex. St. Mary*, from Jamaica.  
" 'D 30 )

" 'P. JAMES ALEXANDER

" 'JOHN ADAMS.'

"This was done without any thought that any thing was wrong, although it is not the custom in transfer orders to ask such a thing to be done; but they neither intimated to any officer of customs, nor to the agent for the warehouse, that they wished them transferred or stopped in any way; and this was done in your behalf as soon as I received your letter, which was about half-past eleven, first, verbally, and then by letter to custom-house officers and warehouse agent; and in the regular import book which I keep, where all the purchasers' names are marked, they are neither marked off to one party nor another, with the exception of the first ten hogsheads to *Bowie and Co.*, my young man being just in the act of marking them off when your letter came. I will be very glad if I can give you any further explanation in this matter."

On the 29th September the appellants presented in the usual form a petition to the sheriff of Renfrewshire, in which, according to the Scotch form, Alexander was joined with Smith and Co. as a defender, praying that the sugars might be ordered to be re-[314]-stored to them. The cause was heard in the Sheriff's Court, and the final decree of that Court was, "that in respect that the sugars in question had never come into the possession of M'Ewan and Co. by delivery, either actual or constructive, the petition was dismissed, with costs."

This decree was duly removed into the Court of Session, where the judgment of the Sheriff was, first, by an interlocutor of the Lord Ordinary Wood, and afterwards by the opinions of all the Judges (except Lords Cuninghame, Moncreiff, and Ivory), affirmed, and a decree made accordingly.

The present appeal was brought against that decree.

Mr. Turner and Mr. Anderson for the appellants:

The judgment of the Court below proceeded upon the provisions of the 5 and 6 Vict., c. 39, s. 7, which was passed to amend and render effectual the 6 G. IV., c. 94,

s. 12, on the construction of which some discussion had arisen in the Courts in England (see *Hatfeild v. Phillips*, 12 Cl. and Fin. 343). It was the intention of these statutes to give an absolute right of possession, and a power to dispose of goods to parties who were only in the apparent possession of such goods, being merely entrusted with them as agents for the original owners. This intention of the legislature is fully expressed in the preamble of the Statute of the 5 and 6 Vict.\* Here the letter of the [315] 15th of August gave to Alexander a complete right of dealing with the goods, and fully entrusted him with them, according to the intention of the statute. Nay, more; Bowie and Co. became, and were by that letter declared to be, the owners of the goods, for Alexander was directed to deliver the goods to them. If so, their title to possession was complete from that time. Then comes the question whether they did not obtain at least a constructive possession of the goods. The answer to that question must be in the affirmative. The goods were lying in the bonded warehouse of Little and Co., in the name of Alexander. It is true that the entry in Messrs. Little's books was "Alex-[316]-ander for Smith," but that recognition of him as agent only brings him within the last words of the provision in the statutes. He was entrusted with the goods, and had the goods and the title of them in his possession. The order to him was in substance a delivery order, and the most positive recognition of the absolute title of Bowie and Co. to these goods was furnished by Smith and Co., not only by the note of the 15th of September, but by the invoice they afterwards furnished, which they dated back to the 15th of August, and in which they described the sugar as "delivered to Bowie and Co." Up to this time Messrs. Bowie and Co. had not actively enforced their rights, but on the 25th of September, the appellants, to whom they had sold the sugars, and to whom they had transferred the delivery order, gave a notice to Alexander, which notice operated as a completion of the transfer, if any such completion had been necessary. It may be admitted that Alexander had a lien on the sugars for the rent he had paid for them, and for his commission, but that lien was good only as against his employers, and not as against third parties. Nor were the sugars attempted to be detained under pretence of this lien. Alexander did not claim any right over the sugars in virtue of the debts due to him; he made no objection on that account to complete the delivery by the transfer order of the 25th of September. He did not claim a lien as against any one, not even as against the respondents; for on their order he at once removed the sugars from Little's to Kerr's warehouse. If he did not claim a lien as against them, he could not claim it as against others on their account. Any difficulty on account of his lien is therefore out of the case. If Smith and Co. had, by what they had pre-[317]-viously done, lost all right over these sugars, they ought to be restored to the appellants to whom that right had been lawfully and validly transferred.

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\* Which, after reciting the 6 G. 4, c. 94, says, "And whereas advances on the security of goods and merchandize have become a usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bona fide* advances upon goods and merchandize as by the said recited act is given to sales, and that owners entrusting agents with the possession of goods and merchandize, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances *bona fide* made on the security thereof:" and then, reciting that much litigation had arisen on the construction of the recited act, it provides that, "from and after the passing of this act, any agent who shall thereafter be entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bona fide* made by any person with such agent so entrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding any person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."



The facts here are at least as strong as those in the cases of *Hawes v. Watson* (2 Barn. and Cres. 540) and *Crawshay v. Thornton* (2 Myl. and Cr. 1), in each of which an acknowledgment of title being once made to third parties, was held conclusive in their favour as against those who made it. Here that acknowledgment was made by Alexander, and by Smith and Co. themselves, and they have not now any right to stop the goods which, in virtue of what they themselves did, have become the property of the appellants. Here too the delivery order was given by the respondents themselves, and is consequently conclusive against them; *Pickering v. Busk* (15 East, 38). In *Dixon v. Yates* (5 Barn. and Ad. 313), which will perhaps be cited on the other side, the vendor had not given any delivery order, but merely an invoice of the goods, which remained in the vendor's warehouse, and the possession of which could not lawfully be changed without such an order being given and acted on. That case is therefore inapplicable to the present. In *Townley v. Crump* (4 Ad. and El. 58) a delivery order was given, but was never acted on, and the question there arose between the original vendor and the assignees of the vendee, so that no interests of third parties were concerned.

A delivery order, acknowledged by the warehouseman, operates as a complete transfer of the property mentioned in it, at least as between a warehouseman and a third party; *Whitehouse v. Frost* (12 East, 614), *Hurry v. [318] Mangles* (1 Camp. 452), *Harman v. Anderson* (2 Camp. 243), *Stonard v. Dunkin* (Id. 344) *Hammond v. Anderson* (1 New Rep. 69). Here the delivery order had been sufficiently acted on to bring this case within the principle of those now cited; for Alexander stood in the place of the warehouseman, and his note of the 25th of September was, in substance, a delivery of the goods.

The Attorney General and Mr. Blackburn for the respondents:

This case is not at all affected by the statutes 6 G. IV., c. 94, and 5 and 6 Vict., c. 39, which apply only to the cases of factors and agents. Bowie and Co. were neither factors nor agents, nor, if Alexander could be conceived to bear that character, had their dealings been with him as such. They and the appellants were principals dealing with his principals, and all that he did was what a mere clerk of the principals, resident on the spot, might have done. This distinction runs throughout the case, and makes many of the arguments on the other side inapplicable.

There certainly was no actual delivery of the property, nor can it be truly said that there was a constructive delivery of it to the appellants. A delivery order does not alter the property, if anything, beyond the mere act of delivery, remains to be done after it has been given. Here the weighing of the goods had not taken place at the date of the first delivery order, and the necessity to do that act prevented the delivery order from having the effect of an actual transfer of the goods; *Busk v. Davis* (2 Maule and Sel. 397). This rule was acted on [319] by Lord Chief Justice Gibbs, in *Withers v. Lyss* (4 Camp. 237), and those cases may be considered as establishing the law on that point. This question has been recently discussed in a case in the Court of Common Pleas, and the doctrine now stated was there maintained under circumstances of some hardship. That was in the case of *Jenkyns v. Osborne* (7 Man. and Gr. 678). There beans were shipped, at Leghorn, for A., but in a greater quantity than he had ordered. The bill of lading for the whole cargo was indorsed to him. When the letter inclosing it arrived, he accepted a bill for such of the beans as he had ordered, but declined to take the residue. D. took the residue, and thereupon A. wrote him a letter, acknowledging such residue to be his, and inclosing a delivery order for that residue. D. accepted a bill drawn for it, and paid this bill when at maturity. Before the arrival of the ship, D. sold this residue to E., who accepted a bill for the amount, and received A.'s letter and delivery order. Before E.'s acceptance became due, and before the arrival of the ship, E. stopped payment. D. was held entitled to stop the delivery of the residue, even as against a person who had advanced money to E. upon it, and had received as security for the advance A.'s letter and delivery order. The Court held that the delivery order given by A. was not equivalent to a bill of lading, and expressly affirmed the holding of Mr. Justice Burrough, in *Akerman v. Humphrey* (1 Car. and Pay. 53), that the giving of a shipping note and of a delivery order does not make a change in the property. That case comes very near to the present, and shews the true value

of a [320] delivery order, and the small effect it has in making a transfer of the property.

Then, has there been any constructive taking of possession? There has been none. A mere formal act will not, under such circumstances, amount to a taking of possession; there must be with that formal act something done by the carrier which is equivalent to a delivery up of possession, or to a consent to hold possession on account of the person claiming the title to it; *Whitehead v. Anderson* (9 Mee. and Wels. 518; see *Stoveld v. Hughes*, 14 East 308). There the agent of the assignees of a bankrupt went on board a timber ship to take possession of a cargo of timber, and touched the timber, and gave notice to the Captain, who made no objection to the agent's title, but promised to deliver the timber on being satisfied as to the freight. This was held not to be such a taking of possession as to put a stop to the right of stoppage *in transitu*. In the present case the appellants did not do so much; for though the Captain was the person having the actual custody of the timber, Alexander was not the person having the actual custody of the sugars. They were in the warehouse of the Messrs. Little, entered in the name of Alexander, it is true, but entered with the description of him as agent for the respondents. The notice to Alexander amounted therefore to nothing. The cases of *Hurry v. Mangles* (1 Camp. 452), and *Whitehouse v. Frost* (12 East, 614), do not apply, for in each of them the vendor acted as warehouse-keeper, and in the first received rent from the vendee, and in the other, [321] accepted from him notice of a sale to a third party. Nor is *Harman v. Anderson* (2 Camp. 243), or *Lucas v. Dorrien* (7 Taunt. 278; 1 B. Moore, 29), applicable here, for each of them depended on the question whether the warehouseman had accepted and acted upon the notice of transfer; while here there was absolutely no notice whatever given to the warehouseman.

This is the case of a sale made by a vendee before taking possession of the goods, and consequently is one where the purchase is one made at the risk of the party making it; *Dixon v. Yates* (5 Barn. and Ad. 313); for though the sale gives a title to property, it does not confer a right of possession; *Bloxam v. Sanders* (4 Barn. and Cres. 941).

Then the terms of the letter of the 15th of August are relied upon as if they were an estoppel as against the respondents. But if that mode of treating such a paper was adopted, its effect would be to give to a delivery order that of a bill of lading, which cannot be. *Farina v. Home* (16 Mee. and W. 119). The introduction of the words, "or order," will not change the character and effect of the instrument. However frequently assigned over, it would merely amount to an authority to Alexander to take the goods out of the possession of Little and Co., and to deliver them to some one else, but could not make the instrument operate, by mere delivery, as an actual transfer of the goods.

This is not like the case of *Dixon v. Baldwin* (5 East, 175), or that of *Dodsworth v. Wentworth* (4 Man. and Gr. 1080), a case where some perfect act of delivery has taken place, so as to [322] effect an absolute transfer of the possession of the goods. Here the sugars always remained in Little and Co.'s bonded warehouse, in the name of the respondents, the character of their agent being that alone which was borne by Alexander, and nothing being ever done with the original delivery order to constitute a delivery of the goods. It was never presented to Little and Co., nor until Alexander removed the goods from their warehouse to that of Kerr, were they ever called on to do any act which might amount to a recognition of its authority. It might, therefore, be admitted, that a delivery order acted on by the holder of it, and by the warehouseman who was in actual possession of the goods, would transfer the property: still the respondents would be unaffected by that admission, for nothing of the sort occurred here.

Mr. Turner, in reply.—The transfer of possession here was complete, if not by an actual, at least by a constructive, delivery. It would be an encouragement to fraud to allow a vendor to give a delivery order to a vendee, and then, when a third person, on the faith of that delivery note, had bought the goods, to permit the original vendor to step in and claim them against his own order and in defiance of the *bona fide* claims of a purchaser who had purchased on the authority of it. Here too the circumstances are stronger than the mere giving of a delivery order, for the respondents throughout acted in recognition of the validity of that order; it was

afterwards recognised by Alexander himself, (for the act of his clerk must be taken to be his act), and his note of the 25th of September was a confirmation of that of the 15th of August, and amounted in itself to a con-[323]-structive delivery of the sugars. So that here was a delivery order given to a first vendee, constantly recognised by the vendor, and a second and confirmatory order given to the second vendee. After such acts, the original vendor cannot step in and defeat the *bona fide* rights of the second vendee.

The Lord Chancellor:—The facts of this case are short and simple. Certain sugars, imported by Messrs. Smith and Co., the respondents, were placed in a bonded warehouse belonging to Messrs. Little, at Greenock. These sugars were entered in the books of Messrs. Little in this form: "James Alexander for J. and A. Smith." They remained in this warehouse till the insolvency of some parties, to whom a portion of them had been sold, raised a question of ownership. The respondents sold this portion to Bowie and Co., and gave them a delivery order addressed to Alexander, who acted, at Greenock, as the agent for the respondents. No step was taken by Bowie and Co. with regard to taking possession of these sugars, but they were sold by Bowie and Co. to the appellants. On the 26th of September, the respondents wrote to Alexander that they had just heard of Bowie and Co.'s failure, and added, "Take immediate steps to secure our forty-two hogsheads of sugar, *ex. St. Mary*, lately sold them, if they are still in the warehouse." Upon that, Alexander, who acted for the respondents, caused the goods to be removed into another warehouse. So far these facts show no matter of dispute at all. The respondents, the vendors, had not parted with the possession, which remained as upon the first arrival of the sugars. Before the possession was parted with, or the custody of the sugar altered, [324] they were removed by the respondents' order into another warehouse.

The question now before the House is raised, not on behalf of Bowie and Co., the original vendees, but on behalf of the appellants, to whom the sugars were sold by Bowie and Co. On the sale to Bowie and Co., the respondents gave them a delivery note in these terms: "Mr. James Alexander. Dear Sir,—You will please deliver to the order of Messrs. James Bowie and Co., the under noted forty-two hogsheads of sugar, *ex. St. Mary*, from Jamaica, in bond," and the sugars were then described, so as to identify them. Messrs. Bowie and Co. did nothing under this note to take possession of the sugars, but simply sold them to the appellants, who likewise allowed them to remain untouched in the hands of Little and Co. Upon the 25th of September however, they applied, not to Little and Co. in whose warehouse the goods were bonded, but they went to the place of business of Alexander, where they saw a clerk named John Adams, who gave them the following memorandum: "Greenock, 25th September, 1843. Deliver to the order of Messrs. W. M'Ewan, Sons, and Co., of this date." That memorandum is not addressed to anybody, and it appears that the word "deliver," which was originally written in it, has been altered to "delivered." Whatever may have been the object of that alteration, that object entirely failed, for it was nonsense to say that by that memorandum the goods were delivered. They were not delivered in fact, and this memorandum did not constitute a delivery, for they were not in the hands of Alexander, by whom the document was given, but in those of the warehousemen, Messrs. Little, to whom the order was directed. It was not the acknowledgment of a fact done by the [325] person who made the acknowledgment, but was an order to a third person, who might or might not think fit to execute it. It makes no difference that the memorandum was written by the clerk,—if Alexander had himself written it, no more force would have been attributable to it. He was only the agent for the vendors, under whose authority alone he could act. The goods were in the warehouse of Little and Co., and all he could have done would have been to give directions to the warehousemen, as Adams did in fact give them.

It is therefore clear, that up to the 26th of September, nothing had been done which changed the possession of those sugars. They remained in the warehouse of Little and Co., in the same state in which they had been placed there on their first arrival. It follows, therefore, that when on that day the vendors heard of the failure of Bowie and Co., they had a right to stop the delivery of these sugars. But this right is denied on several grounds made in argument for the appellants, who are the

sub-vendees of these sugars. First, it is said, that though the delivery note does not pass the property as a bill of lading would have passed it, by being indorsed over from one party to another, still it operates as an estoppel upon the party giving it, so far, at all events, as a third party is concerned; and it is argued that it is a kind of fraud for a person to give a delivery note, which the person receiving it may use so as to impose upon a third person, and then to deprive that third person of its benefit. But that argument is merely putting the argument as to the effect of a delivery note in another form, and it assumes that such a document has all the effect of a bill of lading. But as the nature and effects of these two documents are quite different from each other, it seems to [326] me that such an argument has no foundation at all, and cannot be adopted without converting a delivery note into a bill of lading.

The next argument is, that the possession of the goods was changed by what took place with Alexander on the 25th of September. But it is clear to my mind that Alexander was not himself in actual possession of the goods, and that what he did at that time could not change the possession. He was only the agent of the vendors, and was so named in the books of Little and Co. He, therefore, merely stood in the position of a person through whom the respondents meant to exercise their rights and powers as owners of the goods.

It was then said that the circumstances here gave a peculiar effect to this note of Alexander's on the 25th of September. It was contended that, assuming the delivery note given to the first vendee to have no effect in changing the property, yet, if the second vendee comes to the original vendor, and obtains a new order, the vendor cannot afterwards say that he has not been paid by the first vendee, and so defeat the title of the second vendee, the sale to whom he had in fact sanctioned, by making that second note, and dealing with him as a party entitled to the custody of the goods. But this argument is answered by the observation that Mr. Alexander is here assumed to have an authority, which, in fact, he never possessed, for, in truth, he possessed no authority but that which the first delivery note, given to Bowie and Co., had conferred upon him. Entirely putting out of view the circumstance, that the note of the 25th of September was signed by the clerk, and supposing it to have been signed by Alexander himself, I am of opinion, that it [327] gave the second vendee no better title than the first delivery note gave to Bowie and Co. It is not possible to construe this note as a dealing between the vendors and the second vendee, when, in fact, there was no communication whatever between them.

Being therefore of opinion, that the circumstances, as they stand, clearly leave the title to the goods in the vendor, and that those subsequent transactions which are said to take this case out of the ordinary rule, and to give a title to the second vendee, have no operation for that purpose, I move to affirm the interlocutors appealed from, with costs.

Lord Brougham:—I am entirely of the same opinion. I do not think that on the 25th of September, Alexander had any authority which he did not originally possess, and that original authority was clearly nothing more than that of an agent of the owners. Alexander was not in custody of the goods; he was not authorized to sell them or deal with them in any way. I perfectly agree that the memorandum written on the 25th of September, means nothing, and that the word "delivered," even supposing that the last syllable had not been added, but that the word had been originally so written, is mere nonsense. The goods were not delivered by the effect of that memorandum. The delivery order given by the respondents to Bowie and Co., has been argued upon as if it had the effect of a bill of lading, but that is not the case. The case appears to me entirely free from doubt, and though I have great respect for the opinions of the learned judges who constituted the minority in the Court below, I have no hesitation whatever in saying, that the interlocutors appealed from ought to be affirmed, with costs.

[328] Lord Campbell:—The single point in this case is, whether Smith and Co., the respondents, the original vendors of the goods, retained their lien upon them. Several of the Judges in the Court below discuss at great length the question of stoppages *in transitu*. That doctrine appears to me to have no more bearing on this case than the doctrine of contingent remainders. One of these learned judges calls

the right of stoppage *in transitu* a new right, the operation of which, he says, he would not extend. I cannot say that I agree with him. What is stoppage *in transitu*? It is this, that where a vendor of goods has to send them to a vendee, and has for that purpose parted from them to a carrier, he may, upon hearing of the insolvency of the vendee, while they remain in the hands of the carrier, and, before delivery to the purchaser, stop their delivery. I think that this doctrine of stoppage *in transitu* is a most just and equitable doctrine, and I would by no means strive to limit its operation. But be that doctrine what it may, it has nothing to do with this case, which is, whether the lien of the vendor of goods remains or has been lost. There cannot be a doubt that after sale of the goods, the vendor has a lien on them for the price, so long as they remain in his possession, and this is a doctrine as old as any doctrine connected with the purchase and sale of goods. Here the goods had been sold, but the price of them had not been paid. Then how is the lien of the vendor lost? First, it is said it has been lost by the giving of the delivery order of the 15th of August. But the Lord Chancellor has clearly and satisfactorily established that this is not the case, for a delivery order alone does not change the possession. Then it is said, that here there has been a subsequent [329] sale, and that the price has been paid by the second vendee, who has obtained from Alexander an order to take the sugars away, and that, consequently, these circumstances amounted to a recognition of the first delivery order, and were equivalent to an actual delivery of the goods to the second vendee. But this argument altogether proceeds upon the assumption that a delivery order has the effect of a bill of lading. If a bill of lading is given, and that is indorsed for a valuable consideration, that would take away the right of the vendor to prevent the delivery of the goods; but that is not so with a delivery order. It would be a gratuitous *dictum* to say, that, according to the usage of trade, or the law of the land, such would be the effect of a delivery order.

It is said that the delivery order, and the subsequent payment of the price of the goods by the second vendee, take away the lien of the vendors. These acts do not seem to me to do so, for, first, this price was not paid to the original owners, and then, to treat what passed between other people as an estoppel to the original owners, is to give the delivery order the effect of a bill of lading, and thus the argument again and again comes round to that point for which no authority in the usage of trade or in the law can be shewn. No fraud has been practised here by the owners, although the second vendee has undoubtedly been a sufferer. But then it is said that possession was given of these sugars, if not by the delivery order of the 10th of August, at least by the act of Alexander, on the 25th of September, the answer to which is, that Alexander had not then the custody of the sugars; he was the mere agent or broker, not the warehouse keeper of the owners, and [330] the goods were not in his possession, but in the possession of the warehouse keepers, who alone could actually change the possession of the sugars, and, therefore, in fact, the very foundation of the argument, as to the change of possession, fails.

There has been some negligence on the part of M'Ewan and Co., who, when they bought from Bowie and Co. sugars which were known to have belonged to the respondents, should have ascertained that the purchase money had been paid for them, or should at least have taken care that the sugars were duly transferred into their names, instead of which they continued to act with the utmost supineness, until the intimation of Bowie and Co.'s insolvency became noised abroad, when they sought, by going to Alexander's and getting the memorandum from him, to change the possession of these sugars, which they could not legally do in that way.

The decision of this case will not in the least degree embarrass commerce, but will tend to make men more careful and watchful in their dealings.

Interlocutors of the Court below affirmed, with costs.

[331] LOUSIA ADELAIDE PIERS, and FLORENCE A. M. DE KERRIGUEN (formerly PIERS),—*Appellants*; Sir HENRY SAMUEL PIERS, Baronet,—*Respondent* [March 15, 19, 22, 1849].

[*Mews'* Dig. i. 350, 370; vii. 640, 655. S.C. 13 Jur. 569; 10 Ir. Eq. 341. Commented on as to presumption in favour of marriage in *De Thoren v. A.-G.*, 1876, 1 A.C. 689; *Collins v. Bishop*, 1878, 48 L.J. Ch. 32; *Sastry Velaidar Aronegary v. Sembecutty Vaigalie*, 1881, 6 A.C. 372; *Lauderdale Peerage*, 1885, 10 A.C. 761. As to preparation of appendix, see *Annual Practice*, 1901, vol. 2, p. 667, *Directions for agents*, 24.]

*Marriage—Evidence—Presumption—Costs—Practice—Appendixes.*

The question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage.

There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof.

Where, therefore, two persons had shewn a distinct intention to marry, and a marriage had been, in form, celebrated between them, by a regularly ordained clergyman, in a private house, as if by special licence, and the parties, by their acts at the time, shewed that they believed such marriage to be a real and valid marriage, the rule of presumption was applied in favour of its validity, though no licence could be found, nor any entry of the granting of it, or of the marriage itself, could be discovered; and though the Bishop of the diocese (during whose episcopacy the matter occurred), when examined many years afterwards on the subject, deposed to his belief that he had never granted any licence for such marriage.

The House will not grant the costs of an appeal to come out of the estate, upon a mere miscarriage of the Court below, where the subject of litigation, though in the result decided by the Court, was one which might have required to be tried as a question of fact.

The House strongly condemned the custom of each party printing an Appendix to his Case, and desired that, in future, a joint Appendix might alone be printed.

This was an appeal against a decree pronounced in the Court of Chancery in Ireland, by Lord Chancellor Brady, in a suit instituted by the appellants on the 29th October, 1845, in which they sought to establish [332] their title to a charge for raising a sum of £4000 out of certain estates, now in the possession of the respondent Sir H. S. Piers. The appellants claimed to be the lawful daughters of the late Sir John Bennett Piers, who when he became of age, in 1794, had joined his father, Sir Pigott W. Piers, in suffering a recovery of certain lands settled upon the father's marriage. By the re-settlement of the estate then made, it was "provided, declared, and agreed upon, by and between all the parties thereto, that it should and might be lawful to and for the said John Piers (and the other persons to whom estates for life were therein limited), when and as they should respectively be in possession of the premises and hereditaments aforesaid, by virtue of the limitations aforesaid, to settle by way of jointure for any wife or wives, a sum of money not exceeding in the whole the sum of £600 a-year, which jointure or jointures should be in bar of dower or thirds, and also that they the said John Piers and the said other persons therein named, to whom estates for life were limited as aforesaid, respectively, as they should be in possession under the limitations aforesaid, might charge said premises and hereditaments, as and for a portion or portions for younger children, with a sum of money not exceeding in the whole the sum of £4000."

Sir Pigott William Piers died in the month of April 1798, leaving his eldest son John (who was thenceforth known as Sir John Bennett Piers), and five other sons, him surviving, three of whom died in the lifetime of Sir John, without issue. The

fifth son Frederick died after his father, leaving the respondent, now Sir Henry Samuel Piers, his eldest son and heir at law, surviving.

Sir John Bennett Piers, upon the death of his father, entered into the possession of the estates comprised in [333] the deed of 1794, and so continued till his death. In the year 1803, he became acquainted with Elizabeth Denny, *alias* King, then an actress at Astley's theatre, in Dublin, whom he removed from the theatre, and who went to live with him, and had by him seven children: Henrietta, born November 1803; Henry, born October 1805; John Edward, in October 1807; W. Stapleton, born November 1809; George, December 1810; and the appellants, Louisa and Florence, born respectively the 23d June, 1815, and 17th April, 1819.

It was alleged on the part of the appellants, that while their parents were resident in the Isle of Man, namely, on the 27th of May 1815, a marriage was solemnized between them in the parish of Kirk Bradden, in that island, by the Reverend T. O. Stewart, an Irish clergyman, then assistant curate of St. George, Douglas, and it was in virtue of this alleged marriage that the appellants claimed, in the character of lawful "younger children," to be entitled to a charge on the respondent's estate, created in their favour by Sir John Bennett Piers, in pursuance of the power reserved to him by the deed of 1794.

The evidence, given by the appellants, as to the marriage was in substance as follows:—The Reverend Thomas Orpen Stewart, A.M., was, on the 2nd of November, 1810, named domestic chaplain to Dr. Crigan, then Bishop of Sodor and Man, and on the 25th of January, 1812, was appointed by the Bishop assistant to the curate of Saint George's Chapel, Douglas. Sir John Bennett Piers lived at a house called Leece Lodge, near Douglas, situate in the parish of Kirk Bradden, but not within the district of Saint George's Chapel. In the year 1814, the Rev. Dr. Murray succeeded Dr. Crigan, as bishop of Sodor and [334] Man, and the Rev. T. O. Stewart continued occasionally to perform duties as a clergyman at St. George's Chapel. Previously to the year 1815, Sir J. B. Piers, finding that there was likely to be fresh offspring from his connexion with Miss Denny, expressed, in strong terms, his desire to have legitimate children, who could succeed to his estate. Lady Piers, in her deposition, made with regard to this matter the following statement:—

"I am quite certain that my late husband fully contemplated and intended that a marriage between him and me should be solemnized, for a period of more than two years before it took place in the year 1815; and I am also quite certain that he intended to solemnize a legal and valid marriage, as he frequently expressed to me an anxious wish that I might have issue which would inherit his estates, and that he would make a certain and safe provision for me and my children; and I know that my late husband was desirous that his brother, the Reverend Octavius Piers, who was then residing in England, should perform the ceremony of marrying us; and that his said brother would come to the Isle of Man for that purpose, which he was unable to do, as his wife objected, in consequence of her approaching confinement, and was afterwards delayed, until my late husband became intimately acquainted with the Reverend Thomas Orpen Stewart, who was at that time assistant chaplain at the chapel of Saint George's, Douglas, in the Isle of Man.

It was alleged, that this intended marriage actually took place in the year 1815, being celebrated under a special license, at Leece Lodge, by the Reverend Thomas Orpen Stewart, in the presence of John Edwards, then a captain in the regiment of Ancient Britons. The following certificate was given:—"I certify, that I have [335] this day, the 27th May, 1815, in the parish of Bradden, Isle of Man, celebrated, according to the rites and ceremonies of the church of Great Britain and Ireland, as by law established, a marriage between John Bennett Piers, Baronet, of Tristernagh Abbey, county Westmeath, Ireland, and Elizabeth King, *alias* Denny, spinster. Signed the day and year above."

"T. O. Stewart, clerk, A.M.

"John B. Piers, } In the presence of John Edwards."  
"Elizabeth Piers, }

This document was produced in evidence by the appellants, as proof of the marriage of their parents. It was also argued upon as shewing the intentions of the parties. And, for the purpose of proving Sir J. B. Piers' belief that a valid marriage had been celebrated, evidence was given that, immediately afterwards, he executed a will in the following form:

"I hereby will and bequeath to my wife, Elizabeth Piers, a jointure of £600 per annum, to be paid out of my estates in Westmeath and Longford.

"Witness my hand and seal, May 27th, 1815.

"John B. Piers.

"Present, T. O. Stewart, John Edwards."

In 1821, Sir John and Lady Piers went to reside in Ireland, and then a second marriage was duly solemnized between them. In 1836, Sir John executed, under the powers of the deed of 1794, a charge of £2000, in favour of each of his two daughters, born subsequently to May 1815, and by a will, dated 30th of May, 1842, he ratified the appointments of the jointure and charges. Sir J. B. Piers died, in July 1845, without lawful issue male, and the respondent entered into possession of the settled estates, and took the title.

A bill had been filed against the respondent and others, in the lifetime of Sir J. B. Piers, praying that [336] the charges in favour of the appellants might be declared to be established. That bill was dismissed as premature, but without costs, as the then Lord Chancellor (Lord Plunket) was of opinion that the legitimacy of the plaintiffs in that bill (the present appellants) had been unnecessarily and improperly contested, and had been satisfactorily established (*Piers v. Tuile*, 1 Dru. and Walsh, 298).

Several witnesses were examined in that cause. Sir J. B. Piers had himself been examined, and as to the *fact* of marriage, deposed: "I have looked on the paper writing marked (A), and endorsed my name thereon. It is the certificate of my marriage, dated the 27th of May, 1815; the said certificate and the signature, 'T.O. Stewart, clerk, A.M.,' is the handwriting of the Rev. Thomas Orpen Stewart, since deceased, who performed said marriage ceremony, on said day, between me and Elizabeth King, otherwise Denny, spinster, my present wife. The said Thomas Orpen Stewart was a beneficed clergyman of the established church, and at that time officiated as one of the curates in the parish church of St. George's, Douglas, in the Isle of Man. The said marriage took place at my residence, at Leece Lodge, near Douglas, in the forenoon of said day. Captain John Edwards, formerly of the regiment called the Ancient Britons, was present at and witnessed said marriage. He died in about four or five years afterwards; his name is subscribed as a witness to said marriage certificate, and in his proper handwriting; the signatures John Piers and Elizabeth Piers thereto, are the proper handwritings of me and my said wife; the said Thomas Orpen Stewart informed me and my said wife, at said time, that said marriage was perfectly valid, which from my own knowledge I [337] believed was perfectly true." He also identified the paper by which, on the same day, he created the charge of £600 a-year for his wife.

Lady Piers, in her examination in this cause, deposed in the same terms as to the marriage, and added that "at the conclusion of the marriage ceremony, the Rev. T. O. Stewart stated to my late husband, in my presence, in answer to an inquiry if all was correct and legal, that the marriage ceremony had been all duly solemnized." Both parties accounted for the marriage being kept secret, by stating that the mother of Sir J. B. Piers was alive in 1815, and that she having absolute controul over the greater part of the family estates, he was afraid of offending her by a marriage which she might not consider sufficiently advantageous.

Mrs. Mary Stewart deposed, "I have a very distinct recollection of the day and occasion of the said marriage certificate, viz., the 27th of May, 1815, and I remember very well that my said husband, the late Rev. T. O. Stewart, upon that occasion, left home from his residence at Douglas aforesaid, in the forenoon of the said day, for Leece Lodge, the residence of the said Sir J. B. Piers, for the purpose of solemnizing a marriage between the said Sir J. B. Piers and Elizabeth Denny; and I recollect perfectly well, upon my said husband coming back from Leece Lodge aforesaid, upon the same day, he told me that he had performed the marriage between the said parties; to the best of my recollection and belief it was about the hour of one o'clock in the afternoon when he returned home upon that occasion; and I am quite certain that the marriage ceremony was performed before the hour of twelve o'clock in the forenoon of that day, because I have a distinct recollection of my husband's telling me at the time how [338] very anxious the said Sir John Bennett Piers was, that said marriage should be solemnized within canonical hours; and I recollect his saying at the same time, 'Well, I have just married Sir John to Miss Denny, and I am very glad of it, for it is a pity that there should be any slur upon such a mild, amiable,



nice person as she is.'” It was proved that the said Mr. Stewart died in Jamaica in 1819, having for two years held the living of St. Dorothy’s, in that island.

Miss Margaret Christian, daughter of the late Vicar General of the Isle of Man, and sister of the Rev. John Christian, curate of St. George’s, deposed that the Rev. T. O. Stewart was appointed to assist her brother in the curacy, “as her brother was too young to perform the whole service himself, he being only in deacon’s orders, and there being no other clergyman. I heard a report of Sir J. Piers’ marriage with the present Dame Eliz. Piers, which, I believe, must have taken place about 1815.” “I never visited the plaintiffs’ mother as Lady Piers; I knew her to be styled Lady Piers, and I also knew that Mrs. Stapleton, a lady of most correct conduct, and the wife of General Stapleton, did visit Lady Piers, and was very intimate with her in the Isle of Man.”

Upon the question of credit and repute, Mrs. Stewart deposed that, after May 1815, “I know that the said Sir John B. Piers owned and acknowledged her to be the mother of the complainants in this cause, and his lawful wife, and the said complainants to be his legitimate children, issue of the said marriage; and the said Dame Elizabeth was introduced to his friends, acquaintances, and visitors, as I have always understood, and do believe, as his lawful wife; and immediately after it became a matter of notoriety and well known in the [339] town of Douglas, that they had been married by my said husband as aforesaid.”

Sir William Hillary, bart., a justice of the peace in the Isle of Man, deposed:—“I was acquainted with the late Sir John Bennett Piers, on or about the 27th of May, 1815, and subsequently thereto I was informed by the Rev. Thomas Orpen Stewart, sometime in or about the latter part of the year 1815, that he had married Sir John Piers to Miss Denny; and subsequently I was informed by Sir John Piers, that he deeply regretted that he had not secured the inheritance to his sons of his estates and title, but that he had done everything in his power to rectify the error by marrying their mother, as” he (Sir John Piers) added, “you have no doubt, already heard;” and I said, “I had heard that they were so married.” “I was in the frequent habit of dining, with other gentlemen, at Sir John Piers’s residence, Leece Lodge, and Hampton, subsequently to the 27th of May, 1815, until his departure from the island, and ever after I had been so as aforesaid informed of the marriage of Sir John Piers with Miss Denny, I believed them to be man and wife; they lived together as man and wife, and at various times when I have dined with him, she presided at his table, and I believe their acquaintances generally believed them to be man and wife.”

Captain Caesar Bacon, formerly of the 23d Light Dragoons, deposed:—“I returned to the Isle of Man in the year 1817; I then heard of the marriage of Sir John Bennett Piers with Miss Denny, and from that time they lived together as man and wife, and I considered them to be lawful man and wife.”

No entry of any licence could be found, nor any register of the marriage. These circumstances were accounted for by the appellants as the consequence of the [340] great irregularities which, up to a very recent period, had occurred in matters relating to marriages in the Isle of Man; and much evidence was given to shew that marriages, the lawful celebration of which was undoubted, had not been registered, and if celebrated by licence, no trace of the licence was to be found. One of this latter class was in the case of two marriages of the Hon. Captain Murray, first cousin of the said Dr. Murray, then bishop of Sodor and Man, and now Bishop of Rochester. The first of those marriages was celebrated in the year 1811, and the second in 1819, but of neither of them was an entry made till 1822, some years after his Lordship had come into possession of the see.

In further evidence of those irregularities and omissions, the Rev. Francis Broderick Hartwell deposed—“I hold the situation of chaplain to the protestant chapel of St. George’s, at Douglas, in the Isle of Man, and have held that office nearly eleven years; I held the offices of Vicar-General and Surrogate for the southern part of the Isle of Man, in which the parish of Kirk Bradden is situate, from the year 1832 until the 1st of January, 1846, when I resigned the office of Vicar-General; but I still hold the office of Surrogate for issuing of marriage licenses. I have not the possession of any registry book of marriage licenses granted by the Vicar-General for the time being of said island in the year 1815, or prior, or subsequent thereto; I have no knowledge, nor do I believe that there are, or ever had been any such books of

registry of marriage licenses, or affidavits, or bonds grounding same, at all registered by the Vicars General. I have never known, and I do not believe, that marriage licenses in, or previous to the year 1815, or the affidavits or bonds to ground such marriage licenses, were regularly entered in any books of registry, in [341] or previous to said year 1815; and when I knew the parties, I have usually dispensed with written bonds or affidavits, but I have always required them to be sworn before me, that they were eligible to be married, and I believe that my predecessors in office adopted the same practice. I have the custody of the registry books for marriages by special license in the chapel of St. George's, Douglas. I have carefully examined the entries of marriage by special license in said registry book, which amount in number to fifty-nine, and I only find two out of the whole number of fifty-nine licenses recorded or forthcoming."

It was stated in evidence that the practice in the Isle of Man was, to hand the special licenses to the officiating clergyman, who had not been in the habit of depositing them in any office, or taking any care to preserve them.

The Reverend Joseph Qualtrough, Vicar of Kirk-Lonan, who was a beneficed clergyman in the island from 1810, deposed—"I do not recollect what became of the original marriage licenses; I do not believe that I returned the special marriage licenses which I received for performing the marriage ceremony, to any public office or registry, but that I kept them probably for some time, and I cannot tell what became of them afterwards."

The Rev. Joseph Brown, episcopal registrar of Sodor and Man, stated that in 1818 he received special directions from the Bishop to take affidavits according to the canons of the church, previously to granting marriage licenses. He afterwards deposed:—"I have searched in the ecclesiastical registry of the Isle of Man, to ascertain whether or not the special marriage licenses, in or previous to the year 1815, or the affidavits or bonds [342] to ground such marriages by special license, were regularly or at all entered; but I have not been able to discover any entry in such registry, and I cannot state whether or not they have been registered elsewhere, in and previous to the year 1815; there is not any registry of special marriage licenses, or affidavits or bonds, that I know of, since the year 1815. I am unable to state whether or not it was the custom of clergymen, celebrating such marriage, to destroy the licence." He added that affidavits to obtain licenses were made by the parties before him, the registrar. As to baptisms, he stated that it was a common custom to specify in the certificate the christian and surname of the father of the child, and the christian and maiden name only of the mother, without adding her marriage surname.

Lawrence Adamson, law clerk, deposed:—"I have inquired, in order to search for licenses, bonds, or affidavits, to ground licenses for marriages. I am quite certain that there is no public registry or office in Douglas for the preservation of licenses, or bonds, or affidavits to ground licenses for marriage. The paper-writing marked (H) purports to be a copy of the entries of marriages by special licence in the registry book of St. George's chapel, Douglas, in the Isle of Man; I have compared such copy and list of marriages by special licenses with the original registry book of marriages by special license kept in the chapel of St. George's, in Douglas aforesaid, and it is an accurate list of such marriages by special license appearing therein, and such document is, as nearly as I could make the same, a *fac simile* of said registry, differing from the same as little as possible, having bestowed great labour thereon. I believe the chapel of Saint George's to be within the parish of Kirk Bradden, and [343] a chapel of ease to the parish church of Kirk Bradden; I have made diligent search in the original parish registry books at Kirk Bradden for corresponding entries of those marriages so contained in said list abstracted from the said registry at St. George's chapel, and I only found one entry of the said several marriages duly entered in the parish registry at Kirk Bradden, viz., the entry of the marriage of Francis Matthews and Alicia Forbes, who appear to have been re-married by licence on the 12th day of April, 1813, at Kirk Bradden aforesaid; I have examined the registry of the parish church of Kirk Bradden, and there are not any marriages by special licence registered therein in the years 1814, 1815, or 1816, respectively. I have examined the book of registry for marriages at St. George's chapel, Douglas, which appears to have been kept down to the year 1816, and find that many of the marriages therein entered are not entered consecutively and regularly, according to

their numbers, and the dates and years of such marriages; several of the marriages are entered in wrong places, and there are four entries of marriages in said book purporting to have had only one subscribing witness. I found that after the fourth leaf in the said last mentioned registry book, that two leaves appeared to have been cut out; and I found after the fifth leaf of said book, that one leaf appeared to have been torn out; and I also found immediately after the said two leaves, so appearing to be cut out as aforesaid, four leaves had been inserted in the said book, and sewn into it with strong thread, and many marriages are entered in such introduced leaves."

For the respondent, defendant in the suit in which the decree now appealed against was pronounced, it was [344] contended that there had not been any valid marriage between Sir J. B. Piers and Miss Denny in May 1815, and in the first instance, the "Act to prevent Clandestine Marriages," passed at the Twynwald Court, held at the Castle Rushen on the 27th of May, 1757,\* was relied on. Evidence was also given to show that no [345] such marriage had taken place. The first piece of evidence was a certified extract from the register of baptism of one of the appellants, who was baptized as the child of "Elizabeth Denny," and not Elizabeth Piers. The extract was in these terms:—"Anna Maria Stapleton Florence Fredrica, daughter of Sir John Bennet Piers and Eliza Denny, born 17th April, 1819, and baptized November 24th, 1820."

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\* By which it was enacted, "that no license of marriage shall, from and after the publication of this act, be granted by the bishop, vicar-general, or other person having authority to grant such licenses, to solemnize any marriage in any other church or chapel than in the parish church of, within or belonging to, such parish in which the usual place of abode of one of the persons to be married shall have been within the space of three months immediately before the granting of such license, and in no other place whatsoever; provided always, that nothing herein contained shall be construed to extend to deprive the bishop and his successors of the right of granting *special licenses to marry at any convenient time or place, so that the said license be under his own proper hand and seal episcopal.*

"And it is hereby enacted, that such licenses for solemnizing marriages shall not be valid unless the same be under the hand and seal of the persons authorized to grant such licenses respectively, and that no such licenses shall be granted to any person whatsoever, but according to the directions of the several ecclesiastical canons of 1603 relating to marriages.

"And whereas many persons do solemnize matrimony without publication of banns or license of marriage first had and obtained as aforesaid, therefore, for prevention thereof, be it enacted by the authority aforesaid, that if any person shall from and after the publication of this act, solemnize matrimony in any other place within this isle, or the dominion thereof, than in a church where banns have been published, *unless by special license from the bishop* as aforesaid, or shall solemnize marriage without publication of banns, unless license of marriage be first had and obtained from some person or persons having authority to grant the same as aforesaid; every person knowingly and wilfully so offending, and being lawfully convicted thereof, or persons holding any ecclesiastical living, or exercising any ministerial function in the church or chapel of this isle, shall be deemed and adjudged to be guilty of felony, and shall be transported to some of his Majesty's plantations in America for the space of fourteen years; and if such person solemnizing marriage contrary to this act be an alien, foreigner or stranger, and not of the ministry of this isle, and convicted as aforesaid, such alien shall be publicly exposed, with his ears nailed to a pillory, to be erected for that purpose at Castletown Cross, upon the next court day of general gaol delivery after such conviction, at twelve o'clock at noon, and there to remain for the space of one hour, when his ears are to be cut off and remain on the said pillory, and the said offender to be returned to prison in Castle Rushen, there to remain confined till the governor, or his deputy or deputies for the time being, shall think proper to release him, upon paying a fine not exceeding the sum of £50, and abjuring this isle, and all marriages solemnized from and after the publication of this act in any other place than a church, *unless by special licence* as aforesaid, or that shall be solemnized without publication of banns or license of marriage from a person or persons having authority to grant the same first had and obtained, shall be null and void to all intents and purposes whatsoever."

Other exhibits shewed that the registers of the baptisms of the children of Sir J. B. Piers, born before 1815, had been in the same form.

For the purpose of discrediting the character and acts of the Rev. T. O. Stewart, who was said to have celebrated this marriage, evidence was given of an action for adultery, commenced by one *E. O. Smith v. the Reverend T. O. Stewart*, in February 1815, which terminated in October 1816, by a sentence of divorce *a mensa et thoro*, of Smith from his wife.

A certificate of the marriage of Sir J. B. Piers with "Elizabeth King," at St. Catherine's, in Dublin, on the 19th day of March, 1821, was put in evidence. This marriage was celebrated by license, and in both the bond to obtain the license and the *fiat* granted thereon, the lady was described "Elizabeth Piers, otherwise King, otherwise Denny."

The evidence chiefly relied on by the respondent was that of the Right Reverend Dr. Murray, Bishop of Rochester, who deposed, "I do not know any of the parties in the title named. I was Bishop of Sodor and Man previously to my becoming bishop of Rochester, and I was consecrated at Whitehall chapel, Westminster, in the month of March 1814, and I continued Bishop of such former diocese until the year 1827, when I was translated to my present diocese. I was not personally acquainted with the late Sir John Bennett Piers, but I knew him by character, and had seen him in the streets of Douglas, in the Isle of Man, in and previous to the year 1815; the said Sir John Bennett Piers was living in said island in that year, and had been a resident there previously thereto, and also, I believe, continued to reside there some years afterwards, but for how long I cannot say. I was resident in said island continuously, from the [347] month of April 1814 till the Autumn of the year 1816, during the whole of which period I was never absent from said island. I do not know of any marriage having been celebrated between Sir John Bennett Piers and any person, while he was so resident in the said island; and I never heard of any such marriage, or any intended marriage; and I verily believe that no such marriage could have taken place without my knowledge, inasmuch as such an event would have been well known, and talked of in the neighbourhood of Douglas, where I resided; and because, also, the clergyman by whom any such marriage ceremony had been performed would, I have no doubt, have mentioned to me the circumstance, if banns had been called. I never was applied to, to grant a special license for the celebration of a marriage between Sir John Bennett Piers and Elizabeth Denny or Elizabeth King, or any other female, in the year 1815, or at any other time; and I never did grant any such special license to celebrate such marriage; and I have good and particular reason for being certain that I never did grant any such special license, inasmuch as the known characters of the parties would have prevented me from doing so, a special license being an act of favour; and moreover, in order to obtain such special license, Sir John Bennett Piers must have personally appeared before me to take the prescribed oaths, and I am perfectly certain that I never spoke to him or was in the same room with him in the course of my life. It was generally reported and believed, that some female lived and cohabited with the said Sir John Bennett Piers, in the said island, in the year 1815; but whether she so lived with him previously, or subsequently thereto, I cannot [348] set forth. The said female was not, to my knowledge or belief, known or reported to be Lady Piers, or associated with in the said island as such: and I always heard her spoken of as a Miss Denny, and she was generally known by that name. I never heard any reports relating to such cohabitation, save than that the said Miss Denny was at such time supposed to be living with the said Sir John Bennett Piers in a state of concubinage. Special licenses for marriages were granted exclusively by myself during the period that I was bishop of Sodor and Man; and no such special licenses were ever granted by a Vicar-General, Surrogate, or any other person appointed by me as Bishop, in the years 1814 and 1815. It was a usual thing to grant such special licenses for marriages in a private house or place, other than a church or chapel within the said diocese, and the granting of such licenses is altogether discretionary. I am positively certain that I never did, and also that no person by my authority ever did, grant any special license to marry the said Sir John Bennett Piers to the said Elizabeth Denny, otherwise King, at Leece Lodge, or any other private house in the said Isle of Man; and in addition to the reasons already given by me for being certain that I never did grant any such special license, I have to add, that I

should naturally have stated the fact of my having so done, on the occasions of my hearing her (as I did subsequently for many years) always spoken of as Miss Denny, and never as Lady Piers. The steps usual and necessary to be taken previously to granting such special marriage license in the said Isle of Man, during the time that I was Bishop of that place, were, for the gentleman going to be married to appear before me, together with [349] two bondsmen, and previously to granting such special licenses, the gentleman was required to make an affidavit or oath that there was no legal bar or impediment to such marriage, and no such special licenses were ever granted without requiring such oath or affidavit. I do not now recollect the express form of such special license, nor can I set forth whether or not it contains any injunction or clause respecting the registry of such marriage. I was acquainted with the Reverend Thomas Orpen Stewart, and so knew him in and previous to the year 1815. The said Reverend Thomas Orpen Stewart was not a person of respectable character, and in consequence of his having been a convicted defendant in an action for damages brought against him for criminal conversation, I prohibited him from officiating in said diocese or island; but save than, as aforesaid, I knew nothing of the said Thomas Orpen Stewart, or his character and conduct, he having been merely a casual resident in said island, and I believe that he left said island in consequence of his having been convicted of the offence aforesaid."

Several witnesses deposed that they knew of Sir J. B. Piers and Elizabeth Denny or King living together, but did not know that they were ever married. One of these witnesses, however, admitted on cross-examination that, in the year 1815, the servants at Leece Lodge told him that Sir J. B. Piers and Miss Denny had been married the day before, and married by Mr. Stewart, but he did not believe it to be true.

The cause was heard in the Court of Chancery, in Ireland, on the 22nd, 23rd, and 26th days of April, 1847, and the Lord Chancellor offered—provided the Bishop of Rochester would come to Ireland for the [350] purpose of being examined—to grant an issue to try whether any special license was granted for the solemnization of the alleged marriage of 27th of May, 1815, under the hand and episcopal seal of the then Bishop of Sodor and Man. This offer could not be accepted on the part of the appellants without the Bishop's consent to pass over to Ireland, which after a letter of request had been written to him, he refused to do, and the decree was, therefore, made on the 10th of May, 1847, dismissing the bill, without costs (10 Ir. Eq. Rep. 341).

The appeal was brought against that decree.

Mr. Bethell and Mr. Glasse for the appellants:

The question raised here is as to the validity of a marriage celebrated in the Isle of Man. The appellants submit that that marriage is valid both in law and in fact.

The marriage is valid in law on the ground of legal presumption. There are three presumptions of law, all of which are here in favor of the appellants. The first is, *Semper praesumitur pro matrimonio*: this is a presumption of law. The next is, that every intendment shall be made in favor of a marriage *de facto*; so that if any clergyman was present performing the ceremony, the law will presume that he was a clergyman properly authorised. The third is, that where an act appears to have been performed by proper persons, the law will intend that everything was done in a proper manner. The burden of impeaching this marriage lies therefore on the respondent.

The extent and effect of these legal presumptions were not adverted to in the Court below, and hence the error into which that Court has fallen. The force of a legal presumption, especially in the case of marriage, [351] and of legitimacy of children, is complete, unless it is absolutely rebutted by proof; *St. Devereux v. Much Deuchurch* (1 Sir W. Bl. 367). In *May v. May* (Bull. N.P. 112), the presumption of fact in favor of marriage was allowed to prevail against a recital of a private act of Parliament, founded on the oath of one of the parties. In *Wilkinson v. Payne* (4 Term. Rep. 468) the jury having found a verdict on a presumption of a legal marriage, the Court would not afterwards disturb that verdict, though there was actually evidence to shew that that presumption was unfounded. In *Steadman v. Powell* (1 Addams, 58), probate of a will was refused to a person who claimed to be executor

to a female, such female having been a married woman, and the Ecclesiastical Court there held the marriage to be proved by circumstantial evidence alone. In like manner the Court of Common Pleas, in *Doe d. Fleming v. Fleming* (4 Bing. 266), held reputation to be good evidence of marriage, though the party adducing it as evidence sought to recover property as heir at law, and his father and mother were still living. And the Ecclesiastical Court, first by a decision at the Peculiars, and then on appeal before the Delegates, held, in *Smith v. Huson* (1 Phillimore, 286), that a marriage of a minor by license, though there was only the implied consent of the father, was good.

This rule of presumption is strongest in favor of the validity of marriage, but it also extends to other matters. Thus, where the law requires a particular act to be done by a particular person, and the omission of it would make him guilty of a criminal neglect of duty, the law will presume that he has done it, and [352] will throw the burden of proving the negative on the other side; *Williams v. The East India Company* (3 East, 192). There notice to the captain, by the charterers, of having put on board a ship a dangerous commodity was presumed, and the burden of proving that there had been no notice was held to lie upon him. That application of the rule of presumption is important as to another part of this case, for it is clear that, had the clergyman who celebrated this marriage, wilfully violated the provisions of the Marriage Act of the Isle of Man, the provisions of which he was bound, not only as a resident, but still more as a clergyman, to know, he would have subjected himself to very severe penalties. This doctrine of presumption was applied in the case of *The King v. Twynning* (2 Barn. and Ald. 386), in favor of the valid marriage of one party, not only because of the presumption in favor of marriage, but also on account of the presumption against the committing of a crime. This last case was recognised, and not overruled, in *The King v. Harborne* (2 Ad. and El. 540; 1 Har. and Wol. 36); and all these authorities, together with that of *Cunninghams v. Cunninghams* (2 Dow, 482), were brought under the attention of this House, and admitted in the case of *Lapsley v. Grierson* (*ante*, Vol. I., p. 498).

Assuming, then, the rule as to the presumption of law in favor of the validity of a marriage, and against the committing of a crime, to be established, the question here turns upon the application of that rule to the circumstances of the present case. The parties impeaching the marriage, having the burden of proof thrown on them, rely on the testimony of the Bishop of Ro-[353]-chester, who, in 1815, was the Bishop of Sodor and Man. It is submitted that that testimony is quite inconclusive for such a purpose. In the first place, the event was a distant one; and throughout his evidence the Bishop speaks of what was done, not with the positiveness of a clear and undoubting recollection, but with a belief founded on reasons of probability and convenience. These reasons are not in themselves satisfactory, and some of the supposed facts which constitute some of the reasons, or which are the foundations for others, turn out to be mistaken. Thus it is clear that parties requiring a special license might not appear personally before the Bishop; they might go, and, according to the Rev. J. Brown's testimony, appear, as a matter of course, to have gone before him, and not before the Bishop for a license. Besides this, a license, either on personal application to the Bishop, or on the ordinary application to the registrar, might be granted and acted on, and a regular marriage take place, and yet no entry of it, or no entry of it at the proper time, be found in the register. The marriages of the Bishop's nephew, Mr. Murray, were instances of this sort, and furnish another argument in favor of the appellants; for not only were there regular licenses in those cases, and not only did regular marriages take place, but the first of those licenses was granted by Dr. Crigan, the predecessor of Dr. Murray, in 1811, and yet no entry of the marriages appeared until some years after Dr. Murray had held the see, namely, in 1822. The license, in the case of Sir John Piers, might have been in like manner granted by Bishop Crigan, and probably was so granted at the time when Sir John Piers' brother was expected to perform the ceremony. If so, it would not be used at the moment [354] because the brother did not come; but it would be used afterwards, and would constitute a valid authority for celebrating the marriage. The maxim *Omnia rite acta*, is in support of this supposition; for it cannot be imagined that a clergyman who, like Mr. Stewart, knew the law of the island, would, without any interest to influence

him, expose himself to penalties for violating it. It must be presumed that he, being a properly authorized person to celebrate a marriage, celebrated this marriage upon proper authority, and in regular form.

The fact of a formal marriage in 1821 between these parties by no means impeaches the validity of the marriage in 1815. It is in evidence that Sir John B. Piers desired to conceal his marriage from his mother, from whom he had expectancies, and the second marriage was nothing but a public re-assertion of the parties' intention, which had lawfully been carried into effect some years before. Nor is the circumstance of the lady being described in the certificate of that marriage, and signing it, in her maiden name at all material—

[Lord Campbell:—There is nothing in that. Lord Eldon was married a second time. The second marriage took place in Newcastle; and though there was no doubt that he had been validly married in Scotland, yet his wife used her maiden name on this second marriage.\*

The Lord Chancellor.—In cases where a ward of Court has been married clandestinely, the Court always directs a second marriage; and in such marriages the maiden name of the lady is always used.]

By a similar reason, the use of the maiden name of Lady Piers in the certificate of baptism of one of the [355] children in November, 1820, is accounted for. It was a frequent practice in the island to describe the mother by her maiden name, and such description did not in any manner affect the question of her marriage, or even shew that a doubt was entertained upon the subject of it.

Mr. J. Parker and Mr. F. Goldsmidt.—The respondent is willing to take on himself the burden, which, according to the doctrine of the other side, is cast upon him, of shewing that there was no valid marriage of Sir J. B. Piers and the mother of these appellants in the year 1815. He admits that he must shew that there was a high degree of probability that there was no license authorising this marriage. The Court below proceeded on the assumption that the duty of impeaching this marriage lay with the respondent; and he, having completely and satisfactorily discharged that duty, Lord Chancellor Brady gave judgment in his favour. That judgment is right both in law and in fact.

It has been said that the effect of the law of presumption was not properly considered in the Court below; but there is nothing to support that argument. The case of *Lapsley v. Grierson* (*ante*, vol. I., p. 498) is an authority for the respondent, for it shews that presumption may be [356] rebutted by evidence,—a rule which had, years before, been acted on by the Court of Queen's Bench, in the case of the *King v. Harborne* (2 Ad. and El. 540; 1 Harrison and Wol. 36), where it was held that the weight that was to be attached to a presumption of fact was to be regulated by the facts of each particular case. The decision of that case in favor of the validity of the first marriage was in consequence of the weight of evidence there most favoring such a conclusion, and Lord Denman expressly denied that there was any such rigid presumption of law as that now contended for.

[Lord Campbell.—That was as to the presumption of life or death. But that does not affect the presumption of law that when a properly qualified person does an act within the limits of his authority, the presumption, *Omnia rite acta*, is to be applied. We are bound to presume here that there was a license. It is true that that presumption may be rebutted; but it must be by very strong evidence.

The Lord Chancellor.—We can see what presumption the Court below had in

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\* The following is extracted from the parish register of Saint Nicholas, Newcastle:—"John Scott and Elizabeth Surtees, a minor, with the consent of her father, Aubone Surtees, Esq., and both of this parish, were married in this church by license, the 19th day of January, 1773, by me,

CUTH. WILSON, Curate

"This marriage was solemnized between us,

"JOHN SCOTT.

"ELIZABETH SURTEES.

"In the presence of us,

"AUBONE SURTEES. HENRY SCOTT."

Lord Campbell's Lives of the Chancellors, vol. vii., p. 34.

consideration ; for the issue proposed by the Court was whether the Bishop of Rochester had granted a license.]

In the Banbury Peerage case, the Judges gave answers to certain questions which very exactly ascertain the limits of this doctrine of presumption upon the question of the legitimacy of a child. Those answers are to be found in a note to a report of a case of *Morris v. Davies* (5 Clark and Finnelly, 163 ; see p. 229, n), which occurred in this House. From those answers, and from that case itself, the rule of presumption appears to be this, that the presumption of [357] legitimacy from the birth of a child in lawful wedlock, may be rebutted not only by proof of non-access, but of such circumstances, even where the husband and wife are in the same house, as tend to disprove any sexual intercourse having taken place between them. Surely the presumption in favor of the celebration of a marriage cannot be stronger than the presumption of the legitimacy of a child, born in lawful wedlock. The same reasons in favor of the application of the doctrine of presumption exist in both cases, but more directly in the latter than in the former. In *Head v. Head* (Turn. and R. 138, 141), Lord Eldon said, "where there is personal access under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and this presumption must stand till it is repelled satisfactorily by evidence that there was not such sexual intercourse." What that satisfactory evidence is, he goes on in that case to shew, and it amounts to no more than that which the respondent has offered here. The respondent is entitled to succeed if, on the evidence, he can satisfy the House that it was in a high degree more probable that there was not a license, than that there was one. Such was the doctrine adopted by this House in the case of *Morris v. Davies* (Cl. and Fin. 163).

[Lord Campbell.—In considering that case, it must be remarked that the birth of the child was concealed from the husband.]

But independently of the particular facts of that case, the Lord Chancellor there lays down the rule that the presumption of law may be rebutted by circumstances, and especially speaks (*id.* 242) of "Evidence diminishing [358] the probability or shewing the improbability that such intercourse did in fact take place."

The case of *Wilkinson v. Payne* (4 Term Rep. 468) can hardly be said to affect the present, for there the jury having found a verdict on the facts, the Court would not, on a mere presumption, set aside that verdict, when the parties were clearly entitled in equity and justice to recover. Again, in *Williams v. The East India Company* (3 East, 192) the plaintiff was merely nonsuited, because he did not produce the best evidence in support of a material allegation in his declaration, namely, that the servants of the Company knew of the dangerous nature of the material they put on board the plaintiff's vessel. Here the case could not fail on that ground. The case of *The King v. Twynning* (2 Barn. and Ald. 386) was questioned in *The King v. Harborne* (1 Har. and Wol. 36 ; 2 Ad. and El. 540), where it was expressly denied that there was such a rigid presumption of law as that which is now asserted.

On the other hand, it is clear that when a marriage has been questioned in the Ecclesiastical Court on the grounds of non-compliance with the statute in the publication of banns, that Court has decided on the balance of evidence, and not on any mere doctrine of legal presumption ; *Frankland v. Nicholson* (3 Maule and S. 259, n), *Pougett v. Tomkyns* (*id.* 262, n), and *Mather v. Ney* (*id.* 65, n). The Court of Exchequer in Equity, too, has adopted the same course of proceeding, in a case where the validity of a marriage by license was in question ; *Poole v. Poole* (1 Younge, 331). And [359] finally, this House, on a claim of peerage, expressly recognised the rule as laid down in *Morris v. Davies* (5 Cl. and F. 167), of admitting presumption in such matters to be rebutted by proof, and decided the claim on the ground that the proof there given was sufficient to establish a case of illegitimacy ; *The Barony of Saye and Sele* (*ante*, vol. I. p. 507).

It is therefore submitted that the judgment of the Court below in this case was right. In the first place, there is no such absolute presumption of law as to exclude evidence ; and in the next, evidence being admitted, that evidence was conclusive against the validity of the pretended marriage. What was that evidence ? It was in substance this, that there was no trace of the grant of any license ; that there was no entry of any solemnization of marriage under any license ; that the Bishop of



Rochester had been Bishop of the island for a year before the pretended marriage took place, and had not granted any such license, but would, on account of the known character of the parties, have refused it if applied for. Then come the facts of the misconduct of the person who is said to have solemnized the marriage; the absence of any general recognition of the parties as married; the baptism of one of the appellants, with the name of "Denny" given as that of her mother; and, lastly, the formal marriage of these parties in Dublin in 1821. No one of these facts might be conclusive against the alleged marriage of 1815, but the whole of them, taken together, render it impossible to believe that any such marriage took place. The decree of the Court below must consequently be affirmed.

Mr. Bethell, in reply.—The fallacy of the argument on the other side is, that the *praesumptio legis vel facti* [360] and the *praesumptio juris*, are confounded together. The one may certainly be rebutted by evidence; for it is in truth nothing but a conflict of presumptions. But the other, which flows from facts already established, cannot be rebutted. The rule of the civil law, which has been everywhere adopted, is well expressed in the Digest, "*Estque nihil aliud quam dispositio legis praesumentis, et super praesumpto tanquam sibi comperto statuentis: contra quam non admittitur probatio*" (Dig. bk. xxii. Tit. iii., "De Probationibus et Praesumptionibus").

[Lord Brougham.—And in pleading, the *praesumptio juris* can never be traversed.]

That is so. In the present case, the facts are established, and the *praesumptio juris* applies. The authority of *The King v. Twynning* was not impeached in *The King v. Harborne*, so far as the rule of law was concerned; but it was held not to apply with all its force to that particular case. The language of Lord Denman related only to a presumption of the fact of the continuance of life, in that case, being liable to be considered with reference to the weight of evidence in its favour and against it. That is a mere balance of presumptions, and it was so considered in this House in the case of *Lapsley v. Grierson* (*ante*, vol. I., 498, 505).

This case has not been properly tried; and the two conclusions of the Court below are wrong. The decree ought to be reversed, and the legitimacy of the appellants declared.

The Lord Chancellor (March 22): This is an appeal from the decision of the Lord Chancellor of Ireland, upon the adjudication to which [361] he has come, as to the legal validity of the marriage upon which the legitimacy, and therefore the rights of the appellants, depended. It appears that the Lord Chancellor ultimately decided that point on the evidence before him, but he, at the same time, offered an issue, which he thought would try the question of the validity of the marriage. The issue which he offered to the parties was, "whether there had been a special licence from the Bishop of Sodor and Man, authorizing the clergyman of that island to celebrate the marriage."

Now it does appear to me that the issue so tendered goes very much to explain the ground upon which the Lord Chancellor decided the case, because it shows that according to the view which he took of it, the question in dispute depended upon the greater or less weight of the evidence upon the one side or the other; otherwise the issue would not reach the question so as to decide upon the validity of the marriage. Such an issue would rest upon the balance of evidence as to a particular fact, upon the result of which the validity of the marriage undoubtedly would depend; but that is not the mode in which the law contemplates matters of proof relating to the lawfulness of a marriage. It entirely lays aside all that strong legal presumption upon which the law proceeds in the case of marriage, and adjudicates upon the point as upon any other matter of fact, with respect to which there is no presumption one way or the other, but where, upon the result of the investigation as to the existence of the fact, the right of the parties might depend.

My Lords, I have not found that the rule of law is anywhere laid down more to my satisfaction than it is by Lord Lyndhurst in the case of *Morris v. Davies*, [362] as determined in this House (5 Clark and Fin. 163). It is not precisely the same presumption as exists in the present case; but the principle is strictly applicable to the presumption which we are considering. He says (see p. 265), "The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive." No doubt, every case must vary as

to how far the evidence may be considered as "satisfactory and conclusive;" but he lays down this rule that the presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question.

Now, my Lords, here the legitimacy of the plaintiffs, which is the question in the cause, depends upon the validity of a marriage celebrated in the Isle of Man by a clergyman whose *status* is not a matter in dispute, he having been a regularly ordained clergyman, doing duty in a church there, and as to whose capacity to celebrate marriage there is no dispute. The question arises as to whether the marriage so celebrated was valid according to the law of the Isle of Man, requiring the special license of the bishop in cases where the marriage is celebrated, as this was, in a private house, and not in a church.

Of the fact of the marriage there is no dispute whatever; there is not even a question raised about that. But not only is the fact of the marriage proved, but it is proved to my entire satisfaction that the clergyman and the parties to the marriage were all anxious that a valid marriage should be celebrated, and all supposed that a valid marriage had been celebrated. It is in [363] evidence that Sir John Piers—the lady whom he married being at that time near the period of her confinement—was anxious to have a child born who might be the heir to his property. There is no doubt that the woman, at all events, must have been anxious for a valid marriage. The clergyman not only must have been anxious not to incur the penalties which the law imposes upon clergymen celebrating marriages otherwise than according to the law of the island, but the evidence shows that he could not possibly have been in that situation, in which he is attempted to be described in the cause, namely, that of a person ignorant of the law, and therefore likely to err, as not knowing what the law of the island was. He not only was a clergyman who had been for a considerable time exercising the functions of a clergyman of one of the churches in the island, but he had been the private or domestic chaplain, as it is called, of the preceding Bishop of Sodor and Man; and he, it appears, had also been previously engaged in celebrating marriages of this description. We therefore have it for certain, that all the parties must have intended that a valid marriage should be celebrated; and that at least one of the parties understood the law relating to the marriage which he was celebrating.

Then we have the subsequent conduct of the parties, proving beyond all question that they supposed that a valid marriage had been celebrated. The children are treated as legitimate children; the wife is treated as the lawful wife; and the conduct of the parties, from beginning to end, shows that they believed a valid marriage to have been solemnized. This is not at all shaken by the fact of a subsequent marriage having taken place in Ireland. We know that that does frequently happen without the slightest imputation on the validity of the first marriage.

[364] Now, under these circumstances, the validity of the marriage is impeached upon this ground, that there is no proof of there having been a special license granted by the Bishop. Then we have a marriage unimpeached by any circumstances to show the knowledge of the parties, or the opinion of the parties, that other than a valid marriage had been celebrated, accompanied by the anxious wish that such marriage should be celebrated—and we have a clergyman engaged in celebrating the marriage, who must be supposed to have been cognizant of the law of the island: he appears to have been so; and, in point of fact, from his position there can be no room for doubt as to whether he was or was not cognizant of the law of the island: and opposed to these circumstances is the absence of proof of the license under which the marriage was celebrated.

Then here is a case which raises all the presumptions the law can raise in favor of a valid marriage. There is nothing to shake it but this—Was there or was there not a special license? Now, that that may be matter to be inquired into, I do not at all deny. It might be possible to disprove, even at this distance of time, some circumstances upon which the validity of the marriage might depend; but, if disproof was offered, it must be met with all that strength of legal presumption which would operate in favor of the marriage being valid.

Of what then does the evidence consist?—It consists of the testimony of the Bishop, who can only speak to his not recollecting having granted a special license. He states reasons why he has confidence in his belief that there was no special license.

If the opinion which he has given is maintained altogether by those reasons, his conclusion from those reasons is hardly entitled to [365] more weight than the conclusion which your Lordships yourselves may draw. It does not appear that he gives any other reason for coming to that conclusion, except that he has no recollection of having granted a special licence, and that, from certain circumstances, he thinks it very improbable that he should have granted it.

Those reasons, when examined, beyond all doubt do not appear to be very satisfactory. Some of the facts upon which he proceeds, if not entirely displaced, are very much shaken by evidence in the cause; as, for instance, that a party wishing to obtain a special licence must appear before the Bishop personally, and inform him of the fact. We have very good evidence from Mr. Brown—who held an official situation which must have brought to him a knowledge of the usual practice—from which it is to be inferred that that is not the universal practice. It certainly would be rather an extraordinary practice in matters of that description, which are matters very much of course, and are usually transacted by officers authorized for that purpose, and not by the Bishop himself. For instance, Mr. Brown says, that in the year 1818 (it is true that that is after the marriage in question), he received certain directions from the Bishop as to the course to be pursued upon application for a special licence. From that, one would infer that the Bishop, in the ordinary course, permitted that part of his duty to be exercised by his lawfully constituted officer, and did not himself personally interfere in the details of all those transactions.

But, however, giving all the weight to the Bishop's testimony which can possibly be asked by those who rely upon the effect of it, it comes to no more than this [366]—a mere negative,—a mere absence of recollection of a transaction which took place thirty years ago, with certain grounds stated, upon which, either in the whole or in great part, that conclusion, to which the Bishop has come, has rested. I cannot say that that is evidence, in the language of Lord Lyndhurst “strong, distinct, satisfactory, and conclusive.” It appears to me to be the very contrary of what we understand by the meaning of those words.

But independently of that, there is not only evidence of possibility, but of probability, entirely outweighing the probability of the marriage having been celebrated without a special licence, in the fact that the preceding Bishop may have granted such a licence. There is nothing whatever at variance with that, except the period which elapsed between the time when the special licence is supposed to have been granted, and the time when the marriage was celebrated. But there is evidence that it is not at all an unusual thing for a considerable time to elapse between the one and the other. And we have this in proof, that the marriage was contemplated two years before—the brother of Sir John Piers was intended to be the clergyman to officiate. He was not able, however, to come to the Isle of Man, and the postponement took place on that account. We have therefore the fact of the intention having existed at the period at which, if the licence was granted by the preceding Bishop, the licence in question would have been so granted. That is not a fact upon which we can rely as conclusive, but it undoubtedly removes a great deal of the alleged improbability of the licence having been granted at a period so long antecedent to the time of the marriage.

[367] But, my Lords, I will not go into all the circumstances in detail, simply because the view which I take of this case does not depend upon such an examination of them, but it depends upon this: there is a strong legal presumption in favour of the validity of the marriage, particularly after the great length of time which has elapsed since its celebration, which is not met in this case by that species of positive, distinct, and satisfactory disproof which is essential in order to get rid of the probability of the marriage having been duly celebrated.

Under these circumstances therefore, I cannot come to the conclusion to which the Lord Chancellor of Ireland has come, either as to the result, namely, dismissing the plaintiffs' bill upon the ground that they had not made out their title as legitimate children, or still less as to the form in which he proposed to try the issue upon the validity of this marriage. I really have no difficulty whatever on this part of the case. It never appeared to me that there was made out that species of contradiction of the legal presumption, which would justify any Court in coming to a conclusion against the validity of the marriage. The only doubt which I had was as to the course

which a Court of Equity ought to have adopted for the purpose of disposing of the question.

Beyond all doubt, my Lords, in an ordinary case in which a question arises as to the legitimacy of children, or the validity of a marriage, it would be a case for a Court of Equity to send to trial. But there are peculiar circumstances in this case, which, after some consideration, I am satisfied make it the duty of this House not to adopt that course. In the first place, it is hardly possible to adopt that course in a mode [368] which would lead to a satisfactory conclusion. It is not a case in which a Court of Equity is bound to do it. It would only do it in the ordinary course of administering its jurisdiction in order to satisfy itself as to the fact upon which the issue would be directed. If the marriage is disproved, there can be no issue directed. Here then the question is, whether the facts are such as, in the discretion of the Court, make it the duty of the Court to direct an issue to be tried by a jury. First of all, it does not depend in any great degree, as we see now from the evidence produced before the Court of Chancery, upon parol testimony; it depends more than anything else upon the effect and validity to be given to the legal presumption. It is not that kind of case which is peculiarly to be investigated before a jury by parol testimony, the aid of which a Court of Equity requires in ascertaining a disputed fact.

But there is another great difficulty. If this issue is to be directed, it will be directed to be tried in Ireland. Now it does so happen, that the evidence upon which the fact is to depend seems to be found anywhere but in Ireland. Part of it, and a most important part on one side of the question, is to be found in this country—that of the Bishop. Now the Bishop of Rochester is residing here, and he has, as it appears, declined to go to Dublin for the purpose of giving his testimony there. But the other part of the evidence, and perhaps next to that of the Bishop, the most important part of the evidence, is to be found in the Isle of Man. So that you would have the jury in Ireland, but you would have no evidence in Ireland; besides which, if evidence could be obtained, the trial by jury would not in this case be a satisfactory mode of investigating the fact.

[369] Another ground which appears to me to be conclusive as to the course which this House ought to adopt is this:—the question depends a good deal upon the effect to be given to the legal presumption, as opposed to the description of evidence which we have here. If a jury should come to the conclusion to which the Lord Chancellor of Ireland has come, namely, that the evidence is sufficient to repel the legal presumption, and that fact should be brought before this House in proper form, could this House be satisfied with such a verdict proceeding upon these grounds? I think it could not, and I believe therefore that an attempt to try the question by an issue would lead to great and unnecessary expense; and that we should by no means come, in all probability, to a more satisfactory result upon the real merits of the case than we may come to on the evidence we have now before us.

My opinion therefore being that the strong legal presumption is not repelled by the evidence in the cause, my advice to your Lordships is to reverse the decree of the Lord Chancellor of Ireland, and to declare that the appellants have established their *status*. That decree upon the finding is quite of course. There will be no reason for sending it back to the Court of Chancery. If there should be anything else to be adjudicated upon, I apprehend that this House will not decide it, but in that case will remit it to the Court of Chancery for the purpose of having that matter disposed of there. As far as I have been able to see into the cause, there is no defence set up against the claim of the appellants, except the question of whether they are legitimate children, and entitled to the property. If that is so, this House will not be departing from [370] its ordinary course in making a decree in favour of the appellants.

Lord Brougham.—My Lords—I am altogether of the same opinion, and for the same reasons. I consider the rule of law to have been very clearly laid down in *Morris v. Davies* (5 Clark and Finnelly, 163, 265), by my noble and learned friend, Lord Lyndhurst. My noble and learned friend there laid down that rule in very plain terms; and if I had any doubt as to any one of the four descriptions which he gave of the evidence required to rebut the legal presumption of legitimacy, it is as to the last. I should say, “clear, distinct, and satisfactory evidence.” I am not quite prepared to use the word “conclusive.” I think some doubt may arise upon

that, which it is unnecessary to raise, because if the evidence required be clear and satisfactory, that is quite sufficient for me. I do not like ever to lay down the rule that evidence must be "conclusive," because that gives occasion very frequently to needless and inconvenient doubt.

Have we, then, in this marriage; alleged to have been had 35 years ago in the Isle of Man; always acknowledged to have been intended by the parties for a considerable time before the fact; acknowledged to have been satisfactory to the parties to a certain extent immediately after the fact; recognised by them, and by their acts and deeds at the very time, and subsisting till brought into dispute by two circumstances, the one a matter of fact, namely, an unquestioned marriage solemnized in 1821, the other, the proceeding in question to get rid of the charge of £4000 upon the estate; [371] always acknowledged to have been a sufficient marriage except in those two instances, and until those two periods:—have we, I say, sufficiently "strong, distinct, and satisfactory" evidence to repel the legal presumption in accordance with that course of action and acknowledgment?

I say nothing of what took place in 1821, for I am entirely of opinion that that is no argument whatever against the parties believing that they had contracted and solemnized a legal and valid marriage in 1815. It is a constant course with persons who solemnize irregular marriages, which, though irregular, are perfectly valid and perfectly legal, and against which nothing either of presumption or of law can be alleged; it is a constant course for them afterwards, needlessly, superfluously, and, in my opinion, irregularly, to solemnize what is termed a regular marriage, *in facie ecclesiae*. I say "irregularly," for an obvious reason; because, if the first marriage is valid, the second marriage becomes an irregular marriage. The first marriage was irregular for want of certain ecclesiastical or legal solemnities; but in law it was valid. The second marriage is a mockery; because, for two persons who are single to marry is intelligible, but for two persons who are already married to marry is mockery, and I may almost say a profanation of a very solemn rite of the church. Therefore, though I do not consider that that acting of theirs is at all to be commended, yet it is constantly had recourse to. It is a constant course for persons in a certain station of life, who make what is commonly called a runaway or irregular marriage, afterwards to marry *in facie ecclesiae*, for the purpose of quieting the scruples of persons of nice conscience, but also for the purpose of putting down any public clamour that may [372] have arisen. In England, where the law is so different from the Scotch law, it is a very common thing; for the public here do not know that the Scotch law requires no proclamation of banns, no license, and no consent of parents or guardians, to solemnize a marriage. They do not know these things; and, therefore, they say, "Oh, these people have only been married at Gretna Green, and it is not a valid marriage." In order to meet that public clamour about the fancied illegality and invalidity of the marriage, persons very naturally, but, as I said before, very irregularly, and not commendably therefore, in my opinion, marry again in the Established Church. The same parties would be excessively annoyed and very indignant if you were to tell them that the second marriage was necessary, for they would say, "Why, we have cohabited a week before; were we living in concubinage at the time?" They would be excessively angry if you were to tell them that. I have seen the experiment tried in the families of those persons who were the fruits of such a marriage, and they did not at all like it; but, nevertheless, they were the very first people, I have observed, to complain of others as having been married at Gretna Green, and to say, "Oh, yes, but our fathers and mothers were married in certain churches in England." My answer to that always was, "but if the second was a necessary marriage, in what position were your father and mother previously to that solemnization taking place in that church?" And that generally brought the matter to an issue, and put an end to the clamour. However, the existence of those feelings in the public mind upon so very delicate a matter in valuing character, and especially female character, is quite sufficient to account for the marriage in 1821 in this case, and to take away all presumption, [373] which might thence arise, of the parties not believing themselves to have been married in the Isle of Man; not, perhaps, that that of itself would be decisive as the cause of the subsequent marriage, but still it is a strong circumstance.

It appears to me, therefore, that we may take this to be a marriage not questioned

till these proceedings took place, and, therefore, the presumption of law, both as to marriage and legitimacy is, in the words of Lord Lyndhurst, only to be rebutted by "strong and satisfactory evidence." Have we that in this case?—Certainly not. I entirely agree with my noble and learned friend that, from the way in which the issue was tendered, we can quite see what it was which misled the very learned and excellent Judge in the Court below. To send the question of the legitimacy of the marriage to be decided, not upon the whole case, as it ought to be, not upon the whole matter, but to be decided upon one point, to make that one supposed circumstance of fact, the pivot upon which the whole is to turn, is, to my mind, a monstrous error in the Court below—it is an error which cannot be exceeded, because it is a total confounding of two perfectly different things. It would not be much better than to do this:—We say that a parson in a tithe suit has a right to an issue—we say that an heir at law has a right to an issue—we say that—but did anybody ever, in sending an issue upon a tithe suit, which the parson has a right to have against the man setting up a *modus*, did anybody ever, in sending an issue, which the heir at law has a right in like manner to have, think of making it depend upon a particular fact, not upon the whole question, whether a right to tithes is established, or a *modus* is established or not, upon the whole fact of heir or not; but upon [374] some question in the one case, of whether A. B. was churchwarden at the particular time when the terrier was made, or whether a particular fact took place which tended to show that A. B. was heir at law to C. D. or no? No such thing was ever heard—the whole matter is sent to be tried. But it is worse here, because there you have the mere fact in question, and I could much more easily tolerate an order directing an issue, though it would be a most erroneous direction, to try one special circumstance of fact in those two cases that I put, than I could tolerate this issue which has been proposed to be directed here, because this issue is not the thing in question. The thing in question is the validity of the marriage—the thing in question is rebutting or not the presumption of law in favor of the marriage—that is the question; and the issue proposed would have been an issue trying one fact among many in the case; and this appears to me perfectly erroneous, and a total miscarriage as far as it goes, but a miscarriage fatal to the whole judgment, for it goes to affect the whole.

There is in this case a very peculiar circumstance. No doubt much, if not the whole, depends upon the fact of the license—whether there was a license or not. It is most important to consider who it was that celebrated this marriage—it is a fact which really does dispose of the question in my opinion. It is celebrated by a person in orders, and who had been for some time in orders, in the Isle of Man. It is celebrated by a person who could not by possibility be ignorant of the law of the Isle of Man respecting marriage, because it is celebrated by a person who actually, I think, was chaplain to Dr. Crigan, the predecessor of my Right [375] Reverend friend the present Bishop of Rochester, Dr. Murray, the Bishop in whose time the marriage was celebrated. Here then is a clergyman who had been accustomed to celebrate marriages, who knew from his position, officially, clerically, and generally, the law upon the subject; aye, and who knew another thing,—the high risk that he incurred if he did not celebrate the marriage duly. Is it to be presumed—is it to be really supposed, upon a mere want of memory in the Bishop, for there is a possibility that he might have forgotten, or upon the impossibility of Dr. Crigan, his predecessor, having granted this license, for you must exclude that also—is it upon these possibilities, or either of them, to be presumed that this clergyman should have been so reckless—he who had no kind of interest in running any risk at all? Sir John Piers had an interest, and Lady Piers had an interest in running a risk; but Mr. Stewart had no interest whatever. Mr. Stewart was a man cognizant of the law, who had acted under the law, who had been engaged officially in administering. I may say, the law, as the Bishop's chaplain, and who exposed himself to utter and absolute ruin by celebrating a marriage irregularly. I cannot suppose that likely. It appears to me that that makes a short end of the question. I cannot conceive a man in his position incurring this risk for nothing; and if he did not incur this risk, it was because, in fact, there was a license.

Then, as my noble and learned friend has most justly observed, the conduct of the parties concurs with the legal presumption, and everything is opposed to that

which would tend to rebut that presumption. Two years the marriage had been in contemplation, and it is explained why it did not take place before. That also [376] lets in the possibility of Dr. Crigan having granted a license, which, if you admit every title of the evidence in the cause, is not excluded, because all that Dr. Murray can tell you is, that he does not remember granting the license. Suppose Dr. Murray, instead of saying (for that is all his evidence amounts to), "I do not think I did—I do not recollect that I did," had actually, stringently and conclusively sworn, "I never did; I know I never did; for I have reason to know I never did; I am as certain I never did as I am certain I never committed felony, or my own self married irregularly without a license, and thereby committed a great offence." Suppose he had said that, which he has not said, he cannot tell what Dr. Crigan did; he cannot tell what happened before his time; he does not pretend to say so. Then am I to shut out all possibility of this having taken place before, when all that is to be urged against it is delay? But Sir John Piers might have let the license lie over for a particular reason; and, accordingly, a particular reason is actually afforded here with respect to the expectation of his brother coming over to celebrate the marriage.

Then they act accordingly; they intended to marry. Had they a reason to intend to marry? Most undeniably. There was a very considerable fortune and a Baronetcy depending upon it. Sir John Piers wished to have a legitimate son, and the lady was in that state which made it most likely that he should then wish the marriage to take place, because she was within some three or four weeks of her actual confinement. It might be done, therefore, to take the chance of a legitimate son and heir being produced by that lady to whom he was attached. Then they intended to marry. What did they do? They performed what they believed to [377] be a valid ceremony of marriage; and on the very day of the marriage Sir John Piers executed a settlement in which he calls the lady his wife.

Upon the whole, therefore, I entertain no doubt whatever in this case, that upon the merits there has been a miscarriage below. The only question,—and I was of the same opinion as my noble and learned friend the last time the cause was before your Lordships,—the only question which we had to consider was whether we ought not to direct an issue, as, generally speaking, this is the sort of matter which is sent to be tried by an issue. I should most deeply have lamented if it had been found necessary to send an issue, for this one reason among the rest that, as my noble and learned friend says, in the circumstances of this case, suppose the jury had come to the conclusion that there was no evidence of the license, or that it was disproved; and led away by that or any other circumstance, or by the play at Nisi Prius, which one, who has lived so long in that atmosphere as some of us have done, knows to be practised, and knows too that though it may be very expedient for successfully reaching the truth, is not always without the result of misleading the jury, the truth failing to be elicited. Supposing that from any such accident the jury had come to a conclusion contrary to what I verily believe the fact to have been, I am quite sure I should not have been satisfied by it, and the verdict would not have bound me. If it had gone back to the Court below, it would not have bound the Court. The Court is not bound by the verdict; it may send it to another trial, but if the Court had been satisfied with that verdict, it would have come here again, and I should have been just in the same position in which I am now,—that is, always upon the supposition that a different kind of [378] evidence would have been producible before the jury than has been forthcoming before the Court, and is forthcoming and is produced before us. But would there have been any such further evidence? I am putting it very strongly in supposing that there might have been such evidence, the possibility of obtaining which very often tempts us, contrary to our wishes, to send cases to be tried where there is the possibility of the jury seeing and examining the witnesses when giving their evidence *viva voce*, a possibility which we have not in equity. But would that have been the case? I am putting it as supposing it had been; but even then it would not have been conclusive. We are not bound, either by law or in fact, by the certificate of a Court. But here you could not have that parol evidence, nor any thing of the kind; for, as my noble and learned friend has well observed, Ireland must be the place where the issue would have been tried. The witnesses are either in this house, the Bishop, or in the Isle of Man, and some of them dead. Then you would have, what? You would have a commission here to

examine the Bishop. But you have got his examination already. The Bishop would not give other evidence under any commission than what he has given under the last commission. The other evidence in the Isle of Man you would have, but it would be just the same as you have here. Then where should we be with an issue? We should stand precisely in the same position in which we stand at this very moment; we should have the very same evidence, together with, what I should call, the useless verdict of a jury. Therefore, I most heartily rejoice, and for these reasons, that we do not find it necessary to send it to a jury.

No doubt if there is anything to be done further, the [379] case ought to go back, but I see nothing here except the charge upon the estate, and the validity of that charge of £4000 depends upon the fact whether A. B. and C. D., in whose favour the power is to be executed, or the charge to be raised, are lawful children or not. If that is the whole question, I do not see, any more than does my noble and learned friend, any reason for sending it back. I therefore entirely agree with my noble and learned friend, that this case has been misdecided below, and that the judgment below ought to be reversed.

Lord Campbell.—My Lords, it seems to me that this case depends entirely upon the effect to be given to the presumption of law in favour of the marriage. It is allowed that there is a presumption in its favour, and, until the contrary is proved, we are bound to draw the inference that everything existed which was necessary to constitute a valid marriage, and among other things, that there was a special license from the Bishop of Sodor and Man. But it is likewise admitted on the other hand, that this is not a *praesumptio juris*, that it may be rebutted, and that it can only stand subject to the contrary being proved. The whole question therefore depends upon what sort of evidence is required to prove the negative, and to give effect to it. It seems to me, my Lords, as if the very learned Lord Chancellor of Ireland had been of opinion, that the only effect of the presumption is to shift the burden of proof; and that instead of the party who stands upon the validity of the marriage being obliged to shew that there was a license, it lies upon the other side to impeach the validity of the marriage, and prove that [380] there was no license, but that the *onus* being shifted, then it is a question to be treated as any other fact between indifferent parties, and that the conclusion to be pronounced is one which depends merely upon the balance of testimony. It is quite clear, in my opinion, that this was the view taken of it by the Lord Chancellor of Ireland, from the issue which he proposed to direct; for if that issue had been tried, it is quite clear the jurors could merely have been directed to consider whether in their private belief, there had been a marriage or not.

But it seems to me that that is entirely contrary to the well established principles of law which have been long laid down and acted upon for the security of marriage. Indeed, Mr. Parker, as might be expected from a gentleman of his great legal discrimination and high professional eminence, allowed at the bar, as he was bound to do, that that was not the mode in which the validity of the marriage was to be tried: and he said, you must shew a high degree of probability that there was not a license. That comes pretty much within the definition of the mode in which the presumption is to be rebutted, which has been cited by my noble and learned friend on the woolsack, from Lord Lyndhurst, and which has been acquiesced in by my noble and learned friend who last addressed your Lordships, with some slight modification.

My Lords, my opinion is, that a presumption of this sort, in favour of a marriage, can only be negated by disproving every reasonable possibility. I do not mean to say that you must shew the impossibility of any supposition which can be suggested to support the validity of the marriage; but you must shew that [381] this is most highly improbable, and that it is not reasonably possible. Because, otherwise there is a tremendous responsibility cast upon you with regard to the *status* of the woman and of the children. See the peril which you are encountering; because you may be deciding that a woman is a concubine, and that the children are bastards, upon a mere speculation, when in fact, contrary evidence may afterwards be produced, when it is too late, to shew that there was that in existence which would render the marriage valid, the woman the wife of the person to whom she was married, and the children legitimate. My Lords, to avoid such a peril, the law requires that you should negative every reasonable possibility. Here, there are two possibilities which are suggested:—first, that there was a license granted by Dr. Crigan, the former Bishop of



Sodor and Man; and secondly, that there was a license granted by Dr. Murray, who was the Bishop of Sodor and Man at the time when the marriage was solemnized.

In the first place, I must draw your Lordships' attention to the presumption of law which requires a Judge not to exercise his own private notion, or to indulge in his own private opinions upon the subject, but to believe that everything was solemnly and effectively done. That is greatly strengthened here by the facts of the case; because that there was a marriage *de facto* is not denied. The parties were exceedingly anxious that there should be a marriage. The clergyman not only had the means of knowing the law of the island, but there is every reason to believe that he did know the law of the island; there is every reason to believe that he was aware that if he solemnized a marriage contrary to the law, he was liable to severe penalties, and amongst others, to have his ears nailed to [382] the pillory. It is quite clear that the parties believed that they had celebrated a valid marriage; for on the very day on which the marriage was celebrated, Sir John Piers executed a deed, whereby he charged the estate, according to his power, with certain uses, and in that deed he calls the lady his lawful wife.

How then is this presumption, so strengthened, rebutted? Simply by the evidence of Dr. Murray, the late Bishop of Sodor and Man, now Bishop of Rochester. I look upon his evidence to be most candidly given; that he is as sincere as it is possible for a man to be; and that his mind is wholly unbiassed. But what does even his evidence amount to? Merely to this; that there was a conviction,—no doubt a firm conviction,—upon his mind that he had not granted a license, but only for the reasons which he assigns. Now the principal reason was, that he surely could not have granted the license, because Sir John Piers and the lady were living in concubinage. That might certainly be a strong reason against granting the license, but possibly also it might be a reason for granting it; because, if a letter had been written, or if a memorial had been sent to the bishop, by Sir John Piers, stating that he had unfortunately been living with a lady as his mistress, that her condition was known in the island, that he was desirous of making her his lawful wife, and at the same time avoiding the publicity of the ceremony, and that he would have the marriage celebrated if he could procure a license and do it privately, it is possible that, for the purpose of rendering the connection between this man and woman a lawful one, the bishop might have granted the license, he might or he might not, but whether it was so or not, it is impossible for us, at this distance of time, to ascertain.

[383] But there is another supposition: The Lord Chancellor, when listening to the arguments at the bar of this House, and when his mind is addressed, as it always is, to what falls from the learned gentlemen at the bar, may be signing thirty or forty documents. Supposing you were called upon to negative the fact that he had signed a particular document, which, there was no doubt, bore his genuine signature, if that document should not be forthcoming, would you negative the existence of it by Lord Cottenham being called and saying, "I have no recollection whatever of having signed that instrument"? Notwithstanding all our high respect for him, should we be necessarily bound to believe that his opinion of what he had done or had not done was right, by some reason which he assigned for it, particularly if that reason should not be altogether satisfactory? Is it at all in a high degree improbable, taking Mr. Parker's test, that the secretary laid that instrument before him, that the Bishop signed it, and that, at a distance of thirty years, he has forgotten that he did so?

Your Lordships will also bear in mind, that I am not bound privately to believe either one speculation or the other. The question is, are they all satisfactorily negatived? I am not bound to believe that Dr. Crigan granted the license; but it is possible that he may have done so, and that possibility is enough for me to act upon, if it is not satisfactorily negatived. Where is the high improbability that he may have granted the license? In the first place, the license might have been granted, and Sir John Piers might have done, as I have known others do, who were living in concubinage, wait until the woman became pregnant, and he was likely to have issue by her, and then make her his lawful wife before the birth of the child. It appears in this [384] case, that they had been waiting for some time, till another clergyman, a brother, should perform the ceremony. I am not bound to say that that certainly took place, or that it probably took place; it may have taken place; there is no reason—

able impossibility of its having taken place, and that is a supposition, to negative which not a tittle of evidence is brought before your Lordships.

It appears to me therefore, my Lords, that the presumption of law which exists in this case, and which is strengthened by the facts, is not at all met by contrary evidence, and that therefore we are bound to believe that the license existed.

As to the second point, upon which the Lord Chancellor of Ireland did not lay much stress, but upon which some stress has been laid at the bar, I must observe, according to what has been said by my noble and learned friend, who last addressed the House, that it is entitled to no weight whatever. I think during the argument it was mentioned that the Archbishop of Canterbury and the Lord Privy Seal had both been married in Scotland, and had afterwards been married in England. My Lords, I have by me an instance in the case of a Lord Chancellor. This is what was done by a great lawyer, who, even at the time of his marriage, was eminent in his profession. No doubt was entertained about the marriage celebrated at Galashiels being sufficient both at law and in equity. He had been married in Scotland by an episcopalian clergyman, not by the blacksmith. He was married by a regularly ordained clergyman of the Church of England, according to the rites and ceremonies of the Church of England. With a view to the easy evidence of the marriage in future times, it was thought right to have the parties married in England, in conformity with the [385] provisions of Lord Hardwicke's act. Accordingly the ceremony was again performed in the parish church of St. Nicholas, Newcastle, in the presence of the father of the bride, and the brother of the bridegroom, and the following entry was made of it in the register:—(His Lordship read it; see *ante*, p. 355.) Now here she is described as a single woman, and only by her maiden name. In the present case there is an allusion made to the name which the woman acquired by marriage. In Lord Eldon's case it was the same. Therefore, according to that distinguished precedent, the second marriage, which, in the case before your Lordships was afterwards celebrated in Ireland, does not, in the slightest degree impugn the fact that there had been a valid marriage in the Isle of Man.

Then we come to the question as to whether there ought to be an issue or not. I should deeply have deplored if there had been any rule guiding Courts of Equity, which required that there should be an issue. I am happy to find that there is none such. Then, as it does not come within the cases where there is such a rule, if there was such, with all respect we should be governed by it; but, there being no such rule, we have to consider whether it will further the ends of justice that such an issue should be directed.

My Lords, where there is no such rule for the guidance of a judge, I apprehend that he is to consider whether upon the matter submitted to him he thinks a jury will try that question better than he can himself try it. If he has no doubt, or if he thinks he can, under the peculiar circumstances of the case, come to a safer conclusion than a jury would do, it is his duty to decide himself, without granting an issue. My Lords, I cannot know what a jury would do; but I should say that any judge who should try this cause, and who [386] knew how the cause ought to be tried, upon such evidence as we have here, would direct the jury to find a verdict in favor of the validity of the marriage.

Then, my Lords, it is not suggested that there is to be any parol evidence taken—we have the whole case before us. Moreover, this is not a case depending upon the credit of a particular witness, where it is suggested that he has perjured himself, or that there is a conspiracy to deceive the Court, and to pervert the ends of justice. It might be proper in such a case to submit the facts to a jury, before whom the witnesses may be examined, and cross-examined, that they may see their demeanor, and judge whether they are to be believed or not. I give implicit credit to every syllable that the Bishop has said. Then why should there be an issue? I must say, my Lords, with respect to cases which are fit to be tried by a jury, no one has more respect than I have for the decision of a jury; but cases of this sort can just as well be tried by a single Judge sitting in Equity, or by your Lordships sitting here as a Court of Appeal. I do not see why twelve gentlemen, wholly unacquainted with the rules of evidence and of law, should try it better. Therefore I rejoice to think that there is no such rule which compels us to grant an issue in this case; and there being no rule,

I have no hesitation in saying that I believe there ought not to be an issue granted, but that we ought to follow the course suggested by my noble and learned friend.

Mr. Bethell applied for the costs of this appeal, and referred to *Stokes v. Heron* (12 Clark and Finnelly, 203), as laying down the rule that the costs of an appeal in a case where there had been a great miscarriage in the construction of a will, should be paid out of the estate. He submitted [387] that that principle ought to be extended to the present case.

The Lord Chancellor.—The cases differ from each other. There the expense of the appeal was occasioned by the wrong construction of a will, which was purely an act of the Court. Here the question was one of fact, which it might have been necessary to carry to a Court of Law.

Mr. Bethell then called the attention of the House to the fact, that two Appendixes, containing the same evidence and documents, had been printed in this case, and an expense wholly unnecessary had therefore been incurred.

Lord Brougham.—There ought never to be two Appendixes. That is an abuse never practised in the Admiralty Courts, and which, though it once existed at the Privy Council, is now discontinued there. The same course ought to be followed here. The parties ought always to print a joint Appendix.\*

The Lord Chancellor.—I perfectly agree with my noble and learned friend on that point.

Decree reversed, and a new decree made, declaring the appellants the lawful children of Sir J. B. Piers, and the sums claimed to be charges on the lands comprised in the settlement, and remitting the cause to the Court of Chancery in Ireland, to give effect to this decree. Journals, 22 March, 1849.

[388] WILLIAM HENRY ROCHFORD,—*Appellant*; THOMAS BATTERSBY, ELIZABETH BROWNE, and Others,—*Respondents* [March 19, 22, 27, 1849].

[Mews' Dig. i. 335, 336, 364. S.C. 14 Jur. 229; 2 J. and Lat. 431. Commented on as to position of insolvent debtor in *Motion v. Moojen*, 1872, L.R. 14 Eq. 208; *In re Leadbitter*, 1878, 10 Ch.D. 391; *Ex parte Sheffield*, *In re Austin*, 1879, 10 Ch.D. 434; and see the two cases last cited explained in *Bird v. Philpot* (1900), 1 Ch. 822.]

#### *Appeal—Costs—Insolvent—Parties—Practice.*

An insolvent debtor has not such an interest in property assigned under the Insolvent Debtors' Acts, as to entitle him to enter into any litigation respecting it.

The circumstance that a person has been made a party to a suit in the Court below, if improperly so made, will not entitle him to appeal to this House against a decree made in that suit.

W. R. was the owner in fee of certain estates in Ireland, which, on his marriage with E., he charged with an annuity by way of jointure. W. R. had issue a son, W. H. R., and died. For some years the annuity fell into arrear. The widow (under the terms of the settlement) entered into possession of the estates, and received the rents. W. H. R. became insolvent, and the assignments, usual under an insolvency, were executed. W. H. R. afterwards mortgaged to B. his interest in the estates, without giving notice to the mortgagee of his pre-

\* The practice had probably been adopted upon a construction of the following Standing Order. No. 119, formerly No. 194, 8th December, 1813.—“Ordered, That in all cases of appeals and writs of error, which were depending in this house, and the printed cases in which were delivered on or before the 24th day of February, 1813, the party or parties do *respectively* print an Appendix to the said cases delivered, and do therein set forth so much of the proofs taken in the courts below as they intend to rely on *respectively* on the hearing of the said causes, and which is not already set forth in the printed cases by them so *respectively* delivered; and that such Appendix do contain a reference to the documents where the same may be found, etc.”

vious insolvency. He gave, as further security, a bond and warrant of attorney, it being thereby provided that B., on redemption of the mortgage, should reconvey the lands, and sign satisfaction on any judgment which might have been entered up on the warrant of attorney. The mortgage was duly registered, and therefore, under the Irish acts, took priority over the assignments, which had not been registered. A bill for foreclosure or redemption was filed by B., the mortgagee, who made the jointress, the insolvent, and the assignees, parties thereto. The Court decreed the jointure to be the first charge on the estates, and the mortgage to come next, and directed accounts to be taken accordingly. The assignees did not appeal against this decree. The insolvent presented an appeal against it:

Held, that he ought not to have been made a party to the suit, and therefore had no title to appeal against the decree.

[389] An objection to the competency of an appeal ought to have been presented to the Appeal Committee, but was not noticed till the case came on for hearing at the bar of this House: the objection was in its nature fatal:

The House therefore dismissed the appeal, but, because the objection had not been taken till so late a period, dismissed it without costs.

This was an appeal against certain parts of two decrees of the Court of Chancery in Ireland, dated respectively 15th February, 1846, and 16th June, 1847, and made in a cause in which the respondent Thomas Battersby was the plaintiff, and the appellant and the other respondents were the defendants. The suit was instituted under the following circumstances: Elizabeth Browne, originally Elizabeth Sperling, had been three times married; first, in 1788, to William Rochfort, Esquire, of Portland Place, in the county of Middlesex, and the appellant was the only issue of that marriage. Mr. Rochfort died in 1798, and in 1801 his widow married the Reverend William Beville, who died in 1822, without issue, and in 1827 she married General Charles Browne, who died in 1836.

By a settlement made on the first of these marriages, and dated 17th May, 1788, Mr. Rochfort conveyed his estates in Westmeath and elsewhere in Ireland, to the use of himself for life, and after his death, to the use that his intended wife should receive thereout an annuity of £480, for her jointure, in bar of dower and thirds, with remainder to trustees for ninety-nine years, without impeachment of waste, for the purpose of raising this annuity, remainder to the use of the first son of the marriage in tail, and with divers remainders over.

The settlement also contained a covenant by Mr. [390] Rochfort with the trustees, which (so far as it related to the jointure of £480 per annum) was as follows:—"That in case at any time from and after the decease of the said William Rochfort, by any arrear whatsoever, the clear yearly rents and profits of the premises comprised in the before-mentioned term of ninety-nine years, or intended so to be, should not for the time being be sufficient to pay and keep down and satisfy the yearly rent or annual sum of £480 thereinbefore secured to be paid unto the said Elizabeth Sperling, for her life, in case she should survive the said William Rochfort, by and out of the same, as and in part of her jointure as aforesaid, \* \* \* or if the person entitled to the said annual rent or yearly sum should not be paid the same according to the true intent and meaning of that indenture, that then and in every such case, the heirs, executors, or administrators of him the said William Rochfort, some or one of them, should and would out of their, his, or her own proper monies, make up and duly pay the said annual rent or sum of £480 unto the said Elizabeth Sperling, or her assigns, \* \* \* or so much thereof as should not have been paid at the times and in the manner and by the means thereinbefore expressed, and according to the true intent and meaning of that indenture." The rents and profits of the lands comprised in this settlement were never, before the year 1835, sufficient to pay the jointure or annual sum of £480. To make up the deficiency, an indenture was executed, dated the 15th of June, 1793, and made between Sir John Hadley D'Oyley of the first part; the said William Rochfort of the second part; and John Gustavus Lemaistre of the third part; by which Sir John Hadley D'Oyley, for a valuable consideration, [391] granted to Mr. Rochfort, his executors, etc., during the life of

Mrs. Rochfort, and for her benefit, an annuity of £138 10s. of lawful money of Great Britain, charged upon certain lands and hereditaments therein mentioned.

At the time of Mr. Rochfort's death, the aggregate rents of the settled estates charged with the jointure of £480, under the deed of 1788, amounted only to the sum of £290 per annum, late Irish currency, and such rents being insufficient to satisfy the jointure, the respondent Elizabeth Browne then entered into possession or receipt of the rents and profits of the whole of the settled estates, and she has ever since continued in receipt of such rents and profits, and in the management of the estates.

By an indenture, dated the 5th of February, 1801, and made previously to the marriage of Mrs. Rochfort with Mr. Beville, reciting the settlement of May 1788, and the deed of June 1792, and that the clear annual rent of the lands and hereditaments charged with the payment of the said annuity of £480 did not then, upon an average, exceed the sum of £240, Mrs. Rochfort assigned the annuity, and all arrears and future payments thereof, and all powers and remedies for recovering and enforcing the payment thereof, and also the said annuity of £138 10s., to two persons therein named, and also demised certain lands to the same persons for a term of years, upon a certain trust which has since ceased, and subject thereto it was declared, as to the annuity of £480, that the trustees "should, during the joint lives of Elizabeth Rochfort and Mr. Beville, receive and take so much of that annuity as the clear yearly rents and profits of the hereditaments charged with the payment thereof should from time to time be sufficient to pay and satisfy, and [392] should pay over the same when so received to Elizabeth Rochfort, and should stand and be possessed of and interested in the arrears then due and owing of the said annuity of £480, and also of and in all the arrears which should thereafter accrue or become due of the same annuity, in consequence of the rents, issues, and profits of the lands and hereditaments charged therewith being insufficient to answer the same;" upon trusts, relating to the appellant, and to the children of the intended marriage, that never happened.

In the year 1819, the appellant, being tenant in tail in possession, suffered a recovery of the settled estates charged with the jointure of £480 per annum, and by the deed to lead the uses of such recovery, dated the 18th June, 1819, and made between Mr. Belville and his wife of the first part; the appellant of the second part; and other persons of the third and fourth parts; after reciting the two settlements of May 1788 and February 1801, and that the yearly proceeds of the hereditaments on which the annuity of £480 was charged had, ever since the decease of Mr. Rochfort, fallen considerably short of that annuity, it was agreed that the recovery should operate for confirming unto the persons named in the deed of 1801, the annuity of £480, and all the arrears and future payments of the same, and all the remedies for recovering payment thereof, and the trusts declared of the same by that deed, so far as these trusts were then subsisting and capable of taking effect, and subject thereto, to the use of the appellant, his heirs and assigns, for ever.

In the year 1821, the appellant was discharged as an insolvent debtor in England; and on the 21st of July 1821, he executed an assignment of all his real and personal estate to the provisional assignee of insolvents in England, who, by deed of the 17th of February [393] 1823, assigned the same to the assignees of the estate and effects of the insolvent, who were also made respondents in this appeal, but who took no part in complaining of the decree.

The assignment was not registered. In November 1834, Mrs. Browne, by certain legal proceedings, set aside a lease for years of part of the settled estates, made by Mr. Rochfort, after which that part of the estates was relet, and from that time the aggregate yearly rents of the estates comprised in the settlement of 1788 have considerably exceeded the sum of £480 sterling per annum, and the value of the estates has been since further increased, so that at the present time they produce the clear yearly sum of £850, or thereabouts.

By an indenture of the 30th March, 1841, the appellant mortgaged these estates in fee simple to Thomas Battersby, for securing the sum of £3000 and interest; and the debt was further secured by bond and warrant of attorney, on which judgment had been entered up; such mortgage was still a subsisting security. This mortgage was duly registered under the 6 Anne, c. 2, by which all conveyances

of lands in Ireland, whether executed in Ireland or not, are to receive priority according to the date of their registration.

On the 24th of November, 1843, Battersby filed the bill in this cause against the appellant, and against his assignees, and against Elizabeth Browne and others claiming interests respectively as incumbrancers upon the appellant's interest in the settled estates, and also against the surviving trustee under the settlement of February 1801, praying that an account might be taken of the sums remaining due to Battersby for principal, interest, and costs, on his mortgage and the securities collateral therewith, and that the appellant might be [394] decreed to pay to Battersby the sum so found due, or in default might be foreclosed, and that the mortgaged premises, or a competent part thereof, might be sold, subject to the jointure or annuity of £480, payable to the respondent Elizabeth Browne, and to the remedies provided for recovering the payment thereof; and that the proceeds of such sale might be applied to the payment of Battersby's demand, with costs.

The bill also prayed, in the usual manner, that all proper parties might be compelled to join in the sale, and for a receiver and an account.

Answers were put in by most of the defendants, and it was insisted on the part of Mrs. Elizabeth Browne, that she was entitled to have the full amount of all the arrears of the jointure of £480 from the 5th of February 1801 to the year 1835, raised and paid to her under the trusts of the term of ninety-nine years, created by the settlement of 1788, notwithstanding the trusts as to such jointure, and the arrears thereof, contained in the settlement of the 5th of February 1801; this claim was resisted by the appellant, and all the other respondents.

On the 13th February 1846, Lord Chancellor Sugden made the first decree now appealed from, declaring, among other things, "that the surplus yearly rents and profits of the lands and premises in the pleadings mentioned, over and above the amount of the jointure or yearly rent-charge of £480, payable to the said Elizabeth Browne under the said deed of marriage settlement, bearing date the 13th day of May 1788, which had arisen or accrued, or should thereafter arise or accrue during the joint lives of the said Elizabeth Browne and the appellant, were applicable to the payment of all arrears of the said jointure [395] which accrued from and after the fifth day of February 1801, being the date of the settlement executed on the marriage of the said Elizabeth Browne with the said William Beville." And an account was ordered, and the Master was to report on the priorities of the different claims upon the estate.

The Master made his report on the 14th of May, finding, among other things, "that the arrears now due on the jointure of £480, after giving credit as against the same for all sums whatever received by Elizabeth Browne, from or on account of the surplus rents and profits, amounted to the sum of £5820 5s. 7d., which arrears were secured by the unexpired residue of a term of ninety-nine years in the lands and premises in the pleadings mentioned, limited by the deed of marriage settlement of the 13th of May 1788, commencing and to be computed from the decease of William Rochfort. The Master also found that this sum of £5820 5s. 7d. is the first charge on the said lands and premises, to the extent of the residue now unexpired of the said term of ninety-nine years. And that the said sum of £5820 5s. 7d. is now vested in the surviving trustee of the marriage settlement of February 1801, upon the trusts therein declared in relation thereto; and that the statute of limitations is not applicable to the said arrears. The Master also found a sum of £3818 18s. 0½d. due to Battersby for principal and arrears of interest.

The appellant filed eight exceptions to this report, insisting, among other things, that no sum was due for such of the arrears as were barred by the statutes of limitations, and that the covenant of the deceased William Rochfort to make good the annuity of £480 was in part performed by the purchase of the annuity [396] from Sir J. H. D'Oyley, the sums received from which had not been properly taken into account by the Master.

By the second decree made at the hearing, on the above exceptions, and other exceptions taken by Battersby, and upon further directions on the 16th of June 1847, the present Lord Chancellor of Ireland overruled all the exceptions, but ordered the deposits to be returned, and the costs of each party on the exceptions to be costs in the cause. And the Master's report was confirmed. "And it was ordered

and decreed, that the appellant, or such other of the defendants as ought so to do, should, within three calendar months, to be computed from the date of that decree, pay to the plaintiff, said Thomas Battersby, the sum of £3818 18s. 0½d., reported due to him for principal, interest, and costs, on his mortgage, and a judgment collateral therewith, with subsequent interest and costs to be taxed as therein mentioned, and should also lodge in the Bank of Ireland, with the privity of the Accountant-General of the Court, to the credit of the cause, the sum of £5820 5s. 7d., reported due for the arrears of the jointure or rent-charge of £480 payable to the said defendant Elizabeth Browne, and also pay to the defendant Elizabeth Browne her costs in the cause, when taxed and ascertained;” and it was further ordered, that Battersby should reconvey the mortgaged lands and premises, free and clear from all incumbrances made by him, or any person claiming by, from, or under him, and deliver up upon oath all deeds and writings in his custody or power relating to the said lands, and in default of due payment to Battersby of such principal, interest, and costs, that W. H. Rochfort should be for ever barred and foreclosed from all [397] equity of redemption in the mortgaged lands and premises. It was further ordered, that the Master should sell, according to the course of the Court, the lands and premises comprised in Battersby’s mortgage, or a competent part thereof, such lands to be sold subject to the jointure of £480, payable to Elizabeth Browne during her life, and out of the money to arise by such sale, that the sum found due for arrears of the jointure, being the first charge on the said lands and premises, should be in the first place lodged in Court to the credit of the cause, to abide the further orders of the court, and that Elizabeth Browne should be paid her costs of suit (2 Jones and Latouche, 431).

The Appellant appealed against both these decrees.

Upon the appeal being called on and partly opened,—

Mr. Bethell objected that it was not competent to the appellant to be heard in this case. This is an appeal by an insolvent, whose assignees do not appeal against the decrees, though they were parties to the suit in which those decrees were pronounced. In this suit, which was a suit by the mortgagee against the appellant, certain trustees of the mortgaged estates, and the jointress, she set up here claims under the jointure as a prior charge on the lands, and a report was made in her favour. To that report the assignees took exceptions, which were overruled, and the second decree was made. The assignees do not appeal against this second decree. The insolvent cannot do so.

[Lord Brougham.—Was he not a party to the suit below?]

He was.

[398] [Lord Brougham.—And the decree was against him as well as against the assignees. Can it be doubted that he has an interest in the matter?]

He cannot properly be a party to the suit, nor consequently to the appeal. All his interest is now vested in his assignees, and they do not complain of the decree.

Mr. Turner and Mr. R. Palmer.—The appellant shews himself in this way to be a party aggrieved, that his future rights are affected by the operation of these decrees. He may therefore be properly a party to the suit and the appeal. He has a direct interest in the surplus. It is true that the appellant is an insolvent debtor, but the mortgage was made by him subsequent to his insolvency, and it is only in consequence of there having been no registration of the title of the provisional assignee, that this mortgage was adjudged to take precedence of the assignment under the insolvency. It is this title to precedence which is disputed. The sum claimed by Battersby is secured to him, not only by a mortgage of the property, but by a bond and a judgment entered up on a warrant of attorney. The proviso for redemption does not follow the ordinary form, but is in these terms:—“Provided that if Rochfort shall pay £3000 with interest, Battersby will, at the expense of Rochfort, re-convey the town lands, and if any judgment shall be entered up upon such bond, he shall sign satisfaction to that judgment.” There is, therefore, by the contract between Battersby and Rochfort, an obligation upon Battersby, not only to re-convey the estate, but to re-deliver the bond and the warrant of attorney in order that they may be cancelled. The bond and the judgment are debts which [399] affect the future property of Rochfort; and he has therefore a direct

interest in the question whether the mortgage is satisfied, and an interest in the property when it shall have been satisfied.

[The Lord Chancellor.—That is always so under an insolvency.]

The future property of the insolvent in this case is not to be considered in the same light as future property in ordinary cases of insolvency; for here there is a contract on the one side to pay, on the other to re-convey, which is, in addition to, and independent of, the ordinary legal liability. Such a contract is recognized by the Courts, and the title of a bankrupt or an insolvent to the surplus is recognized; for a bankrupt cannot be examined in a matter which may affect his surplus, without first releasing it. If nothing is done in respect of the mortgage, the insolvent is entitled to have the bond delivered up, and satisfaction entered upon the judgment. He is therefore entitled to know whether the amount due on the mortgage is smaller than is claimed, and consequently he is a proper party in a suit where the amount due on that mortgage is a point in question.

[The Lord Chancellor.—In that case every insolvent and bankrupt would be a necessary party to a suit between a mortgagee and the assignees.]

If the mortgage enjoyed no priority over the assignment, the Court might have power to say to the insolvent, you have no title to come into Court; but if the mortgage or any other charge takes the priority, he has a right to come in and see that, as against the assignee and his own future property, every due allowance in account is made.

[400] [Lord Campbell.—Can you ask anything of this House for the benefit of your client?]

Perhaps so, in the result of this case. Here, £5000 are claimed for arrears: if this appeal succeeds, the priority of that charge is removed; the estate is to be sold, and the debts paid. The removal of the priority of the charge of £5000, which now stands as the first charge, will affect the means of satisfying the bond and the warrant of attorney, the sum secured by which constitutes the second charge. On the first of these instruments, both of which must then be cancelled, the insolvent is personally liable, as much as if he never had been an insolvent.

[The Lord Chancellor.—But here his interest is the other way.. The decree gives priority to the mortgage.]

Yes, as against the assignment. But still the whole property is first subject to the arrears of £5000. There is no complaint of the priority of the mortgage as against the assignment. The complaint relates to the priority of the arrears of the jointure, which leaves the mortgage unsatisfied, and so continues the bond and warrant of attorney in full force. No such case could occur in England, but in Ireland it arises through the effect of the Registration Acts, which have, in this instance, given priority to the mortgagee over the assignees.

But let the case be considered independently of the Irish acts. Let it be treated as one simply of a mortgage by Rochfort to Battersby. Then the mortgage debt is a mortgage of the surplus, which the insolvent might have after his liability under the insolvency had been discharged. It cannot be said that the deed, which passed all his property, did not pass the surplus of that property.

[The Lord Chancellor.—The decree puts the mort-[401]-gagee before the assignees, and to that part of the decree there is no objection.]

But to try the case; suppose it to be the other way. If the insolvency has passed the estate to the assignees, they hold under a trust for payment of debts, but if the insolvent afterwards creates a mortgage on that estate, that would pass an interest after the debts had been paid. The mortgagee would have a right to foreclose that interest, and the mortgagor would have a right to redeem.

[The Lord Chancellor.—This is a question as to priority of claim between the assignment and the jointure. In such a case can the insolvent be a proper party?]

That must depend on the terms of the contract between the mortgagee and the insolvent. The case of *Taylor v. Rothwell*, assignee of Fairleigh (6 Wilson and Sh. 301), though not directly in point, has in principle a strong bearing on this case. There, an insolvent had been made a party to a suit like the present. The Lord Ordinary had fixed him with costs; he appealed to the Court of Session, which refused to hear him till he had given security for these costs. Against that order he brought an appeal to this House, and by this House the order of the Court of Session was held entirely wrong, and was reversed. The principle to be deduced from that case is



that if a party, though insolvent, is brought into Court by another party, and heard in the Court below, it is competent for the Court to refuse to adjudicate on his claim of right.

[The Lord Chancellor.—But here the insolvent is not brought in by an adverse party.]

[402] There is, it is true, that distinction, but still the interest of the insolvent here is a substantial interest, which has formed the ground of adjudication in the Court below; and as to that adjudication, he cannot be refused the right of appeal.

Mr. Bethell.—It is a settled rule, that an insolvent's estate can only be administered by assignees. In *Heath v. Chadwick* (2 Phillips, 649), there was an attempt to evade that rule, but it failed; and that case may be referred to, not for similarity of facts, but for the manner in which the whole subject is treated. In addition to the authorities which are there cited in the judgment (*id.* 652), those of *Lloyd v. Lander* (5 Madd. 282), where, on demurrer, a bankrupt was held to be an unnecessary party to a bill of foreclosure by a mortgagor against the assignee,—of *Collins v. Shirley* (1 Russ. and Myl. 638), where the same doctrine was applied in the case of an insolvent,—and of *Kerrick v. Saffery* (7 Sim. 317), where it was likewise held that a mortgagor who had become a bankrupt was not a necessary party to a suit of foreclosure, may be mentioned.

[The Lord Chancellor.—Here the Court has in fact made a decree for foreclosure or for redemption, dealing with the insolvent as a party interested in the estate to be administered.]

The alternative part of the decree is entirely erroneous.

[The Lord Chancellor.—But however wrong it may have been in the Court below to allow the insolvent to be a party to the suit, yet, as here is a decree not appealed against, giving him a right to deal with the [403] property, how can his right to appeal against a part of that decree, which limits or affects his right in the property, be denied?]

Here the party objecting to his right is a co-defendant. The error of the original plaintiff, in making him a party to the suit, cannot affect the rights of the jointress, the real respondent in this appeal.

[The Lord Chancellor.—The second decree gives him a *status* in the suit. The two decrees are connected together, and if he has a right to appeal against one, he may appeal against both.]

By the second decree he is clothed with liberty to redeem the estate. But that does not affect claims previously settled and ascertained. The case is the same as if the litigation up to a certain point had been properly settled, and then a mistake was made in introducing a senseless order, and an unnecessary party. That mistake would not give such a party the right to appeal against all that had been done.

Mr. Turner, in reply to the cases cited.

These cases, especially that of *Lloyd v. Lander* (5 Madd. 282), are inapplicable. Here there is an interest beyond that of the mortgagee or of the assignees. The bankrupt has an interest in all the estate, as against the arrears of the jointure; and the mode of taking the accounts directed by the decree will affect his right in respect of those arrears and of the jointure itself.

The Lord Chancellor (March 27).—In the discussion of this case, it appeared that an appeal had been brought by a party who had taken the [404] benefit of the Insolvent Debtors' Act. The contest in the suit itself was between a mortgagee, who had obtained a mortgage, and a mortgagor, who had granted it, after taking the benefit of the Insolvent Debtors' Acts. Owing to the provisions of the act for the registration of mortgages in Ireland, a question arose, whether that mortgagee was or not to be preferred to the assignees under the Insolvent Act. The Court was of opinion that the mortgagee, under the provisions of this registration act, was entitled to priority, and the decree therefore proceeded upon that decision. The details of that decree are not here a matter in question. It was a suit which was a mere contest between the parties claiming an estate, and the insolvent,—for some reason or other which does not appear,—was made a party defendant. I say that it does not appear,—for although it was very ingeniously put at the bar, that the personal obligations into which the insolvent had entered after his insolvency might be affected by the result of this litigation, that had nothing to do with the suit. It was a suit simply to

ascertain the rights, as between the mortgagee and the assignees under the insolvency, to priority upon the insolvent's estate. And whatever question may arise in consequence of the insolvent having entered into personal contracts after the insolvency, that circumstance could not possibly affect the rights of the parties to the property which passed under the Insolvent Act, and which was affected by the mortgage, nor does any thing of that sort appear upon the face of the proceeding. I mention that only, because it was relied on at the bar, but that does not at all affect the present question of the propriety of having made this insolvent a party to the suit below. The objection does not appear to have been taken below, and naturally enough it [405] did not strike the parties appearing there and taking upon themselves the discussion of the question, that this insolvent, having parted with all his interest in the property, could not be heard to dispute a matter affecting the property which he had prior to his insolvency, but which had thereby passed to the assignees. Accordingly the suit proceeded, and a decree was pronounced in favour of the plaintiff, the mortgagee,—the insolvent remaining a party to the record. Now the decree having established the priority of the mortgagee's title, the assignees, who were alone interested in the case, of course as representing the body of the creditors, acquiesced in that decree, and have not complained of it at your Lordships' bar; but the insolvent has complained of it, and he has become an appellant, and as an appellant questions the propriety of the decision of the Court below.

Now it is a matter to be regretted that the question of competency was not raised in the early part of the proceeding, before the Committee of Appeals, which is the proper tribunal in the first instance to dispose of questions of that sort. If there it had been found that there was any difficulty or doubt about the point, the regular course would have been to refer it to the House; but the question ought to have gone before the Committee of Appeals in the first instance. Ordinarily speaking, where no question of difficulty occurs, the Appeal Committee disposes of any matter of that sort, and by so doing saves very great expense and delay to the parties, who, otherwise, might be needlessly brought here in the regular course for hearing the appeal, when upon discussion here it might turn out that the appeal could not be entered into, in consequence of the defect of title of the party appealing. The proper course is [406] to avoid needless expense, by discussing the question of competency before the Appeal Committee. That course, however, was not adopted in the present case; but the objection as to competency necessarily presented itself upon the discussion of the appeal. The question raised, and which was argued before your Lordships, and which we have now to dispose of, is whether the party appealing is a competent party to claim, at your Lordships' bar, the revision of the decree of the Court below? The appellant had been improperly made a party below; it is therefore quite obvious that that is no reason why he should be heard here; because the question of incompetency may arise very well between parties who are parties to a cause. The question is, whether they have that interest in the subject-matter which would entitle them to appear here as parties questioning the propriety of the decision below. There certainly may be causes in which parties are made such for some matter in which they may have some probable interest, and that matter having been decided below, they come here on the ground that they were parties to the original cause, and have therefore a right to appeal against a decision on a matter in which they have an interest; but if they come here and appeal against a matter in which they have no interest, the House will not hear them, because they are incompetent to raise a discussion of such a matter, and, *a fortiori*, if they appear improperly as parties in the court below, this House will not permit them to raise here an argument in a matter in which they had no interest, even in the Court below.

Now, my Lords, it is much too late to discuss the question whether this appellant is a proper party to this cause,—having already disposed of that portion of [407] the ground on which it was contended that he ought to have been a party to the cause,—I mean the personal contracts into which the insolvent entered subsequently to his insolvency, and confining my observations to his interest in the property which passed by the insolvency, beyond all doubt the insolvent was not a proper party to a contest relative to a priority of charges upon that property passing to the assignees.

My Lords, many cases have been quoted on this subject. In a late case, I had occasion, in the Court of Chancery, to consider those cases, and I can see no reason

whatever, from anything that has passed on this occasion, to alter the opinion that I then expressed. What I did express, after a consideration of all those cases, is to be found in *Heath v. Chadwick* (2 Phillips, 651), in which I state this as the result of an investigation of those cases:—"The acts give ample power to the jurisdiction created by them, to meet all such cases as are stated in the bill, particularly by the removal of the assignee, if he improperly uses or omits to use the authority vested in him; and it is obvious that if individual creditors were permitted to file bills in this Court; instead of resorting to the jurisdiction specially created for enforcing their rights and interests, the public would be deprived of much of the benefit of such special jurisdiction, and much of the business which ought to be transacted there would be transferred to this Court. I have therefore much satisfaction at finding that, in several recent cases, this subject has, as it appears to me, been put upon a proper footing. In *Yewens v. Robinson* (11 Sim. 105), the Vice Chancellor of England decided against the right of creditors to file a bill [408] upon these grounds, as he had before, in *Kaye v. Fosbrooke* (8 Sim. 28), decided against the right of an insolvent debtor to file such a bill; which was also the decision of Vice Chancellor Wigram, in *Major v. Auckland* (3 Hare, 77). The point indeed has been long settled; *Spragg v. Binkes* (5 Ves. 583), *Benfield v. Solomons* (9 Ves. 77), *Saxton v. Davis* (18 Ves. 72), *Hammond v. Attwood* (3 Madd. 158). Some of these were cases in bankruptcy, but the principle is the same, and all of them, except *Yewens v. Robinson*, were bills filed by insolvents or bankrupts, or persons claiming through them; but upon demurrer, the bill alleging a surplus, the equity of the bankrupts and insolvents cannot be distinguished from that of their creditors. *Barton v. Jayne* (7 Sim. 24), and the case under appeal, are the only decisions I am aware of, holding that such bills can be maintained.

The case of *Collins v. Shirley* (1 Russell and Myl. 638) brings the case, not more in principle, but more in point of fact, within the circumstances of the present case; and, as it seems to me, they are identically the same. There, a bill of foreclosure had been filed against the insolvent and his assignees, upon which the assignees disclaimed, and offered to release. The assignees claimed no benefit in the mortgage; the title of the mortgagee had been prior to their own, and they therefore abstained from litigating the point. The discussion arose upon a question of costs. The assignees withdrew from the contest, and it remained only between the insolvent and the mortgagee. "The Master of the Rolls held that the assignees were [409] not entitled to their costs, but that Shirley had been made a party improperly, and ought therefore to have his costs." That was identically the same as here. The assignees represented the property, and were therefore properly made defendants. But as to the insolvent, the Master of the Rolls, Sir John Leach, said, that he was improperly made a defendant; the consequence was, that the Court gave him his costs. Now all these cases refer to the state of the matter as it stands on this appeal, and shew that the insolvent under the Insolvent Debtors' Act, is not considered by the Court as having any such interest in the property as entitles him to enter into any litigation respecting it. It cannot be stronger than this. We find a bill filed by the insolvent, alleging, upon the face of it, that there is a surplus, which practically is made use of by him to shew that he had an interest; but although the law would give him back again that surplus, if it should ultimately arise, the Court says, "Although you have alleged that fact, a demurrer might be taken to that allegation on the ground that that fact does not, under the statute, give you such an interest as entitles you to sue upon it." A demurrer is therefore held to be good to a bill filed by an insolvent, although he alleges a probable surplus, and although he alleges combination and conspiracy to rob him, as between the assignees and the creditors. There cannot be a stronger proof therefore that the Courts have always considered these acts of Parliament as divesting the insolvent of all title and interest in the property, which would authorize and justify him in entering into any litigation respecting it. This objection ought to have been taken in the Court below, and the bill ought to have been dismissed as against the insolvent; but the Court did not adopt [410] that course, but made a decree apparently as if the party had not been an insolvent at all, decreeing a foreclosure against him, which might ultimately lead to a redemption by him.

We have nothing to do, in the present question, with that portion of the decree. The matter we have to dispose of is, simply whether this party has a right to come

here to complain. Now, being of opinion that he was improperly made a party, and cannot be heard by way of appeal, it is not very material to consider how far the decree is or is not for his benefit. Beyond all doubt, it is for his benefit, inasmuch as it gives a priority to his mortgagee, and may, *pro tanto*, be a relief to him. I do not put it upon that at all, because however that may be, he is improperly made a party to this litigation.

Then, my Lords, the question is, whether you can hear him as an appellant? The moment you shew that he had no recognized interest in the property or in the matter, there is an end of his competency to raise the question. It is not for him to raise that question here, any more than it would be for a stranger who, by accident or inadvertence, might have been made a party to a suit, but who had no connection with the subject matter at all. In such a case as that, the Court would hold that a party appealing had improperly appealed, not having such an interest as entitled him to litigate upon the subject at all, and it appears to me that this appellant stands precisely in that position; and without at all entering into the merits of the case, which we are not called upon to discuss here, I am of opinion that this party is not competent to support this appeal; and on that ground I move your Lordships that the appeal be dismissed.

[411] Lord Brougham.—My Lords, I entirely agree with my noble and learned friend. I had some little doubt at first, because of the appellant having been heard in the Court below, and thought that though probably he ought not to have been allowed to appear there, yet, that as he did appear there, he could not be refused the liberty of appearing here. But I have clearly come to the same opinion with my noble and learned friend, that he has no *locus standi* here at all. I agree also with my noble and learned friend, that whatever interest he may have in the decree below, that is quite immaterial to the present question.

My Lords, I cannot help feeling that there is a very great defect in the Insolvent Act, which, in this respect as well as in others, ought to be remedied. Though a debtor comes into Court, as my noble and learned friend has stated, and has shewn a case, he can only be represented by his assignees; he has personally no *locus standi* in Court, and therefore cannot be a party to the suit. Here the case is that of a debtor coming into Court, who has no *locus standi*, but whose property has passed to assignees by assignment under the insolvency.

But my Lords, my objection to the present state of the Insolvent Law is this, that a very great hardship may be worked, and very serious mischief may be done to an insolvent, from a want of power in the Insolvent Debtors' Court to compel the assignees to lend him the use of their names for the purpose of prosecuting his rights, which they may refuse from malicious motives, spite towards him, or from collusion existing between them and the creditors, or from their saying, "We are satisfied; we have got enough. We have got 20s. in the [412] pound," or even a less sum. It may happen that there may be a claim on the part of the insolvent, a perfectly sound and well grounded claim to property or to a sum of money, to a legacy for instance, or to an estate, but which yet cannot be obtained without the assignees granting the use of their names, which the assignees now have a right to refuse.

The Lord Chancellor of Ireland, Sir Edward Sugden, when first the matter came before his Court, felt the great hardship of Mr. Rochfort's case in this instance so much, that there was some correspondence as to how far the Insolvent Commissioners here had the power of compelling assignees, upon an indemnity of course, to appear for the insolvent, or to allow him the use of their names. It was of course felt that they might say, "Why are we to go into Court at the risk of costs? We have no security that we shall be paid the costs." But still the question arose whether by a proper indemnity being afforded, they could be compelled to lend the use of their names. It was at first thought that there was a power of compelling the assignees to take some course of that kind, and the late Mr. David Pollock looked into the matter with the view of seeing whether such a power existed. At first he was rather inclined to think that there was that power; but after he had looked into the Act of Parliament he found that that was not the case. A bill was then framed which passed through this House, and went to the other House of Parliament, to remedy that great and grievous defect. That bill, perhaps, went too far in one direction, though probably not far enough in another. An objection was taken to the bill, and it dropped in the other

House of Parliament. My Lords, something ought to be done to enable parties to obtain [413] the use of the names of the assignees, of course, upon a due indemnity being secured to them, in order to remove the grievance which at present exists. Upon that subject the Commissioners were quite of that opinion, and they in fact drew the bill of which I have spoken. It was first framed in a way to decide the question, and to give Mr. Rochfort final judgment by act of parliament in his favor. That clearly would never do, and therefore it was left out here; it went down to the other House without that objection, and was there lost; but I trust that many months of the year will not pass over before that is altered.

My Lords, all that remains for us to say is, that this gentleman is, as the law now stands, not entitled to be heard; and that therefore the appeal must be dismissed.

Lord Campbell.—My Lords, as I was not here in the earlier part of the discussion of this question, I shall not enter into it at any length, but content myself with saying that I quite concur with the general views of my noble and learned friends, that in the case of a person who is made a party to a suit, but who is not strictly or properly a party, there can be no ground for an appeal by him to this House against the judgment of the Court below.

Lord Chancellor.—The only remaining question is as to the costs. Upon principle, I think the House would not act wisely in departing from the usual rule.

Lord Brougham.—It is not a case that would regulate our general practice.

[414] Mr. Turner.—Your Lordships will allow me to call your attention to the period of the cause at which the objection was taken. Your Lordships are fully aware that the matter was gone into in the Court below, and no objection was at any time taken to the insolvent being heard.

Mr. Bethell.—Your Lordships will bear in mind that the objection arising upon W. H. Rochfort's insolvency was distinctly taken in the original answer of Mrs. Browne, the respondent here, and was, no doubt, fully considered in the Court below.

Lord Brougham.—You should have petitioned the Appeal Committee to refuse the appeal on account of that objection.

Lord Chancellor.—The ground which my noble and learned friend has just mentioned is quite sufficient to confirm the view which I take. It is a practice very much to be discouraged that objections are not taken at an earlier stage, but that the matter should be brought to the bar of the House, and then that it should appear for the first time that there is an objection to the competency of the appellant being heard. That objection ought to have been taken at an earlier stage. It would have saved a great deal of expense, and therefore the appeal must be dismissed, without costs.

Appeal dismissed, for incompetency, without costs.

[415]

# WRIT OF ERROR.

BARNARD GREGORY,—*Plaintiff in Error*; The DUKE OF BRUNSWICK and HEN. WELLINGTON VALLANCE,—*Defendants in Error* [March 26, 1849].

[Mews' Dig. i. 358; iii. 2135. S.C. 6 Man. and Gr. 205; 3 C.B. 481; 6 Scott N.R. 809.]

## *Practice—Writ of Error.*

Where it appeared to the House that a mistake, committed by an officer of the Court below, in entering the judgment of that Court, was made the ground of a writ of error, the arguments on the writ of error brought on such judgment were stopped, and the case was ordered to stand over, to allow the parties to apply to the Court below to amend the error.

The House made this order, after referring to the report of the opinions of the Judges of the Court below, as stated in the printed reports of the decisions of that Court.

This was an action on the case, brought in the Court of Common Pleas to recover

damages for a conspiracy to prevent the plaintiff from performing as an actor. The defendants pleaded, first, Not Guilty; secondly, that the plaintiff was not about to exercise the profession of an actor for profit and reward; thirdly, that he did not become an actor and exercise the said profession for profit; and fourthly, they justified, for that the plaintiff being editor and publisher of *The Satirist* newspaper, his appearance upon the stage was against public morals and decency. The plaintiff joined issue on the first, second, and third pleas, and demurred to the fourth plea, which, upon argument, was held bad (6 Man. and Gr. 205; 6 Scott New R. 809). No judgment was then entered up, as the issues of fact had not been tried. When they were tried, the jury returned a verdict for the defendants on the three [416] issues, but there was no assessment of damages as to the plea on which judgment had been given for the plaintiff on demurrer. After a motion for a new trial, judgment was entered for the defendants, and it was ordered "that the defendants do recover against the plaintiff £340 ls. Od., for their costs and charges by them expended about their defence, in this behalf, etc." The case was taken, on error, to the Exchequer Chamber, and one of the grounds assigned was, "that the jury omitted to assess damages for the said Barnard Gregory, on the demurrer on which judgment was given in his favour;" another was, "that judgment ought to have been given for Barnard Gregory to recover his costs and charges upon and in respect of the said judgment given in his favour on the demurrer to the last plea, or that the said costs and charges should be deducted from the costs and charges which have been awarded to the said Duke of Brunswick and Henry W. Vallance, against the said Barnard Gregory, on the final judgment given to them as aforesaid." The judgment of the Court of Common Pleas appeared to have been affirmed in the Court of Exchequer Chamber, being thus entered on the record, "It appeared, etc., that there is no error in the record and proceedings aforesaid, or in the giving judgment aforesaid. Therefore it is considered by the said Court of Exchequer Chamber, that the judgment aforesaid, in form aforesaid given, be in all things affirmed, and stand in full force and effect, the several matters aforesaid, above for error assigned and alleged, in anywise notwithstanding. And it is further considered by the same Court of Exchequer Chamber, that the said Duke of Brunswick and H. W. Vallance should recover against the said Barnard Gregory £66 by the said Court of Exchequer Chamber adjudged, etc., for their [417] damages, costs, and charges which they have sustained by reason of the delay of the execution of the judgment aforesaid, on pretence of the prosecution of the said writ of error."

It appeared in fact that in the Court of Exchequer Chamber, the Judges, on the hearing of the writ of error, took time to consider the judgment, which was finally delivered by Mr. Baron Parke, on behalf of the whole Court. His Lordship, after adverting to supposed distinctions between writs of error brought by plaintiffs and those brought by defendants, said (3 Com. Bench, 481, 496; 16 Law Journ., C. P. 35, 39) "But be this as it may, the present is the case of a writ of error *by the plaintiff below*, who complains that the record is erroneous, and asks to have it reversed, and justice done to himself. If judgment is reversed simply, complete justice is not done. To do that, he must have a judgment in his favour on the demurrer; for, the costs may greatly exceed the defendants' costs of the cause. But the Court could not give that judgment, without also giving a complete judgment on every part of the record. The result must be, that the new judgment will not only be for the plaintiff for the costs on the demurrer, but for the defendants on the issues found for them." Notwithstanding this distinct declaration of the intention of the Court of Exchequer Chamber, the judgment was entered on the record as one of simple affirmance.

The present writ of error was brought to this House against the judgment as thus entered.

Mr. Manisty appeared for the plaintiff in error, and argued that the judgment of the Court below could not be sustained.

[418] Mr. Stone, for the defendants in error, said that the entry of the judgment, as it now stood, was nothing but a mistake on the part of the officer of the Court. He read from the report in 3 Common Bench Reports the observations of Mr. Baron Parke in delivering the judgment of the Court of Exchequer Chamber, and contended that this mistake of the officer ought not to deprive the defendants of the benefit of the judgment really intended by the Court.

Lord Brougham (interrupting the argument) said, it appeared that there had been a mere slip of the officer of the Court below in entering this judgment of affirmance, and the case ought to stand over for the parties, one or both of them (he thought both ought to join), to make an application to the Court of Exchequer Chamber to correct the entry of the judgment which, according to *Richardson v. Mellish* (1 Clark and Fin. 224), the Court had still the power of doing, if it should so think fit.

The Lord Chancellor and Lord Campbell concurred.

Ordered accordingly (see, on the subject of the entry of judgment by a court of error, *Thomson v. Mitchell*, 7 Cl. and Fin. 764; *Mackersey v. Ramsays*, 9 Cl. and Fin. 818; *Bourne v. Gatliffe*, 11 Cl. and Fin. 45).

[419] JAMES WORTHINGTON LIVESEY,—*Appellant*; MARY CARTER LIVESEY and HARDING LIVESEY,—*Respondents* [April 2, 23, 1849].

[*Mews'* Dig. xv. 1852. S.C. 13 Jur. 371; and, below, 13 Sim. 33; 15 L.J.Ch. 357. Considered in *Domville v. Winnington*, 1884, 26 Ch.D. 387. Cited in *In re Rivers' Settlement Trust*, 1870, 48 L.J. Ch. 87.]

*Will; Construction—Eldest Son—Vesting.*

A testatrix gave to the eldest son of her daughter Eliza and of her husband E. L., who should be living at the time of her own decease, ten guineas, adding that she left him no larger sum, because he would have a handsome provision from the estates of her late husband and of his own father (who was still alive): And she gave the residue of her property to her executors, upon trust, as to one moiety thereof, to pay and divide the same unto and amongst all the children of her daughter Eliza, who were then in being or should be thereafter born,—except her eldest son, or such of her sons as should, by the death of an elder brother, become an eldest son,—equally to be divided amongst them, and the survivors or survivor, when the youngest should arrive at the age of twenty-one years. At the death of the testatrix, her daughter Eliza had five children, and the eldest son was provided for from the estates in the will mentioned, and he received the ten guineas, but died, without issue, before the youngest child attained twenty-one. The second, who then became an eldest son, did not succeed to the provision which had been made for the eldest son:—

Held, notwithstanding that he, being the eldest son at the time the youngest of the children attained twenty-one, was excluded from any share in the moiety of the residue.

This was an appeal from a decree of the Vice-Chancellor of England (13 Simons, 33), affirmed by Lord Chancellor Lyndhurst (*infra*, p. 425, note), upon the construction of the will of Jane Worthington, widow, dated the 24th of April, 1805.

[420] The testatrix, after bequeathing an annuity of £100 to her daughter Jane, wife of Martin Livesey, for her life, for her separate use, proceeded thus:—"I give unto my daughter Eliza, wife of Edmund Livesey, of etc., the sum of ten guineas, and unto the eldest son of my said daughter and the said E. Livesey, *who shall be living at my decease*, ten guineas; And I leave my said daughter, and the eldest son of my said daughter Eliza and the said E. Livesey, *who shall be living at my decease*, no larger sum, because they have, and will have, a handsome provision from the estate of my late husband, and the estate of the said Edmund Livesey."

The testatrix, after other bequests, gave and bequeathed all the residue of her estates and effects, real and personal, to her executors, their heirs, executors, etc., upon trust that they, or the survivors of them, his heirs, executors, etc., should pay and divide the same in this manner:—

"One moiety or half part thereof unto and amongst all and every of the children of my daughter Jane, who may hereafter be born, she not having any at present, their heirs, executors, etc., equally to be divided amongst them and the survivors or survivor of them, share and share alike, as tenants in common and not as joint

tenants, *when the youngest of such children shall arrive at the age of twenty-one years.* Provided always, that if any such children shall *then* be dead, leaving lawful issue, such issue shall take the share which his, her, or their parent would have taken if living. Provided also, that if my said daughter Jane shall not have any children, or such children shall all die under the age of twenty-one years, without leaving lawful issue, then the aforesaid moiety to go to my said daughter Eliza's children, *save and except her eldest son, or him who by the death of his eldest brother may become so,* and the survivors or survivor of them, and their, his, or her issue, [421] *at such time and in such shares and manner as the other moiety of the aforesaid residue of my estate and effects is hereinafter directed to be paid and divided.*

"And as to the other moiety or half part of the said residue of my estates and effects, real and personal, upon trust, that my said executors, or the survivors of them, etc., do and shall pay and divide the same unto and amongst all and every the children of my daughter Eliza, who are now in being or shall hereafter be born (*save and except her eldest son, or such of her sons as shall, by the death of an elder brother, become an eldest son, it being my will that the son who is or shall become an eldest son shall not be entitled to take anything under this devise or bequest*), their heirs, administrators, and assigns, equally to be divided amongst them and the survivors or survivor of them, share and share alike, as tenants in common and not as joint tenants, *when the youngest of them shall arrive at the age of twenty-one years.* Provided always, that if any such children shall *then* be dead, leaving lawful issue, such issue shall take the share which his, her, or their parent would have taken if living. Provided also, that if all such children shall *die under the age of twenty-one years* without leaving any issue living, the said last mentioned moiety of the aforesaid residue shall go to my daughter Jane's children, and the survivors or survivor of them, and their, his, or her issue, at such time, and in such shares and in such manner as the first mentioned moiety of the aforesaid residue is hereinbefore directed to be divided. Provided also, that if all the children of my said daughters, *except the eldest son of my daughter Eliza, or him who by the death of his elder brother become an eldest son, shall die under the age of twenty-one years,* and not leave any issue living, then the whole of the said residue of my real and personal estate and effects to go to the eldest son of my said daughter Eliza, his heirs, executors, administrators, and assigns.

"And I do hereby declare it to be my will and mind, that in case all the children of my daughter Eliza, except one, who shall happen to be a daughter, shall die under the age of twenty-one years, and without leaving lawful issue, such daughter shall be considered as an eldest son of my said daughter Eliza, and shall not take any part of the residue of my real or personal [422] estate and effects, unless my said daughter Jane shall die without leaving any issue, or such issue shall all die under the age of twenty-one years. And it is my will and mind, that in the mean time, until the respective moieties of the aforesaid residue of my real and personal estates shall be to be divided, the rents, interest, and produce thereof shall accumulate and be added to the said moieties, and become a part thereof, and the said accumulations shall be divided and paid at the same time unto and amongst the same person or persons, and in the same manner as the aforesaid moieties are hereinbefore directed.

"Provided nevertheless, that if at the time my said daughter Eliza shall arrive at the age of forty-eight years, or will, if living, arrive at that age, or at any time afterwards, there shall not be any issue of her, or of my daughter Jane living, or being such issue, the same shall afterwards die under the age of twenty-one years, then it is my will that my said executors, or the survivor of them, etc., shall pay the rents, interest, etc., of the said residue, and of such accumulations thereto as aforesaid, which shall arise from the time when my said daughter Eliza shall attain her age of forty-eight years, or from the time when the last of such issue of my said daughters Jane and Eliza shall die, unto and between my said daughters Jane and Eliza, during their joint lives, and to the survivor of them during her life, etc.; it being my will that, in case of either of the contingencies in the last mentioned proviso, the rents, interests, etc., of my estates shall not afterwards, during the lives of my said daughters, or the life of the survivor of them, accumulate for the benefit of those who will be entitled to the residue of my estates. Provided also, that in case all the children of my said daughters now living, or which may hereafter be



born, shall happen to die before the *younger of them shall attain the age of twenty-one years*, and without leaving any lawful issue, then and in such case," the testatrix gave all the said residue and accumulations from the decease of the survivor of her said daughters, unto her nephew and niece, John and Jane Armstrong, and she appointed her daughter Jane, and William Clarke, banker, her executors.

[423] The testatrix died in 1815, leaving her said daughters, who were her only children, surviving. The will was proved by Jane Livesey, Mr. Clarke having died in the lifetime of the testatrix.

In a suit instituted in Chancery in 1822, for establishing the will, and administering the trusts thereof, several decrees and orders were made from time to time; and it was found, by the Master's last report made in 1839, that the said Jane Livesey was then seventy-one years of age, and had two children only who attained the age of twenty-one, two more having died in infancy; and that Eliza Livesey, the other daughter of the testatrix, had attained the age of forty-eight years in 1819, and had five children only, namely, Edmund Worthington Livesey, the eldest, who was born in 1796 and died in 1827, a bachelor; the appellant, who was born in 1798, and became the eldest son on the death of his said brother; Eliza A. Livesey, who was born in 1802, and died in 1820, under the age of twenty-one, unmarried; and the two respondents, the first born in 1804, the latter in 1809.

By an order of the Vice-Chancellor, made on confirming the report, it was declared that one moiety of the residuary personal estate of the testatrix became vested in the children of Jane Livesey, and the other moiety in the children of Eliza Livesey, entitled thereto under the said will.

The respondents having, in 1840, presented a petition for distribution of the latter moiety (which exceeded £30,000) among them, to the exclusion of the appellant, he and his solicitor filed affidavits, in which it was stated that, under the will of the late husband of the said testatrix, the said Edmund W. Livesey had been entitled to an annuity of £200 for his life, and to a sum [424] of £4000 bequeathed for his benefit, as in the will mentioned, but no provision was therein made for the appellant; that at the date of the will of the testatrix, the said Edmund Livesey had made a will, then existing, by which he devised his real estates in such manner that the appellant, his second son, would become entitled thereto, in case of the death of the eldest son without issue; but that will was revoked by a subsequent and last will, made in 1811, whereby he disposed of the whole of his real and personal estates, subject to legacies of £1000 to each of his younger children, in such manner that on the death of his eldest son, the said E. W. Livesey, and in the events that happened, the whole of them devolved on his daughter, the respondent, and her issue, to go, in default of such issue, to his own right heirs. So that no provision was made by that will for the appellant, except the legacy of £1000 as a younger child.

The affidavits further stated, that the said E. W. Livesey made a will, and thereby bequeathed all his personal estate, including the said sum of £4000 to his sister, the respondent, who was, or claimed to be, entitled to that sum, as well as to the real estates devised by her father's last will.

By the final decree of the Vice-Chancellor, made in the cause and on the said petition, in July 1842, it was, among other things, declared, that upon the true construction of the said will of Jane Worthington, the appellant had, on the death of his brother Edmund, become the eldest son of Eliza Livesey, and was not entitled to any share in the residue of the estate of the said testatrix, but the moiety thereof, given among the children of Eliza Livesey, except an eldest son, or a son taking the place of an eldest son, [425] was divisible in equal shares among the respondents.

That decree was affirmed, on appeal, by Lord Lyndhurst, on the 6th of July, 1846.\*

\* His Lordship, after resigning the great seal, gave out at the request of the parties a note of his judgment, a copy of which was annexed to the respondents' printed case, and was to this effect:—

The second son, (the appellant), took nothing under the grandfather's will, and under the will of the father, as it stood at the date of the disposition in question, he would have taken nothing except after the death of the eldest son without issue, either male or female. As the father was still alive, the will was subject to re-

Mr. Rolt and Mr. Speed in support of the present appeal:

The description given by the testatrix of the eldest son of her daughter Eliza, whom she intended to exclude from any share in the residue of her estates, is not applicable to the appellant. After the bequest of ten guineas a-piece to Eliza and her eldest son, "who shall be living at my decease," the testatrix [426] adds, that she left her said daughter and "the said eldest son" of her and of her husband Edmund Livesey, "who shall be living at my decease, no larger sums, because they have, and will have, a handsome provision from the estate of my late husband, and the estate of the said Edmund Livesey." This description of the eldest son, and the reason for the exclusion of him, apply to Edmund Worthington Livesey; he was the eldest son of Eliza and of Edmund Livesey, at the death of the testatrix; and at the date of her [427] will, she knew he was handsomely provided for in the wills of his father, Edmund Livesey, and of his grandfather, the late husband of the testatrix. The appellant had no provision from the estate of his grandfather, and from his father's estate he received only the provision of a younger child. It is apparent that the testatrix never intended to exclude an eldest son, or one who might become an eldest son, unless the reason for exclusion applied to him; and a Court of Equity ought not to interpret the will contrary to the plain intention. If, in the very beginning of a will, a clear description is given of the person intended to be excluded from its benefits, that description should guide the Court in construing the whole will. There is here a double description of the person to be excluded: he was to be the eldest son of Eliza at the decease of the testatrix, and he was also to be the only person to receive the legacy of ten guineas,—which Edmund W. Livesey actually received. The appellant not being entitled to that legacy, or to the other provisions which the eldest son had, does not come within the reasons for exclusion; *Bowles v. Bowles* (10 Ves. 177).

If it should be held, upon the construction of other parts of the will, that the decease of the testatrix was not the period when the son to be excluded was to be ascertained, notwithstanding the plain meaning of the words before cited, there are

vocation, and was in fact afterwards altered by the exclusion of the second son and the substitution of Mary Carter Livesey his sister. In the subsequent part of the will of the testatrix, a daughter is, under certain circumstances, to be considered and taken to be an eldest son. I think the Vice-Chancellor was therefore right in interpreting the expression "an eldest son" according to its ordinary sense, and without reference to the succession to property.

The question still remains to be considered, to what period the description is to be referred; whether to the death of the testatrix, or to the time when the property was to be divided among the legatees. I think, upon the true construction of the will, that the property did not vest in the children until the youngest of them attained the age of twenty-one years; and that the individual who answered the description of eldest son at that period is the person to be excluded.

In aid and confirmation of this construction, reference may be made to the clause in the will by which, in the event of all the children of the testatrix's daughter Eliza, except one who should happen to be a daughter, dying under twenty-one and without leaving lawful issue, such daughter was to be considered an eldest son of the daughter Eliza, and was not to take any part of the residue, unless Jane, the sister of Eliza, should die without leaving issue, or such issue should all die under the age of twenty-one years. It is obvious that the child who is excluded by this clause as an eldest son might not be ascertained till long after the death of the testatrix, and the whole is dependent on several contingencies. In this case, therefore, the person intended to be excluded could not be a person answering the description of eldest son at the death of the testatrix, and the description must therefore, I think, refer to the time when the fund was to be divided. If this be so in this case, the same interpretation should be given to the designation of an eldest son in other parts of the instrument, that is, an eldest son who should be such at the period of distribution.

It is to be observed that, though the testatrix is disposing of a residue, there is a gift over to the nephew and niece.

The appeal must be dismissed, but, upon reconsideration of the circumstances, I think, without costs.

only two other periods, namely, the time of vesting of the residue, and the time when it was to be paid. The appellant submits that the vesting took effect at the decease of the testatrix, *Adams v. Bush* (8 Scott, 405); and the rule of law is, that the time of vesting is the period for ascertaining an excluded person or class [428] of persons, although the class may be extended so as to let in after-born persons. But although the time of payment is the period referred to, for so letting in individuals of a class, the time of vesting is the period referred to for excluding; *Lady Lincoln v. Pelham* (10 Ves. 166), *Windham v. Graham* (1 Russ. 331), *Driver v. Frank* (3 Mau. and Selw. 25; 6 Price 41; and 8 Taunt. 468), *Steri v. Platel* (5 Bing. N. C. 434). These cases are not affected by the judgment of Sir T. Plumer in *Matthews v. Paul* (3 Swanst. 328), which is not more inconsistent with them than one part of it is with the other (*Id.* p. 329, 340, and 2 Jarm. on Wills, 119, 124). The general rule is, that interests under a will shall be construed to be vested, if possible, rather than contingent. There is nothing in this case to prevent the vesting; on the contrary, regard being had to the form of the limitation, the interests of the younger children of Eliza ought to be construed as vested at the death of the testatrix. The direction to the trustees, "to pay and divide," constituted a complete gift, without the subsequent clause, "equally to be divided," etc. The words "pay and divide," have the same force, as regards the question of vesting, as the words "devise and bequeath" would have, where no trusts were interposed, the former words being in fact substituted for the latter, simply on account of the interposition of the trust. The words "pay and divide," denote the gift by way of trust; the words "equally to be divided among them, etc., when the youngest of them shall arrive at the age of twenty-one years," denote the actual division of the property among the children who survived the testatrix, when the youngest of them at [429]-tained that age; for the attainment of that age by the youngest is not annexed as a condition precedent to the gift contained in the words "to pay and divide," but is virtually disannexed by the words, "equally to be divided."

There is nothing repugnant to this construction in the limitations that follow; that, in favour of the children of Jane is an alternative limitation, in respect of the intervening limitation in favour of the issue of any of Eliza's children dying before the period of division. Both the subsequent limitations are conditional in respect of the prior limitation to the children of Eliza, being intended to take effect in defeasance of the vested interest created by the prior limitation, in the event of the children dying leaving issue, or without issue, before the period of division.

Supposing, therefore, that the appellant took a vested interest in a share of the residue at the death of the testatrix, he not being then an eldest son; that was an indefeasible vested interest, except in the event of his death before the time of division; to construe it to be a vested interest, defeasible in any other event, would make it necessary to supply a whole clause, constituting a conditional limitation, which could not be supplied at law nor in equity, except in furtherance of an intention apparent on the face of the will, and not in violation of it. Besides, it is a rule of construction to hold interests once vested, indefeasible. The appellant having sustained the description in the will of a son, other than or except an eldest son, at the time of the death of the testatrix, took a vested interest in the residue at that time; *Leeming v. Sherratt* (2 Hare, 114), *Hunt v. Moore* (14 East, 601), *Browne v. Lord Ken-[430]-yon* (3 Madd. 410), *Sturgess v. Pearson* (4 Madd. 411), *Phipps v. Williams* (5 Sim. 44; see also 3 Clark and Finn. 665; and 9 Clark and Finn. 583). Unless the interests were vested at the death of the testatrix, the accumulations from that time, until the youngest of the children attained the age of twenty-one, were left undisposed of.

But suppose the interests of all the children were contingent until the youngest attained twenty-one, even in that case the appellant, by the rules of construction before mentioned, would still be denoted by the same description, and would be entitled to his share in the event of his living till the youngest child attained the age of twenty-one years.

The limitation to the eldest son of Eliza in the event of all her other children dying under twenty-one, without leaving issue, shews that, in the exclusion of an eldest son, or of one who should become an eldest son,—except in that event, and in the exclusion of a daughter, being an only surviving child, who in that case would

most probably succeed to all the property under the wills of the testatrix's late husband and of Edmund Livesey,—the intention of the testatrix was to place all Eliza's children on an equality, as nearly as possible, without putting the whole property in contingency, or if there should be an only surviving child, and that child a daughter, then to place the children of the testatrix's other daughter Jane on an equality with such only surviving child of Eliza, being a daughter, as nearly as she could, without contingency, or at all events, to prevent any great disparity in point of property between the eldest son of Eliza and her other [431] children, or between an only daughter and child of Eliza, and the children of her sister Jane.

The decree of the Vice-Chancellor, instead of effectuating such equalization, or preventing such disparity, agreeably to the scheme of the will, not only violates the intention of the testatrix, as expressed in the beginning of her will, and as is manifest from its general context but contravenes all the rules of construction applicable to this case; *Peacocke v. Pares* (2 Keen, 689), *Lord Teynham v. Webb* (2 Ves. sen. 198), *Duke v. Doidge* (*Id.* 203, (n)).

Mr. Bethell and Mr. Stinton, for the respondents:

The construction put upon the will by the Vice-Chancellor's decree is consistent with the intentions of the testatrix, and with the plain meaning of the words of the instrument. It is apparent that it was her intention to deal with both moieties of the residue in the same manner, except the exclusion of the eldest son of her daughter Eliza, or such of her sons as should, by the death of an elder brother, become an eldest son, before the youngest arrived at the age of twenty-one. It is true, the reason for exclusion has failed, in the events that have happened; but the words which are repeated in several clauses of the will, are too plain and unequivocal to be controlled or confined within the limits of the reason so assigned. The only gift in this case is in the direction to "pay and divide:" At what period? At the period when the youngest of the children should attain twenty-one. No person can therefore take under that direction, except such of the children as were qualified to take at the period of payment or distribution. The testatrix has expressly de-[432]-clared, that if a younger son should, by the death of an elder, become and be the eldest son at the time of distribution, he should be excluded. The very event so described has happened, and although the appellant has not succeeded to the provisions which had been made for his elder brother, the exclusion of him from any share in the residue is imperative. If, in the construction of the will, the reason assigned by the testatrix for the exclusion of the eldest son for the time being may be referred to, it is plain that she believed the eldest son, *de facto*, at the time of distribution, would have sufficient provision from the estates of her late husband or of Edmund Livesey, and her belief appears, by the affidavits of the appellant and his solicitor, to have been justified.

Mr. Rolt replied.

The Lord Chancellor (April 23):—Many ingenious arguments have been addressed to your Lordships in this case, and many authorities have been referred to, to induce you to put a construction upon the words of the will different from their obvious and natural meaning. Now those authorities which have been referred to, will all be found, and must necessarily be found, to apply to cases where the terms, which are used, are capable of two constructions, and the choice to be made is, whether you will put upon them a construction which is consistent with the intention expressed in some other provisions of the will, or whether the Court is bound to adhere to the ordinary and usual meaning of the words which are used. It is admitted, and very properly admitted, that if the words are free from doubt and ambiguity, those authorities and arguments are not applicable.

[433] The first question, therefore, is whether the terms which are used in this will, are not so free from doubt, or so conclusive as to what the particular intention was, as to exclude the introduction of those authorities and those arguments which have been addressed to your Lordships.

The particular words are these, "and as to the other moiety, etc., of the said residue, etc." (His Lordship read the clause as above, p. 421, down to and including the proviso, "that if any such children shall then be dead, leaving lawful issue, such issue shall take the share which his, her, or their parent would have taken if living.")

Now two periods are referred to in this clause. One applies to the children "now in being," and the other is the period when the youngest of such children now in being, or who may hereafter be born, "shall arrive at the age of twenty-one." The parties who are excluded are the eldest son existing, or such other son as by the death of an elder brother may become an eldest son. Are not these the two periods at which that event is contemplated as possible? The argument on the part of the appellant introduces a third period, which is nowhere alluded to in this clause of the will, and which is nowhere mentioned, and there is no event connected with that period at all, namely, the death of the testatrix. Now, you cannot go out of the terms of the will for the purpose of finding another period, when you have two periods, and then an event described which is to happen between the first period and the second period described in the will. The appellant was a younger son at the time of the making of the will, and at the time of the death of the testatrix; but the elder brother having died, he became an eldest son; there was [434] then no elder brother, and it is said that he is to take notwithstanding the testatrix has said that a son who shall become an eldest son by the death of his brother, shall not take, and that it is her will that a son who is or shall become an eldest son, shall not be entitled to take anything under that devise or bequest. Is not that the event which she has prescribed, in which a younger son becoming an eldest son is not to take? It is in those very terms.

Now it is said that this results not only in hardship, but in absurdity, because she has, in another part of the will, stated the reason why she excludes the eldest son; that is, the eldest son living at the time of her own death. She gives small legacies of ten guineas to her daughter, and the eldest son of her daughter who shall be living at her decease, "because they have, and will have, a handsome provision from the estate of her late husband, and the estate of Edmund Livesey," he being then alive. It might, of course, be perfectly uncertain whether they would take anything under the will of Edmund Livesey, but the provision under the will of her deceased husband, no doubt, was a fact ascertained, and therefore applicable to the party being the eldest son. Now, if that was the reason (and it may, for anything that appears, have been her motive originally), she has not carried out that intention, and she has not, in the other parts of the will, been influenced by that motive, or if she was, she has totally mistaken the way of carrying it into effect, because then she would have excluded not any son, who might, at any time before the event described, have become an eldest son, but she would, in the terms of this last clause, have saved and excepted her eldest son (that might be her [435] eldest son then living), or such other son as should be an eldest son at the time of her death. That is the way she would have expressed herself if she had intended to frame these two provisions so as to exclude an eldest son who, being such eldest son, would take the provision to which she refers at the commencement of her will; but she not only abandons that in this clause, but she entirely abandons it when she comes to the daughter, for she equally makes an exclusion of an elder daughter, although that daughter would take nothing under the will of her grandfather, or might not have taken anything under the will of the living man, Edmund Livesey. So that she has, neither in the one instance nor the other, if that was her intention, carried out that intention.

It has not been found that any cases can be referred to, in which the Court has taken the liberty of dealing with words so unambiguous as these words are. The Court can only deal with those words where there is, on the face of the will, enough to justify the Court in saying that by the words of the will, "eldest son," meant the eldest who inherited the estate, that is synonymous with taking the estate. No doubt, there have frequently been cases in which terms have been found which the Court has thought itself at liberty to construe,—words descriptive of seniority and age, as meaning the party who takes the estate. But in this case there is nothing to lead to that conclusion, and there is nothing to justify any such conclusion, except the naked fact, which I have shown is not at all the scheme which she has worked out in other parts of the will, of giving a small legacy to the eldest son upon a certain ground which is stated, namely, the provision to which [436] he was or might become entitled under the will of other parties. If that be the opinion of your Lordships, there is no room for any question as to the vesting, or for any other construction to be put upon the will. The testatrix having used terms which are so clear and so distinct in themselves as not to leave room for

doubt as to what she meant, because in that particular event which has happened, she has stated what is to take place. It may not be consistent with the intention expressed in the commencement of the will, but there being no ambiguity in the expressions which are used, I do not think your Lordships are at liberty to go into a speculation as to her intention, and to do violence to words which are so plain, upon an assumption, founded upon more or less of reason, and more or less of argument, as to what it is probable the testatrix intended.

I think the clause with regard to the daughter is of extreme importance, because there she has entirely departed from the question of provision; but there are expressions connected with that gift which are also important to be attended to, in various parts of the case. There is a direction to accumulate; the accumulation is to take place until the youngest child shall attain twenty-one, that is, until the division; during that time the matter is kept in suspense, and that is the period she had in contemplation,—“and it is my will and mind, that in the meantime, until the respective moiety of the aforesaid residue of my real and personal estates shall be to be divided, the rents, interests, and produce thereof shall accumulate and be added to the said moiety, etc.” (*Vide supra*, p. 421—2.)

It does appear to me that the terms which are used by the testatrix, relieve this case from all doubt and [437] difficulty, and that your Lordships have no choice but to act upon the words which are found in this will, and that the second son becoming an eldest son before the period when the youngest child attained twenty-one, although he takes no other provision, he has by that event, according to the terms of this will, been deprived of a share of the property left by the testatrix. I therefore move your Lordships to affirm the decree appealed from, with costs.

Lord Brougham:—I entirely agree with my noble and learned friend; and I have not entertained, during the argument, any doubt at all. There are many cases which have come before the Courts, both at law and in equity, in which ambiguity being found in the words used by the testator, the Court has been called upon, more or less to speculate, and in order to come to a conclusion, and to affix a construction, it has been called upon to do that which it is always most unpleasant to do, and which is only done in cases of necessity, namely, to resort to arguments, in order to devise what may probably have been the intention, the words themselves not giving a clear indication of that intention. But that is not the case here in any way whatever. There is no such ground for going out of the will; there is no such ambiguity existing as necessarily to compel us to have recourse to other parts of the will. There is no question here of going from the words, to ascertain what is the general intention, that is to say, to ascertain from the other parts of the will what the part in question means. We have here words which are not capable of receiving, in my humble apprehension, any other than one construction; and therefore it would be doing the greatest [438] violence which could possibly be done, in reading those words, if we were to go beyond them, when there is no ambiguity to compel us to do so.

The only objection I have to make to the judgment of my noble and learned friend in the Court below, is one of a comparatively unimportant nature. I confess that, as at present advised, if I had been he, I should have dismissed the appeal from the Court below, with the costs of that appeal. My noble and learned friend thought otherwise. He affirmed the judgment appealed from before him, without costs. I do not think I should have done that; and this is the only observation I have to offer upon the judgment, the reasons of which were very satisfactorily and very succinctly stated by my noble and learned friend, and in which, as in the reasons of my noble and learned friend on the woolsack, I entirely concur. At all events, the costs here must abide the result of this appeal, in confirming the two consecutive judgments of the Court below.

Lord Campbell:—If a Court of Equity had the power of supplying the defects of a will, I should be strongly inclined to think the appellant in this case ought not to fail; but my notion is, that it is the duty of a Court of Equity, as well as of a Court of law, to *construe* a will, and not to make it. The Court of Equity, as well as the Court of Law, has refrained from making a will, and those cases to which Mr. Rolfe has referred, when they are examined, will, I think, all be found to resolve themselves into a question of intention, and not to go the length of supposing a defect

which a testator has apparently committed. There is great hardship here, no doubt, but it seems to me that the intention of the testatrix, [439] to be gathered from the language she has employed, admits of no sort of doubt. What her reasons may have been, it is not for us to inquire; she may have had no reasons, there may be no consistency in the disposition which she makes, but the disposition which she makes is clear, and admits of no sort of doubt; therefore I entirely agree with the view that has been thrown out by my noble and learned friend, and concur in the motion that the appeal be dismissed, with costs.

Lord Lyndhurst:—I am of the same opinion.

The decree was accordingly affirmed, and the appeal dismissed, with costs.

[440] JOHN ARCHBOLD,—*Appellant*; THE COMMISSIONERS OF CHARITABLE DONATIONS AND BEQUESTS FOR IRELAND,—*Respondents* [April 24, 26, 1849].

[Mews' Dig. iii. 259; vi. 802; xiv. 583. S.C., in Ch., 11 Ir. Ch. R. 187. Adopted on point as to allegation of fraud, in *Hickson v. Lombard*, 1866, L.R. 1 H.L. 331.]

*Charity—Trustee—Statute—Jurisdiction—Pleading.*

By the Act 7 and 8 Vict., c. 97, the power of the Commissioners of Charitable Donations and Bequests for Ireland to sue for the recovery of such donations and bequests, is expressly limited to cases where they are withheld, concealed, or misapplied; and the same, when recovered by the Commissioners, are to be, by *themselves*, applied to charitable uses, according to the donor's intention. And, although they obtain the sanction of the Attorney-General to their suit, as required by the said act, they must maintain it according to the power of suing thereby given to them, and are not entitled to the general jurisdiction which the Court exercises in suits instituted by the Attorney-General.

A decree, therefore, made at the suit of the Commissioners, first, removing a testamentary trustee of a charity, on the grounds of his bankruptcy and residence abroad, but without proof of any *improper* withholding, or concealment, or misapplication of the trust property; and, secondly, directing the appointment of another trustee in his place, is wholly wrong.

*Semble*, that neither bankruptcy, nor occasional residence abroad, disqualifies a testamentary trustee, to whom the testator has, unconditionally, confided a large personal discretion in the administration of the trusts, together with power to appoint a receiver of the rents of the trust estates.

Where the fact of bankruptcy is not put in issue by the bill, evidence of it is not admissible at the hearing of the cause.

If a bill alleges fraud, which is not proved, and also alleges other matters, which, being proved, are grounds for a decree, the proper course is to dismiss so much of the bill as is not proved, and to give so much relief, under the circumstances, as the plaintiff may be entitled to. (*Infra*, p. 460.)

This was an appeal against a decree of the present Lord Chancellor of Ireland (11 Irish Equity Reports, 187).

[441] Mathew Shee, late of the city of Waterford, by his will, dated the 25th of May, 1832, after giving to his wife Elizabeth Shee, among other things, all his interest in certain houses in the said city, devised and bequeathed to her, for her life, several towns and lands in the will described, situated in the counties of Waterford, Kilkenny, and Wexford, subject to head rents and to the payment of two life annuities of £20 each, and a sum of £50: And after the decease of his said wife, he devised and bequeathed the said several towns and lands to John Archbold (the appellant), of Waterford, his heirs, executors, administrators and assigns, upon trust, that he and they should, as soon as conveniently might be after the decease of the testator's wife, procure, on lease or otherwise, as he or they might think most advantageous, one or more house or houses adjoining each other, in the city of Waterford, or the environs

thereof, sufficiently large to lodge therein twenty poor men and twenty poor women, of sober and reputable character and habits; and on the death or removal of them, or any of them, to fill up their places with persons of a similar description; and to pay each of them every year, by two half yearly payments, the sum of £4 sterling; but if the rents or produce of the said towns, lands, and premises, so devised for the purposes aforesaid, should not be found sufficient to pay the said annual sum, then that the said J. Archbold should have full power to dismiss any number of the said men and women, and to limit the admissions so as to be enabled to meet the diminished rents and income of the said devised lands, or at the discretion of him, J. Archbold, his heirs, executors, etc., to abate rateably, in equal proportions, the said annual sums so payable to each of the said twenty [442] men and women, or such number thereof as he, his heirs, executors, etc., should think proper to retain or admit; it being, however, the will and desire of the testator that no greater reduction in the number of persons so retained or admitted should at any time thereafter be suffered to take place than would be annually found necessary, so as to afford, in the distribution of the annual income arising out of the rents and profits to each and every of the persons so admitted or retained, at least a sum of £3 sterling, annually, payable as aforesaid, and above the rents and other necessary charges.

And the testator declared it to be his will, that the said trustee, his heirs, executors, etc., should not be liable for any loss that might happen relating to the trust, unless the same happened by his or their wilful neglect or default: And he gave them power to grant leases of any of the devised lands for twenty-one years in possession, at the full improved rent, without fines, and to apply parts of the rents and profits to repairs and improvements, and other necessary charges, and also to appoint a receiver of the rents, at such reasonable salary as they might deem proper: "giving to the said trustee, and to his heirs, executors, etc., power to use his or their own discretion in the management of the said charity, as to such matters and things as he had not particularized herein, always keeping in view the exclusive interest and benefit of the said charity, and of the poor people to be maintained and lodged therein."

The testator died in 1832, soon after the date of his will, and his widow, whom he appointed sole executrix, took out probate thereof in the same year, and entered into the receipt of the rents of the devised lands and premises.

[443] Mr. Archbold had been at, and previous to the testator's death, one of the directors of the Provincial Bank in Waterford, and bore a very respectable character in that city; but in the year 1834 he withdrew from the Bank at Waterford, and, a defalcation to a large amount having been discovered in the Bank funds, he was arrested on a charge, brought against him on account of the deficiency, but was discharged, and no further proceeding was taken against him. He resided on the continent from 1834 until, on the death of Mrs. Shee, the widow of the testator, in December 1844, when the devise became available for the charity, he returned to Waterford, for the purpose of entering on his duties of trustee under the said will. He accordingly took on himself the management of the trust property,—which then produced a rental of about £870, subject to £70 head rent,—got possession of the title deeds, and appointed a receiver of the rents, but did not take any effectual steps to establish the charitable institution by the will directed.

In the course of the year 1845, in consequence of complaints made by some of the citizens of Waterford, the Commissioners of Charitable Donations and Bequests for Ireland, appointed under the act 7 and 8 Vict., c. 97, caused a letter to be written by their secretary, requiring the appellant to inform them what steps he had taken towards execution of the trusts of the said will, and to furnish them with accounts of his receipts and disbursements in respect thereof. Several interviews took place subsequently in the same year, between the secretary and the appellant, in the course of which the letter alleged, as a reason for not having founded the charitable institution, that he sought, but did not find, suitable premises for the purpose in Waterford. He [444] also made proposals to the respondents, the purport of which was, as they understood them, to secure a promise of some situation for himself, as a condition of resigning the charity trusts into their hands, intimating at the same time that it was in his power to pervert the charity to political purposes.

In April 1846, the respondents, with consent of the Attorney General, filed their



bill against the appellant,\* therein stating, among other things, the said will, and charging that upon the decease of Mrs. Shee, the testator's widow, the devised lands became available for the charitable purposes in the will mentioned, and the appellant became bound as trustee to carry into execution the charitable trusts thereby declared, but that instead of doing so, he altogether neglected his duties as such trustee. The bill further charged, that in the year 1834, the appellant, being dismissed from his situation of Director of the Provincial Bank of Waterford, and being [445] greatly embarrassed in his affairs, absconded from Ireland, and had since resided abroad, out of the jurisdiction; that although he returned to Ireland on the death of Mrs. Shee, he took no steps to establish the said charitable institution, but after appointing a relation, residing in Dublin, to receive the rents of the trust property, he returned to the continent, and resided there until within three weeks of filing this bill, when he again returned to Ireland; that notwithstanding many applications from the respondents to carry the charitable trusts into execution, he absolutely refused to do so, and converted to his own use the rents of the trust estates, and threatened to pervert the charity to improper purposes; that the appellant was not a proper person to execute the trusts of the will for the reasons aforesaid, and because he had no residence in Waterford, or near the trust estates, so as to be able to manage them, or superintend the application of the rents and profits to the charity.

The bill prayed that the appellant might be removed from being trustee, and that it might be referred to the Master to approve of a fit person to be trustee in his place, and for consequential directions, and also an injunction against the appellant's interfering with the rents or profits of the trust estates.

The appellant, in his answer to the bill, accounting for his delay in establishing the charitable institution, said the executors of Mrs. Shee claimed to be entitled to arrears of rents of the estates, and also to a proportionate part of the current gale, that accrued due subsequently to her death, and that by reason thereof, and of other outstanding claims, as well for head rents and arrears thereof, as for renewal fines and interest thereon, in respect of parts of the estates held under Bishops' [446] leases, he had found it impossible to arrange the trust property without first settling those claims, and that he had made all reasonable exertions for that purpose; that owing to the circumstance of these claims, and that accounts thereof, properly vouched, had not been furnished to the appellant until July 1846, he was unable, up to that time, to say what amount of funds was applicable to the purposes of the charity; that in the mean time, he had made advances out of his own monies, and came to Ireland several times, about the execution of the trust, employed an agent to collect the rents, and made every exertion for the establishment of the charitable institution. He denied that he ever converted any portion of the rents to his own use, or threatened to pervert the charitable intentions of the testator to improper purposes.

He also denied that he absconded from Ireland, or was dismissed from his situation as Director of the Provincial Bank of Waterford, or that he had not always sufficient property to meet his engagements; and he submitted his right to act in the trusts of the said will, and that the Court would not permit the express desire of the testator to be violated, nor remove the appellant as trustee, without having satisfactory proof that he committed a breach of the trust, or misapplied the funds, or otherwise misconducted himself as trustee.

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\* By the 12th section of the act 7 and 8 Vict., c. 97, it is enacted, "that the said Commissioners of Charitable Donations and Bequests for Ireland, may sue for the recovery of every charitable donation, devise, or bequest intended to be applied in Ireland, which shall be withheld, concealed, or misapplied, and shall apply the same, when recovered, to charitable and pious uses, according to the intention of the donor or donors; and the said commissioners shall be empowered to deduct out of all such charitable donations, devises, and bequests, as they shall recover, all the costs, charges, and expences which they shall be put to in the suing for and recovery of the same: Provided always, that no information shall be filed, or petition presented, or other proceeding at law or in equity undertaken or prosecuted by the said commissioners, until the same shall be submitted to and allowed by her Majesty's Attorney or Solicitor General for Ireland, and such allowance certified by him."

Witnesses having been examined, as to the facts before mentioned as charged in the bill and denied in the answer, and also as to the appellant's bankruptcy, though not put in issue by the bill, the cause came on to be heard in May 1847, before the Lord Chancellor of Ireland. His Lordship by his decree, dated in July of the same year, declared that the appellant ought to be removed from further acting as trustee in the receipt of the rents of the [447] trust property, and decreed accordingly; and ordered that it be referred to the Master to appoint a proper person or persons as trustee or trustees, in place of the appellant, and that he should pay into the Bank of Ireland, to the credit of the cause, the sum of £334 9s. 9d., which by the evidence appeared to have been received by him, or his agent, out of the rents of the trust property: And it was referred to the Master to take an account of any further receipts of such rents by the appellant, or his agent, and to appoint a fit person to be a receiver thereof for the future, and to approve of a scheme for the due application thereof, according to the trusts of the said will.

Mr. Bethell and Mr. Walpole for the appellant:

There must be a total reversal of this decree, as unwarranted by the pleadings, by the evidence, and by the act of Parliament, and irreconcilable with the just observations made by the Lord Chancellor himself while pronouncing it. (A short-hand writer's notes of the judgment were printed in the appendix to the appellant's case; it has been since reported, in a corrected form, in 11 Ir. Eq. Rep. 197.)

The respondents sought to remove the appellant from the trust, upon surmises of his intention to reside out of the jurisdiction, of being embarrassed in his affairs, of delay in the establishment of the charity, and of a fraudulent conversion to his own use of the rents and profits of the trust estates. These were the main charges in the bill; but there was no proof given of any of them; the Lord Chancellor in his judgment negatived them, and acquitted the appellant of any breach of trust, or default or unnecessary delay with regard to the establishment of the charity; and assuming the [448] small amount of rents received by the appellant or his agent to be forthcoming,—which the appellant had previously offered to lodge, and did since lodge, in the Bank, to the credit of the cause, his Lordship emphatically stated that “there was no imputation of fraud or mis-management against him.” Yet his Lordship, resting his opinion upon contingent possibilities, upon some vague suspicions of the appellant's bankruptcy and of his intention to reside abroad, decreed his removal from the trust.

Bankruptcy, even if it existed, was not of itself a disqualification of a trustee, specially chosen and appointed by a testator. The bill in this case never alleged or charged that the appellant was a bankrupt; it was insinuated by some of the witnesses, and urged by the respondents' counsel in the Court below; but the fact not being put in issue by the bill, the appellant had no opportunity of explaining or rebutting it; yet the evidence on that, and other points not charged nor put in issue by the bill, was allowed to be read at the hearing, much to the prejudice of the appellant, whose counsel objected in vain to the reception of it. Not only were facts charged in the bill which failed of proof, and proofs read of facts which were not charged or alleged at all; but there was also a circumstance introduced in an interrogatory, but neither charged nor proved, which yet had, in all probability, no small effect on the mind of the learned judge. By this interrogatory, introduced without the slightest reason, the appellant was asked whether he had not declared his intention of opening the charitable institution for the reception of repealers, or of putting over the door the words “Repeal Asylum”? It is essential to the administration of justice to maintain the established rules of our Courts in regard to pleadings and evidence, and [449] a decree, made in total disregard of them, ought not to be allowed to stand.

It is not quite clear that the Court had jurisdiction to entertain this suit. By the act 7 and 8 Vict., c. 97, under which the respondents were appointed and constituted a Corporation, their power to sue is limited, by the 12th section, to the recovery of charitable donations, devises, or bequests, “which shall be withheld, concealed or misapplied.” There was no proof in this case of any improper withholding, concealment, or misapplication of the trust property; the contrary was in fact proved by the evidence for the appellant, and admitted by the learned judge. The jurisdiction, therefore, created by the statute did not arise in this case.

The decree was made upon the grounds of the appellant having ceased to reside in Waterford, or near the trust estates, and of his having some years before been declared a bankrupt. Neither of those grounds, even if true and properly pleaded, would justify the removal of a testamentary trustee, there being no clause in the will for vacating the trust for non-residence nor for bankruptcy. The cases therefore of *Millard v. Eyre* (2 Ves. jun. 94), *Lake v. De Lambert* (4 Ves. 592), *Bainbrigge v. Blair* (1 Beav. 495), and *In re Roche* (2 Dru. and War. 287), referred to by the Lord Chancellor in his judgment, had no application to this case. The power given to the trustee to appoint an agent, and the context of the will, shew that the testator did not expect the constant residence of the appellant on or near the trust estates. Admitting that in a suit properly instituted by the Attorney-General, a trustee might be removed for non-residence or bankruptcy, these are not grounds for the re-[450]-moval of a trustee, at the suit of Commissioners, whose power to sue is limited by the act appointing them to "the recovery of money withheld, concealed, or misapplied." The Attorney-General cannot be held, by giving his sanction to this suit, to be a party to it.

The decree is wrong, not only in removing the appellant from the trust, but also in referring it to the Master to approve of another person to be trustee in his place, and directing conveyances of the trust estates to the new trustee. By the 12th section of the act, the Commissioners, where they are entitled to sue to recover charitable donations, are themselves the legal owners of the property when recovered, and the only persons entitled to apply it to charitable and pious uses. They have no authority to ask for, nor has the Court, in suits instituted by them, authority to direct the appointment of a new trustee. Even if such trustee could be legally appointed, the large powers entrusted by the testator to the personal discretion of the appellant could not be transferred to any new trustee.

There never was a decree so contradictory to the case made by the bill, to the evidence in the cause, and to the jurisdiction given by the statute. It was the duty of the learned judge, at the hearing, to dismiss the bill, with costs, the moment he saw that it was founded on a personal charge of a fraudulent conversion of the charity property, which was not supported by a particle of proof; *Glascott v. Lang* (2 Phillips, 310; see p. 322).

Mr. Turner and Mr. Schomberg for the respondents:

There are two questions raised in this appeal: first, whether the Lord Chancellor had jurisdiction to remove the appellant from the trust; secondly, whether a sufficient case was made for his removal. A great part of the [451] argument urged against the decree was founded on the loose notes of the Lord Chancellor's judgment, printed in the appellant's case; but the House would look to the decree itself, and not to that judgment. The decree was to be sustained on the pleadings and proofs, though not on the reasons of the judge as they appeared in these notes.

The facts were not sufficiently opened by the appellant's counsel, who relied more on the reasons imputed to the judge, and on the poverty of the pleadings and of the evidence. The estates devised for the charitable institution were of great value, and the answer of the appellant admitted that the rents amounted to £870 a-year. The income accrued, for the purposes of the charity, in December 1844, when Mrs. Shee, the tenant for life, died; yet not one step or active measure was taken by the appellant for the establishment of the charity, up to the time of filing the bill in April 1846, although he had been, in the mean time, in the receipt of the rents of the estates, and ought to have received £1200 or £1300. Was not that a withholding and misapplication of the trust money within the meaning of the statute? Complaints of delay in the establishment of the charity were from time to time addressed by the citizens of Waterford, to the Commissioners. The delay was not imputable to them, for it appeared that they, in June 1845, directed their secretary to write to the appellant, requiring him to inform them what steps he had taken to carry into effect the benevolent intentions of the testator, and informing him that they would require him periodically to lay before them accounts of his receipts and disbursements of the proceeds of the charity property. The cause of delay assigned by the appellant was, that considerable arrears of rents were claimed by the exe-[452]-cutors of Mrs. Shee, and that fines for renewals of leases were due to the landlord. The excuse was false, for most of the devised estates were freeholds

in fee, on which no fines were payable, and on the only estate (that in Wexford) subject to fines, Mrs. Shee left due but one fine, which accrued in 1843—

[The Lord Chancellor.—Those matters are not charged in the bill. The charges are, that he neglected and refused to establish the charity, and converted to his own use the rents received by him. The question is, whether matters are sufficiently charged in the bill to enable the defendant to repel them. You are not to raise points here, which are not put in issue by the bill.]

The appellant has, in his answer, taken grounds which are displaced by the evidence; he has not discharged them, having failed in proving what he in his answer stated to be the reason for not establishing the charitable institution. The fines due did not, as appeared in evidence, exceed £90, while the annual income of the estates exceeded £870. The next reason given by the appellant for not establishing the charity was, that sufficient rents had not been received; but it was proved that he had received £334, and might, but for the neglect of himself or his agent, have received a much larger sum; so that this excuse also failed.

The allegations and charges in the bill were sufficient to sustain the decree, at least for the removal of the appellant from the trust; the bill charged,—and it was proved in the evidence,—that being dismissed from his situation of director of the Provincial Bank in 1834, and having become embarrassed in his affairs, he absconded from the country, and had since resided abroad, out of the jurisdiction, except a few weeks, in 1844, when Mrs. Shee died, and again in 1846, [453] when this bill was filed. It is quite clear that it is not his intention to reside in Waterford, and without a residence there it is impossible for him to administer this charity—

[The Lord Chancellor.—According to that doctrine, the Court of Chancery, before it appoints a trustee of a charity, must ascertain whether the person proposed to be appointed intends to go abroad.]

It is submitted that a sole trustee of a charity, like this, ought to reside constantly, and continue in the active execution of the trust; the testator certainly intended that, and at the date of the will the appellant was residing, and likely to continue to reside, in Waterford, where he held a situation of great importance and respectability. It is not contended that in all cases a trustee is removable for non-residence. The necessity for residence depends on the nature of the trust, and whether there is a sole trustee or several trustees.

The power given by the act 7 and 8 Vict., c. 97, to the Commissioners, to recover all charity property “withheld, concealed, or misapplied,” embraced every case of neglect of charitable trusts, and authorised the Commissioners to sue in all such cases; they have, in effect, a title to sue co-extensive with that of the Attorney-General; and the court, at their suit, is bound to protect all charity property which is shewn to be in jeopardy.

Mr. Schomberg, in answer to an objection to his reading a piece of evidence in the cause, which was not read in the Court below, referred to a discussion on a similar objection, in the case of *Attwood v. Small* (6 Cl. and Fin. 291-305), in which the cases of *Rockfort v. Nugent* (5 Bro. P. C. 354), and [454] *Noel v. Noel* (12 Price, 214; see pp. 271 to 322) were relied on for the admissibility of the evidence.

Lord Brougham, referring to the report of the discussion in *Attwood v. Small*, said, the answer of P. Taylor, which was offered in evidence on that appeal, not having been read in the Court below, was rejected, by himself and Lord Lyndhurst, after full argument by the counsel on both sides. They, on that occasion, had consideration of the cases of *Rockfort v. Nugent*, and *Noel v. Noel*, and his impression was that the documents in these cases, though not read in the Court below, were admitted by the House on the appeals by consent of the parties.

Mr. Schomberg referred to his Lordship's observations on the two cases in *Attwood v. Small* (6 Cl. and Fin. 302); “Upon the whole, I think *Noel v. Noel*, and also the other cases, shew that this Court, being a Court of the last resort, and having the highest judicial powers, has a right, in order to satisfy its own conscience, to look at what was not before the Court below,” etc.

Admitting that the prayer of the bill in the present case and the decree were wrong, still he contended that it was competent to the House, in a charity case, to

make a proper decree, such a decree as the Lord Chancellor of Ireland ought to have made; *Mittf. Treatise* (on Pleading, p. 39).

Mr. Bethell, in his reply, confined his argument,—by the direction of their Lordships,—to the single point, whether there was a “withholding” by the appellant of the £334 of rents received from the charity estates; and he submitted that there was not. From whom could [455] he have withheld them? The enactments of the statute applied to charities that were established. This was a charity to be established; there were yet no objects of the charity, and no person from whom the rents of the estates could be withheld; in truth, there were no rents to withhold, only a year and a half having elapsed from the death of the tenant for life to the time of filing the bill, and a proportion of the rent, for the current half year at her death, was claimed by her executors.

The Lord Chancellor.—This bill was filed by the Commissioners of Charitable Donations and Bequests for Ireland, against the appellant, a trustee under a will, who, after the death of the tenant for life, according to the trusts of the will, was to procure a house sufficient to receive a certain number of poor persons, who were then to be appointed to the benefit of the charity of the testator.

The bill proceeds upon the grounds of misconduct, and misapplication of the charitable funds, on the part of the appellant. It says that he, acting under the will of the testator, received monies; that he had been dismissed from being a director of the Provincial Bank of the city of Waterford; that he became bankrupt; that he absconded; that he had misapplied the monies he had received, and threatened to misapply whatever more he might receive; and then it prays an account of those monies, the dismissal of the appellant from the trust, the appointment of another trustee, and that the appellant may be restrained from further management of the charity property.

Now two points arose, which it was necessary we should consider before we came to the last point, which [456] we have heard argued by Mr. Bethell in reply. The first question was with regard to the personal charges against the appellant. Having very minutely examined each of the charges during the time that the respondents’ counsel were heard; and calling upon them with respect to one charge after another, to shew how each was proved, and by what evidence it was established, every one of them in succession appeared to be totally unfounded. There did not appear to be anything in the evidence to support the charges made in the bill. Attempts were made, by matters said to be in evidence, but not upon the record, which, if properly stated and properly proved, might have been grounds of objection to the conduct of the trustee; but the House are of opinion that they cannot enter into the consideration of any matter not charged; and consequently that part of the case we have rejected from our consideration. I only mention it now for the purpose of removing any impression which may have been made by the arguments at the bar, that, because this is a charity case, it is competent for the plaintiffs to introduce unfounded charges against an individual connected with the charity, and yet to sustain the bill, although those improper charges appear to be necessarily thrown out of consideration. There is no such rule; it would be very unjust if there were. The relaxation of strictness, allowed in cases of charities, has no reference to the state of the pleadings as affecting the conduct of individuals. We therefore confined the plaintiffs to what was alleged, looking to the evidence we had in support of those allegations; and that part of the case, in the opinion of the House, entirely fails.

The next question was, whether the act establishing these Commissioners of Charitable Donations and Bequests [457] did or did not extend to what the decree has dealt with, namely, whether it not only enabled them to recover trust property which had been improperly withheld, but also to go on, as the decree does, to deal with this suit as if it had been a suit on behalf of the Attorney General, for the general administration of charity property, and the appointment of a new trustee. Now these plaintiffs have no stake, they have no interest, they have nothing but Parliamentary authority, and they must therefore shew that what they have asked of the Court, and what the Court has done, is strictly within that authority, and derived from the statute, the 7th and 8th of the Queen, under which they are

appointed. That statute gives them authority "to sue for the recovery of every charitable donation, devise or bequest, intended to be applied in Ireland, which shall be withheld, concealed or misapplied." That is the only authority to sue. There is a subsequent direction for the regulation of their conduct when they have got into their hands that which is the subject-matter to be recovered by the suit to be instituted. Their authority to sue is confined to property "withheld, concealed, or misapplied." If the word "withheld" alone had been used, it must obviously have meant, "improperly withheld;" retained by the party having it, when he ought, under the circumstances, not to have retained it, but applied it to the charitable purposes. The word is therefore to be read obviously as if the term in the act had been "*improperly withheld*." Taking the word with the other words with which it is coupled, there is no doubt of the meaning. The words it is coupled with shew the intention of the act, which is expressed in the words "concealed or misapplied." But the word "withheld" itself would be sufficient, [458] considering the meaning of the enactment to be that the right to sue is only for property "*improperly withheld*."

We are very clearly of opinion, that in a suit instituted by the plaintiffs, and by them alone, although under the regulations of the Act they make the Attorney General a party, yet they must maintain their suit in respect of that right of suing which the act gives them. The act gives them a right of suing for property "withheld, concealed, or misapplied." It does not give them a right to the jurisdiction which the Court exercises in a suit instituted by the Attorney General. The act does not intend that that right is to be exercised by these Commissioners in the place of the Attorney General, but it means to deal with them as trustees, as they are in other parts of the act dealt with as trustees; and when they have got the money, it directs what they are to do with it, to enable them to perform their duties in such a way as might probably be a saving of expense; it authorises them to obtain possession of money concealed or misapplied, and when they have got it, it directs in what way they are to apply it.

But the decree pronounced in the suit instituted by these commissioners, goes a great deal further, and deals with the suit to the full extent, to which it would have been dealt with if the decree had been obtained by the Attorney General. My opinion certainly is (and we are told that it is the first case in which the question has been raised), that that is a misapprehension of the authority given by this act; that it gives no such authority; but only gives authority to institute a suit to recover possession of property "withheld, concealed, or misapplied."

That will dispose of the whole of the case, with the [459] exception of that part of the bill which alleges that the defendant had improperly withheld some money,—that he had retained money which he ought not to have retained,—but ought to have applied to the purposes of the charity. That was the only point upon which we wished for further information; and we have had our attention directed to the evidence applying to that, the only point upon which we were desirous of having any observations made in reply. Looking at the period when this trust commenced; looking at the position of the property; looking at the claim to the apportionment of the rents; and having reference to the difficulty sworn to by the witnesses in obtaining the rents, and the small sums at last obtained, without any proof that there was any neglect in not obtaining more; and the first duty of the trustee being to procure a house, which of course could not be done until the funds realized and in hand were sufficient to enable him to do it; it appears to me very clear that that part of the case has failed, not for want of jurisdiction, but for want of evidence; and that there is no proof of the conduct of the appellant in this case coming sufficiently within the provisions of the act, of his having improperly "withheld, concealed, or misapplied" the trust monies.

The result of that will be, that if the House concurs in the opinion I have formed upon the subject, then the whole of the suit has failed, and the decree ought to be reversed, and the bill dismissed, with costs. I should have been of that opinion, even if it had not contained those allegations of misconduct. But when we find what is upon the record, it leaves no doubt of the propriety of dismissing the bill, with costs.

I must, however, observe, as an opinion of mine has been referred to (in *Glascott*

v. Lang, *supra*, p. 450), to [460] the effect that where bills allege matters of fraud, the Court must necessarily dismiss them, because fraud is not proved; that, of course, applies to cases where all the subsequent considerations depend on questions of fraud. But if fraud be imputed, and other matters alleged, which will give the Court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the plaintiff may be entitled to.

With regard to this bill, it appears to me that every part of it is disposed of by the view I have now taken of it; and therefore I move your Lordships to reverse the decree, and dismiss the bill, with costs.

Lord Brougham.—I concur in every remark that has been made, and every argument that has been urged, and in the view taken of every point that has been commented on by my noble and learned friend. I had no doubt whatever during the progress of the cause, except that I felt some hesitation on the construction of the act of Parliament, and afterwards on the point to which the reply of Mr. Bethell was confined, with respect to the money said to be withheld.

It appears to me to be perfectly clear that the Court below has miscarried in some respects; miscarried in matter of law, as in considering that a trustee may be removed on such grounds as those which are stated, including, among others, a temporary residence in another country, without any change of domicile by permanent residence there, and including also bankruptcy (even if there had been bankruptcy here), which is no ground of itself for removing a trustee, unless in a par-[461]-ticular case, where, by special provision of the trust—which is very common, as the Lord Chancellor of Ireland himself observed,—bankruptcy is a ground stated as a cause of removing a trustee. But generally at common law, without regard to any particular provision in the trust, either in the foundation of the charity, or in the particular deed describing the trust, bankruptcy, of itself, would be no ground for removing a trustee. Neither is there any ground here for saying that the trustee had changed his domicile by going abroad. All that the Court says with respect to domicile is, that he is in the country, he is in England or in Ireland; he is within the jurisdiction; the Court only seems to doubt whether he would remain there. That is an extraordinary application of the principle "*Quia timet*," that because he may change his domicile, therefore he is to cease to be a trustee. That might have been matter for consideration in the constitution of the trust; it might have been a matter for consideration in the appointment of a trustee under any foundation; but it is not to be taken as a matter especially applicable to this case alone, which is not to be dealt with differently from other cases, but must be taken upon the general ground.

Then as to the fact of bankruptcy, there is no proof of it at all; it is negatived; so that even if the law were rightly understood by the learned Lord Chancellor of Ireland, the fact appears clear, and leaves no ground for the application of the law.

Then we come to the question of "withholding" the trust monies. The word "withholding," even if it were not in the position of coming within the rule "*nosci-tur ex sociis*," means something more than the mere non-payment of, than the mere non-production of the [462] money; it means being misapplied; in the case of a trust it means something more than the mere non-payment, but *nosci-tur ex sociis*. "Misapplied," the word coupled with it, shews clearly what is meant by it; it is "withheld" in that kind of way to which "misapplied" is a stronger expression, but is also applicable.

I entirely agree, therefore, that this is a case in which there must be a total reversal. It does not appear to me that the Court below has paid sufficient attention to the law or to the facts of this case, to the pleadings, to the evidence, or to the act of Parliament. The consequence of want of attention always is error, error more or less to be lamented, when it gives rise to great hardship; because, although Mr. Archbold is to be recouped whatever costs he may have paid under the erroneous decree, he is brought here with charges against his character,—charges, it is true, no sooner made than abandoned; but he is brought here to defend himself upon the whole matter, to challenge the judgment given against him in the Court below, and he comes here at his own cost; for although we reverse the judgment of the Court below, and he, of course, is not to pay the costs incurred below, yet the rules of this

House, as to costs upon a reversal, are not like the rules of other Courts of Appeal, as in the Privy Council and the Ecclesiastical Courts. In this Court we never give the costs to the party who challenges the decree, as against the party who defends the decree; or on a writ of error, we never give the plaintiff in error his costs as against the defendant who has obtained the judgment of the Court below. Therefore it is very much to be lamented that this miscarriage of [463] to the law and the facts of the case, should have given rise to the hardship under which the appellant leaves this Court, in having its judgment completely on every point in his favour, and yet being saddled with the expense of setting the erroneous judgment right.

Lord Campbell.—I am also of opinion that the decree ought to be reversed. I must confess that I had thought this act, appointing these Charity Commissioners, had conferred much larger powers upon them. What we have to do is to look at the Act, and there I do find that the powers of the Commissioners are very limited; for instead of having powers conferred upon them co-extensive with those of the Attorney-General, I find that the only power that they have of suing, is “for the recovery of every charitable donation, devise, or bequest, intended to be applied in Ireland, which shall be withheld, concealed or misapplied.” Then the words which next follow, with respect to what the Commissioners have to do, remove all doubt, if there had been any, as to what their powers are, because they are “to apply the same (that is, the money which they are seeking to recover) when recovered, to charitable and pious uses.” Therefore the right of suing is confined to sums of money which they are to receive. Consequently, as it appears to me, it is quite clear that this bill, so far as it seeks the removal of the trustee, is not authorized by the act of Parliament, and that that part of the decree which removes the appellant from being trustee, and appoints a new trustee, cannot possibly be sustained. It is unnecessary therefore to enter at all into the evidence as to whether those charges are supported, although, if I did so, I should concur with the observations made by my noble and learned friend on the woolsack, that they are not.

[464] The other point relates to the sum of £334 9s. 9d. Now, so far as that goes, it must be clearly competent to the Commissioners to institute this proceeding, because this was a sum of money which, if they had recovered it, then they would have applied; and so far as that goes, there was jurisdiction to entertain the bill which they filed. When we look at the evidence, I think the Lord Chancellor of Ireland has come to a right conclusion upon that, because having weighed that evidence, he comes to the conclusion that there has been no improper withholding of the money. He says there has been no improper delay in establishing the charity, and as far as that goes, there is no imputation whatever upon the conduct of the appellant. In the course of Mr. Bethell's reply, it seemed to me, from what was thrown out, that this part of the decree was merely consequential upon the other part of it, by which Mr. Archbold was removed from being trustee. For if the Lord Chancellor of Ireland had not thought that he was to be removed from the office of trustee, I think there could have been no decree for payment of this money. It seems to me therefore, that the 12th sect. of the act gives to the Commissioners of Charitable Donations and Bequests for Ireland the power to sue when money has been withheld, but that is when it has been improperly withheld,—retained after it ought to have been paid over and accounted for,—and that the Lord Chancellor of Ireland has come to a right conclusion upon this, that there was no improper withholding.

I concur in the motion that has been made by my noble and learned friend on the woolsack, that the decree should be entirely reversed, and that the bill should be dismissed, with costs.

The decree was accordingly reversed, and the bill ordered to be dismissed, with costs.



[465] WILLIAM SMITH O'BRIEN,—*Plaintiff in Error*; TERENCE BELLEW MAC-MANUS,—*Plaintiff in Error*; The QUEEN,—*Defendant in Error* [May 10, 11, 1849].

[Mews' Dig. iv. 1600, 1724; v. 139. S.C. 7 St. Tr. N.S. 1; 3 Cox. C.C. 360. Cited as to effect of Poyning's Act in extending 25 Edw. iii., stat. 5, c. 2 to Ireland, in *Mulcahy v. Reg.* 1868, L.R. 3 H.L. 318.]

*High Treason—Copy of Indictment—Lists of Witnesses—Plea in abatement—Allocutus.*

An allegation upon a record that three Judges executed a commission in relation to the trials of prisoners, to try whom that commission was issued, is an affirmative allegation of their authority to perform that duty, and is not rendered uncertain by a subsequent statement that the commission was directed to them and others.

An indictment, charging a prisoner in Ireland with compassing, etc., to excite insurrection there, and to levy war, and to put the Queen to death, and charging as overt acts assembling with others, armed with weapons to excite insurrection and to levy war, is not an indictment founded on the 57 Geo. 3, c. 6. Such prisoner, therefore, is not entitled, under section 4 of that act, to the benefit of the statutes 7 and 8 W. III., c. 3, and 7 Anne, c. 21, and consequently is not entitled to a copy of the indictment, and to a list of witnesses, to be delivered ten days before the trial.

The 4th sect. of the 57 Geo. 3, c. 6, extends only to treasons made or declared by that statute.

*Quære*, whether the objection for the want of such copy and list is to be raised by plea on arraignment?

The 36 Geo. 3, c. 7, having been passed before the Union, did not bind Ireland.

The 57 Geo. 3, c. 6, s. 1, made perpetual the provisions of the 36 Geo. 3, but did not extend the provisions of that statute to Ireland.

The only effect of the 11 and 12 Vict., c. 12, was to extend to Ireland certain of the provisions of the 36 Geo. 3, made perpetual by the 57 Geo. 3, but not to extend thither the provisions of the 4th section of the last-mentioned act, which was limited to treasons made or declared by that act.

The offence of levying war against the King, declared by the 25 Edw. III., stat. 5, c. 2, is high treason in Ireland by the effect of the Irish statute 10 Hen. VII., c. 22, commonly called Poyning's Act, by which, acts which were treason in England under the statute of Edw. III., were made treason in Ireland.

An *Allocutus*, whether "the justices and commissioners ought not on the premises and verdict aforesaid to proceed to judgment" against the prisoner, is sufficient. The form "judgment of death," or "judgment to die," is surplusage.

These were cases in which writs of error had been brought upon judgments pronounced by the Court of [466] Queen's Bench in Ireland against the two plaintiffs in error respectively, on charges of high treason. There had been a special commission issued into the county of Tipperary in the month of September 1848, to try certain prisoners then in the jail of that county. The two plaintiffs in error were among those prisoners, and indictments for high treason were preferred against them.

They were tried before Lord Chief Justice Blackburne, Lord Chief Justice Doherty, and Mr. Justice Moore, three of the commissioners named in the commission.

The caption of the indictment was in each case in the following form:—

*County of Tipperary, to wit.*

Be it remembered, That at a Special Sessions of Oyer and Terminer, and general gaol delivery holden in and for the county of Tipperary, at Clonmel, in the said county of Tipperary, on Thursday the 21st day of September, in the twelfth year of the reign of our Sovereign Lady Queen Victoria, and in the year of our Lord, one thousand eight hundred and forty-eight, before the Right Honourable Francis Blackburne, Chief Justice of her Majesty's Court of Chief Place in Ireland, the Right

Honourable John Doherty, Chief Justice of her Majesty's Court of Common Pleas in Ireland, and the Right Honourable Richard Moore, fourth Justice of her Majesty's Court of Chief Place in Ireland, *Justices and Commissioners of our said Lady the Queen*, of Oyer and Terminer, within our said county of Tipperary, nominated and appointed to enquire into, hear, and determine all, and all manner of treasons, murders, man-slaughters, burnings, felonies, robberies, crimes, contempts, offences, transgressions, evil doings, and matters and things whatsoever, by whomsoever done, committed, or perpetrated within the said county of Tipperary, as well against the peace and the common law of Ireland, as against the form and effect of any statute or statutes, acts, ordinances, or provisions [467] theretofore made, ordained or confirmed, and also nominated and appointed, from time to time, as need should be, to deliver the gaols of our said Lady the Queen, of the said county of Tipperary of all prisoners and malefactors therein, saving to our said Lady the Queen all amerciaments thence arising and accruing, being by virtue of a commission under letters patent of our said Lady the Queen, under the Great Seal of that part of the United Kingdom of Great Britain and Ireland called Ireland, bearing date at Dublin, the first day of September, in the twelfth year of the reign of our said Lady the Queen, to them the said Francis Blackburne, John Doherty, and Richard Moore, and others, in the said letters named, directed by the oaths of, etc. (the names of the grand jury); it is presented in manner following, that is to say, etc.

The indictment against O'Brien contained six \* counts, after setting forth which,

\* The first five counts charged the prisoner with the offence, at different times and places, of levying war against the Queen. The sixth count charged that the said William Smith O'Brien (and others named), being subjects, on the seventeenth day of July, in the twelfth year of the reign aforesaid, and on divers other days, between that day and the thirtieth day of the same month of July, with force and arms at, etc., maliciously and traitorously among themselves, and together with divers other false traitors, whose names are to the said jurors unknown, did compass, imagine, and intend to move and excite insurrection, rebellion, and war against our said Lady the Queen within this realm, and to subvert and alter the legislature, rule, and government now duly and happily established within this realm, and to bring and put our said Lady the Queen to death, and the said compassing, imagination, invention, device, and intention, did then and there express, utter, and declare by divers overt acts and deeds, hereinafter mentioned, that is to say, in order to fulfil, perfect, and bring to effect their most wicked treason and treasonable compassing, imagination, invention, device, and intention aforesaid, they, the said W. S. O'Brien etc., as such false traitors as aforesaid, on the said seventeenth day of July, in the twelfth year of the reign aforesaid, and on divers other days between that day and the thirtieth day of the same month of July, with force and arms, etc., maliciously and traitorously did assemble, meet, consult, and conspire amongst themselves, and together with divers other false traitors, whose names are to the said jurors unknown, to devise, arrange, and mature plans and means to stir up, raise, make and levy insurrection, rebellion, and war against our said Lady the Queen within this realm, and to subvert and destroy the constitution and government of this realm, as by law established, and so to bring and put our said Lady the Queen to death. And further in order to fulfil, perfect, and bring to effect, their most wicked treason, and treasonable compassing, imagination, invention, device and intention aforesaid, they the said W. S. O'Brien etc., on the said seventeenth day of July, in the twelfth year of the reign aforesaid, and on divers other days between that day and the said thirtieth day of the same month of July, with, etc., maliciously and traitorously did arm themselves with, and bear and carry certain weapons, etc., with intent to associate themselves with divers other false traitors, armed, etc., whose names are to the said jurors unknown, for the purpose of raising, levying and making public insurrection, rebellion, and war against our said Lady the Queen, and of committing and perpetrating a cruel slaughter of, and amongst the faithful subjects of our said Lady the Queen within this realm, and to bring and put our said Lady the Queen to death. And further, in order to fulfil, etc." Several other overt acts were then set out, all of which consisted of attempts to levy war, and of levying war, by firing at the constables, and obstructing the marching of troops, the acts charged being in fact those which had been previously stated in the first five counts of the indictment.

the record went on to [468] shew continuances by adjournment to the 22d and 23d, and thence to the 28th of September, on which day it alleged that O'Brien was brought to the bar, and after hearing the indictment read, and being asked how [469] he would acquit himself thereof, he pleaded in abatement as follows:

"He, the said William Smith O'Brien, says that he ought not to be compelled now to answer the same, because he saith that by the indictment aforesaid, he the said William Smith O'Brien is charged and indicted for, amongst other offences, compassing, imagining, and intending to put our Lady the Queen to death, and that by the statutable enactments in that case made and provided and now in force in this realm, every person indicted for compassing, imagining, and intending death or destruction to our Lady the Queen, is entitled to have delivered to him ten days before his trial, and in presence of two or more creditable witnesses, a copy of the indictment, and at the same time a list of the witnesses to be produced on the trial for proving the said indictment, mentioning the names, professions, and places of abode of the said witnesses. And the said William Smith O'Brien says that the indictment aforesaid was found a true bill of the jurors aforesaid on Thursday the twenty-first day of September instant; and that on the said Thursday, the twenty-first day of September instant, a copy of the said indictment was delivered to him the said William Smith O'Brien in open court, but that no list of the witnesses, or of any witnesses or witness to be produced on the trial for proving the said indictment, was then or at any time since delivered to him the said William Smith O'Brien. And the said William Smith O'Brien says that ten days have not elapsed since the delivery to him the said William Smith O'Brien of the indictment aforesaid, and this he the said William Smith O'Brien is ready to verify; wherefore he prays judgment, and that he may not be compelled now to answer the said indictment, and so forth."

The Attorney-General demurred to this plea in abatement, and the prisoner having joined in demurrer, the Court held the plea insufficient. O'Brien then pleaded, Not Guilty. The usual award of a *venire* was made, and O'Brien then challenged the array. A plea to this challenge to the array, a replication, and a rejoinder [470] followed, and issue being joined, triers were appointed and sworn, and the triers having found against the challenge, judgment disallowing it was given. The jury panel was then called, and ten jurors were sworn, after which O'Brien challenged peremptorily twenty names, and these challenges were allowed. He then challenged a twenty-first name peremptorily, but the Attorney-General objected to this twenty-first peremptory challenge as being more than the law allowed, and the challenge was overruled. The jurors were then all sworn, and the trial having proceeded, a verdict of Guilty was taken upon each of the first five counts of the indictment, but, as to the sixth count, O'Brien was pronounced, Not Guilty. The record proceeded thus:—

"Upon which it is demanded of him, the said William Smith O'Brien, whether he now hath anything to say for himself wherefore the said justices and commissioners ought not, upon the premises and verdict aforesaid, to proceed to judgment against him the said William Smith O'Brien, for the said treasons in the said first, second, third, fourth, and fifth counts of the said indictment above specified and alleged, who nothing further says than he had before said. Whereupon all and singular the premises being seen, and by the said justices and commissioners here fully understood, it is considered and adjudged by the court here, etc."

And sentence, in the usual form, was pronounced; such sentence being distinctly repeated as to each of the five counts on which O'Brien had been convicted. O'Brien thereupon assigned error in the Court of Queen's Bench in Ireland,\* but judgment was given [471] for the crown. O'Brien then brought the present writ of error.

\* The errors assigned were these:—That in the record and proceedings aforesaid, and also in the giving of the judgments aforesaid, there is manifest error in this, to wit, that by the record aforesaid, it appears that judgment was given upon the record aforesaid, for our said Lady the Queen; whereas by the laws of this realm judgment ought to have been given thereupon for the said William Smith O'Brien, and against our said Lady the Queen, and therefore, etc. Also, that it does not appear by the record aforesaid, that the justices aforesaid, by whom the said indictment was taken,

The proceedings in the case of Macmanus were the same as in that of O'Brien, except that the days of [472] adjournment were more numerous, as O'Brien was tried first, and the adjournments were made from time to time during his trial; and also that in the assignment of errors in the Court of Queen's Bench in Ireland, Mac[473]-manus did not allege that he did not receive a copy of the indictment in due time, nor that a peremptory challenge made by him of more than twenty jurors had been rejected, nor that a particular challenge to an individual juror was improperly rejected.

The cases came on to be heard before Lord Cottenham (the Lord Chancellor), Lords Lyndhurst, Brougham, Campbell, and other Lords.

The Judges who were in attendance on the House were, Lord Chief Justice Wilde, Lord Chief Baron Pollock, Justices Patteson, Wightman, Cresswell, Erle, and Williams, and Barons Parke, Rolfe, and Platt.

Sir F. Kelly, Mr. Napier, Sir Colman O'Loughlen, [474] and Mr Macmahon appeared for Mr. Smith O'Brien, and Mr. Segar and Mr. O'Callaghan for Mr. Macmanus.

The Attorney-General, the Attorney-General for Ireland, Mr. Welsby, and Mr. Peacock, appeared for the Crown.

It was proposed by the counsel for the plaintiffs in error, that they should first be heard in their respective cases, that the counsel for the Crown should then be heard in answer, and that the first counsel for the plaintiffs in error should then reply, leaving open the question (which it was at that time said the Attorney-General intended to raise) as to the Attorney-General's right to a final reply on the whole case. This proposal was assented to on the other side.

The Lord Chancellor intimated that the Lords consented to this arrangement, but observed that what was now done was to be considered as done by consent, and was not to be treated as a precedent.

Sir F. Kelly and Mr. Napier for the plaintiff in error, William Smith O'Brien.

There are four objections to the judgment of the Court of Queen's Bench in Ireland. The first is, that by the caption, it does not appear that there was any juris-

and before whom the same was tried, were duly authorised in that behalf to take or try the same, and therefore, etc. Also, that by the record aforesaid it appears that the letters patent in said record mentioned, appointing and nominating justices and commissioners of oyer and terminer and gaol delivery for the said county of Tipperary, were directed to the justices, by whom the said indictment was taken, and others in said letters patent named, but it does not appear in or by said record that any power or jurisdiction was given to any number of the justices and commissioners, to whom the said letters patent were directed, less than the whole number of the said justices and commissioners, to take indictments, or to hear and determine the offences in said indictment charged, and yet by the record aforesaid it appears that said indictment was taken by and tried before three only of the justices and commissioners to whom the said letters patent were directed, and therefore, etc. Also, that it does not appear by the record aforesaid that the justices aforesaid, by whom the said indictment was taken, were duly or at all in manner by law required assigned to hear and determine offences within the said county of Tipperary, or to deliver the gaols of the said county, and therefore, etc. Also, that it does not appear by the record aforesaid that the said indictment was found by the jurors aforesaid a true bill by and upon the oaths and testimony of two lawful witnesses, pursuant to the statutable enactments in such case made and provided, and therefore, etc. Also, that by the record aforesaid it appears that judgment was given for our said Lady the Queen against the said William Smith O'Brien upon each and every of the first five counts of the said indictment, whereas by the laws of this realm judgment should have been given for the said William Smith O'Brien upon each of the said first five counts, each of the first five counts being insufficient in law to warrant judgment thereon for our said Lady the Queen against the said William Smith O'Brien, and therefore, etc. Also, that judgment was given for our said Lady the Queen upon the demurrer put in by her Majesty's Attorney-General to the plea pleaded by the said William Smith O'Brien on the 28th day of September aforesaid, whereby he the said William Smith O'Brien prayed judgment whether he should be compelled then to answer the said indictment; whereas by the laws of this realm judgment should have been given upon the said demurrer for the said William Smith O'Brien, and

diction in the Judges, before whom the prisoner was tried and convicted, so to try and convict him, but, on the contrary, on the true legal construction of this instrument, it appears that they had no jurisdiction. Secondly, that the plea pleaded by the prisoner, in which he claimed to have the benefit of the statutes of William and of Anne, so far as those statutes require a copy of the indictment and a list of the witnesses to be delivered a certain time before the trial, was improperly overruled on demurrer, whereas the demurrer itself [475] ought to have been overruled. Thirdly, that by the effect of the Irish Act, called Poyning's Act, the statute of Edward III., regarding treasons, was not made applicable to Ireland. That objection related to the first five counts of the indictment, and if it is well founded, then there is nothing to warrant the charge of a levying of war in Ireland as an act of high treason under the statute, and the conviction which was pronounced on those counts alone cannot be sustained. Fourthly, that the form of *allocutus*, or entry on the record, of calling on the prisoner to say why sentence should not be passed on him, was defective for not containing the words "of death." There had been a point raised in the Court below, as to the challenge to the array, but that will not now, on behalf of the plaintiff in error, be insisted on.

As to the first point. The caption, if taken, as it must be taken, to contain a true statement of the proceeding before the Court, shews that there was no jurisdiction to try this prisoner. Whatever is necessary to shew jurisdiction must be specifically expressed. This is especially so in the case of treason, where even the names of the jurors must be set forth; Williams' Saunders (1 Wms. Saund. 249 a, note a). The commission under which the trial took place was directed to at least five persons, to three who were named on the record, and to two others. The authority given to the commissioners was therefore vested in these five. The commission did not contain any *quorum* clause, under which a smaller number than the whole would have authority to hear and determine the matters in question. The whole five persons were therefore

therefore, etc. Also, by the record aforesaid it appears that a copy of the indictment aforesaid was not delivered to him the said William Smith O'Brien ten days before his trial upon said indictment, pursuant to the statutable enactments in that behalf made and provided, and therefore, etc. Also, that by the record aforesaid it appears that no list of the witnesses, or of any witnesses or witness to be produced on the trial for proving the said indictment was delivered to him the said William Smith O'Brien ten days before his trial, upon the indictment aforesaid, pursuant to the statutable enactments in such case in that behalf made and provided, and therefore, etc. Also, that it does not appear by the record aforesaid that any precept or writ for the return of the jurors, who passed upon him the said William Smith O'Brien, was in that behalf issued to the sheriff of the said county of Tipperary, and therefore, etc. Also, that it appears by the record aforesaid that the *venire facias juratores* awarded to the sheriff of the said county of Tipperary by the justices aforesaid, was not a proper *venire facias juratores* in that behalf, and conformable to the statutable enactments in such case made and provided, and therefore, etc. Also, that by the record aforesaid it appears that the challenge of him the said William Smith O'Brien to Southcote Mansergh, one of the jurors aforesaid, who passed upon him the said William Smith O'Brien on the indictment aforesaid, was disallowed by the said justices and commissioners, whereas by the laws of this realm said last-mentioned challenge ought to have been allowed, and therefore, etc. Also, that it does not appear by the record aforesaid that the verdicts above given upon the said first five counts of the said indictment respectively, or any of them, were or was found upon the oaths and testimony of two lawful witnesses, and therefore, etc. Also, that it does not appear by the record aforesaid, that it was demanded of him the said William Smith O'Brien, in manner in like cases used and accustomed and by law required, what he had to say why execution should not be awarded against him, and therefore in that there is manifest error. There is also error in this, to wit, that the judgment aforesaid in manner and form as the same is also given, is insufficient in law, and therefore, etc. Also, that the process and proceedings aforesaid, in manner and form as the same are above set forth, are not sufficient in law to warrant the judgments aforesaid given against him the said William Smith O'Brien, and therefore, etc.

alone entitled to exercise this authority. A *quorum* clause cannot be presumed [476] in a special commission. There have been commissions without it; nor can it be imported into this particular commission. But if it could, still there is nothing to shew what might be the number constituting the *quorum*, whether four, or three, or two, or one. This cannot be matter of speculation, for the commission itself contains no authority as to any less number than the whole, and no argument can be drawn from the commissions of assize, for they always contain a clause giving authority to "you or any one or more of you," and consequently vest ample authority in any one of the commissioners named.

The principle applicable to this discussion cannot be disputed. It is asserted on the part of the Crown that the record cannot be contradicted. The plaintiff in error admits this; but what is the consequence? That the commission, being directed to five persons, must be executed by all of them together; for the record itself shews that to them, and not to more nor to less, had this special authority been confided. The record also shews that only three out of the five did in fact execute the commission. If so, then the trial appears to have taken place before a body not authorised to try; for the persons exercising such an authority must be shewn to have received it; *The King v. Atkinson* (1 Wms. Saund. 248 a, n. 1). It is not necessary for the plaintiff in error to shew that the other commissioners were not there. All the five were nominated, and less than five could not lawfully exercise the special power thus confided to the whole number. This argument may be illustrated by reference to arbitrations. Suppose a case is referred, and there are two arbitrators, A. B. and C. D.; the award would recite the appointment of the two, but the moment it went on to declare that A. B. alone had taken on himself the burden of the arbitration, there would be a clear want of authority, and the award made by him alone would be bad.

It will be contended on the other side that it is consistent with the commission being directed to the three with two others, that it may have vested a separate authority in each of the commissioners. That argument cannot be supported without presuming the existence of a *quorum* clause, which cannot be presumed here. Nor is there anything which shews that the authority thus conferred is a joint and several authority, and without such a presumption there is nothing to warrant the exercise of any, by any number less than by the whole.

The authority must not only be exercised by the proper persons, but the caption must itself shew jurisdiction in those persons; Bacon's Abridgment (Tit. "Indictment I."). It is there said that "the caption of an indictment is no part of the indictment itself, but is the style of the preamble, or return, that it is made from an inferior court to a superior;" and "every caption of an indictment must shew that it was taken before a Court which has a proper jurisdiction; and therefore if it shews only that it was taken before J. S., steward, without shewing to whom he was steward, or in what court, it is insufficient." Other instances are there given to the same effect. The particularity with which a caption must be framed is shewn by Lord Coke (4 Inst. c. 28, pp. 161, 162, and 164), and by Hawkins (2 Hawk. c. 25, s. 121) and Hale (2 Hale P. C. cc. 23, 166, 167); [478] by the last of whom the distinction is clearly taken between the caption of an indictment preferred before a general Court of Quarter Sessions, where there is a general authority to determine by law, and a caption in a proceeding under an act of Parliament, or other special authority, where the particular authority must be shewn, in order to warrant the proceeding.

The precedents which are to be found in Lord Coke (4 Inst. cc. 28, 162) in the reports of Layer's Case (Foster's Cr. Law, 3-4), and of *The King v. Cellers* (1 Siderf. 367), establish both the rule and the distinction as already stated. The case of *Barton v. Sadock* (1 Buls. 105) is a strong authority to the same effect. There "upon the return of a commission to certify the Court of some proceedings, the case appeared to be this: the writ was directed unto eight *nominatim*; seven of them only certified, and whether this was good or not was the question." The case was fully argued, and the report goes on thus: "Yelverton and Williams, justices, and the whole Court agreed with them herein, that the power here given to the eight persons named in the writ, is a joint power, and not a several, and so ought to be pursued by them in their return; and the same is not to be otherwise, unless it is so set down and specified, and shewed, in certain, their power to be joint and several, otherwise it shall not be so construed to be joint and several, but only joint, and so it is here in this principal case, the writ being directed to eight, and seven of them only make the return, this return

is not good, and so was the opinion of the whole Court [479] clearly. 'Fleming, C. J. —If a writ of *diem clausit extremum* be directed unto three, and be executed but by two of them (unless it be expressed specially in the writ that the same may be executed by them all three, or by any two of them), this is not good, and so it shall be in all such special commissions; they ought to be specially executed according to the commission to them directed, and they are not to vary at all from it.' And so, in this principal case, the whole Court agreed clearly that the return here made by seven, the writ being directed unto eight, is no good return, but all the eight ought to have joined in this return." The rule thus stated must govern the present case, and the distinction already noticed does but enforce the rule where the authority given is specially created.

Then as to the second matter of error. The prisoner was entitled by certain statutes to the delivery to him of a copy of the whole indictment and a list of the witnesses, ten days before the trial. He did receive a copy of the indictment, but only five, and not ten days before the trial, and he did not receive any list of witnesses whatever. He has therefore been unduly tried, and the judgment against him must consequently be reversed.

This objection divides itself into two branches, first, whether the statutes 7 and 8 W. 3, c. 3, and 7 Anne, c. 21, apply to Ireland, and next, whether the objection was properly raised by plea in the Court below. As to the first, the 7 and 8 W. 3, c. 3, s. 1, enacts that persons indicted for high treason shall have a copy of the indictment, five days before the trial. The 7 Anne, c. 21, s. 11, extending and enlarging the provisions of that statute, gave to such persons the right to have delivered to them a list of witnesses intended to be pro-[480]duced in support of the charge, and also a copy of the indictment, the two things to be delivered at the same time, and ten days before the trial.

As these statutes give certain advantages to persons accused of treason, it is necessary to see what were treasons in Ireland. On that subject, the general effect of the statutes is this: The 25 Edw. 3, stat. 5, c. 2, declares, among other things, that it shall be high treason "when a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen, or of their eldest son and heir, or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere."

The 36 Geo. 3, c. 7, for the first time constituted certain acts, the chief of which was any attempt against the person of the Sovereign, to be treason. That statute was intended to continue only for a limited period, but it was made perpetual by the 57 Geo. 3, c. 6, on the fourth section of which,\* the objection now [481] raised mainly depends. By that statute, which was passed after the Union, all persons indicted for treason are to have the benefit of the statutes of Wm. 3 and of Anne, except in cases of direct attempts of assassination or bodily mischief against the reigning Sovereign. The question therefore arises whether the provisions of this act

\* 57 Geo. 3, c. 6, s. 4, enacts, That all and every person and persons that shall at any time be accused, or indicted, or prosecuted for any offence made or declared to be high treason by this act, shall be entitled to the benefit of the act made in the seventh year of his late Majesty King William the Third, entitled "An Act for regulating of Trials in cases of Treason and Misprision of Treason," and also the provisions made by another act, passed in the seventh year of her late Majesty Queen Anne, entitled "An Act for improving the Union of the two Kingdoms," save and except in cases of high treason in compassing or imagining the death of any heir or successor of his Majesty, or the death of his Royal Highness the Prince Regent, and of misprision of such treason, where the overt act or overt acts of such treason which shall be alleged in the indictment for such offence shall be assassination or killing of any heir or successor of his Majesty, or assassination or killing of his Royal Highness the Prince Regent, or of any direct attempt against the life of any heir or successor of his Majesty, or any such attempt against the life of the Prince Regent, or any direct attempt against the person of any heir or successor of his Majesty, or against the person of the Prince Regent, whereby the life of such heir or successor, or the life of the Prince Regent, may be endangered, or the person of such heir or successor, or of the Prince Regent, may suffer bodily harm.

extend to Ireland or not. Upon that question it is material to refer to the provisions of the 11 and 12 Vict., c. 12,\* by which it is declared [482] (s. 1) that the provisions of the 36 Geo. 3, c. 7, and 57 Geo. 3, c. 6, except so far as relates to attempts upon the person of the Sovereign, shall be repealed, but which also goes on (s. 2) to declare that such parts of those statutes as are not repealed shall extend to Ireland. The last statute must be construed as a declaratory act, and therefore as settling the question; for it extends to Ireland acts which create certain treasons, and among them is that of compassing the Queen's death. Here then the fourth section of the 57 Geo. 3, c. 6, becomes applicable, and the prisoner having been indicted on the sixth count of the indictment for compassing and imagining to excite insurrection, and levy war against the Queen within the realm, and to alter the legislature, and to bring the Queen to death, which compassings were declared and manifested by certain overt acts, it is clear that he was indicted for an offence under that part of the 57 Geo. 3 which was not repealed, and to the trial of which, therefore, the rules laid down in that statute, as to the copy of the indictment and the list of witnesses, became applicable. If so, then, having been tried not in conformity with those rules, but in violation of them, the trial was bad, and the judgment given on the verdict must be arrested. It will perhaps be contended that these English acts do not apply to Ireland, be-[483]cause there is an Irish act † which gives similar rights to prisoners, and which therefore rendered the application of the English unnecessary. Such an argument cannot be maintained. The Irish act gives smaller advantages than the English act to the prisoner; and it can no more be pretended that the Irish act prevents the operation of the English act than it could be pretended that the statute of William, which gave only a copy of the indictment five days before trial, prevented the operation of the statute of Anne, which gives a right to a copy of the indictment and to a list of the witnesses, ten days before trial. Nor is any argument, derived from the decision in Frost's Case, capable of being urged here against the prisoner; for in that case, all that was done was done before the time required by the statute; and therefore the prisoner had received a greater, and not, as here, a less advantage than the statute intended for him.

Then comes the second branch of the objection, namely, the question whether the

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\* 11 and 12 Vict., c. 12, s. 1, recites the 36 G. 3, c. 7, and the 57 G. 3, c. 6, and that there is a doubt whether the provisions of the former act, made perpetual by the latter, extend to Ireland; and that it is expedient to repeal all such provisions of these acts as do not relate to offences against the person of the Sovereign, and to enact "other provisions instead thereof, applicable to all parts of the United Kingdom, and to extend to Ireland such of the provisions of the said acts as are not hereby repealed;" and it then proceeds to enact, "That from and after the passing of this act, the provisions of the 36 G. 3, c. 7, made perpetual by the 57 G. 3, c. 6, and all the provisions of the last-mentioned act in relation thereto, save such of the same respectively as relate to the compassing, imagining, inventing, devising, or intending death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the heirs and successors of his said Majesty King George the Third, and the expressing, uttering, or declaring of such compassings, imaginations, inventions, devices, or intentions, or any of them, shall be, and the same are hereby repealed."

The 2nd section enacts, "That such of the said recited provisions, made perpetual by the said act of the 57 Geo. 3, as are not hereby repealed, shall extend to and be in force in that part of the United Kingdom called Ireland."

† 5 Geo. 3, c. 21, by which it is enacted, That after the 1st August, 1766, "all and every person who shall be accused and indicted for high treason under the said statute" (25 Edw. 3) "shall have a true copy of the whole indictment delivered to them, or any of them, on request, five days at least before he or they shall be tried for the same; whereby to enable them or any of them respectively, to advise with counsel thereon to plead and make their defence, his or their attorney or attorneys, agent or agents, requiring the same, and paying the officer 2s. 6d. for such copy, and no more."

The second section gave to "every person so accused or indicted, arraigned or tried, for any such offence as aforesaid," the right to make a defence by counsel.



objection, if the prisoner was entitled to make it at all, was properly [484] put on the record in the form of a plea. The statutes which have been before cited as giving the right, must again be referred to, and, for the purpose of shewing that the proper course has been adopted in enforcing it, must be assumed to apply to this case. It was impossible for the prisoner to take the objection at an earlier period. In *Frost's Case* (Mr. Gurney's Report, Saunders and Benning, 1840, pp. 56, 72, 77, 774, 778) the judges held that the prisoner was entitled to what he claimed, but they also held that the delay in claiming it prevented him from taking the objection as to the statutes not having been complied with; the fact being that the objection as to the non-delivery of the indictment and of the list of witnesses was not taken till the Attorney-General was about to open the case for the prosecution. In one respect the decision there is incomplete. It shows that the objection should not be postponed to so late a period; but in consequence of the tribunal before which the case was argued not being an open court, where the judges state their opinions and their reasons, it is not known at what period of the proceedings it was considered that the objection ought to have been taken. That question must therefore be determined by the ordinary rules of legal analogy, all of which are in favour of this objection being made by a plea in abatement. The prisoner could not know till he received the formal intimation from the officer of the court that the grand jury had found a true bill against him. Foster, in his *Crown Law* (Tit. of High Treason, c. 3, s. 6, p. 229, 2nd and 3rd ed.), seems to point out the rule as to the time when such an objection should be made. It is that which has been adopted here. Speaking of the statute 7 Anne, c. 21, he says, "Though the act men-[485]-tioneth only the copy of the indictment, yet the prisoner ought to have a copy of the caption delivered to him with the indictment, for this in many cases is as necessary to enable him to conduct himself in pleading, as the other. This is now the constant practice. But if the prisoner pleadeth without a copy of the caption, as some of the assassines did, he is too late to make that objection, or indeed any other objection that turneth upon a defect in the copy; for by pleading he admitteth that he hath had a copy sufficient for the purposes intended by the act." And he goes on to say of the delivery of the copy, that it must be exclusive of the day of the delivery and of the day of arraignment. It is clear that the prisoner could not plead till the arraignment, and therefore that he ought not to defer pleading on this matter till after that time. If, consequently, he was entitled to make this objection at all,—about which there is now no doubt,—and was entitled to make it the subject of a plea, the time of arraignment was the proper time for pleading it.

The only remaining question on this part of the case is, whether the prisoner could make this objection the subject of a plea at all. It is submitted that he could. This was properly a dilatory plea, which, in criminal matters, is the same as a suspensatory plea in civil matters. It is not a plea to the merits, nor a plea in bar, which would put an end to the indictment: it is a plea by reason of something which is matter of law, shewing that the prisoner is not bound to answer at that time. The old practice of the parol demurring is precisely the same as this dilatory plea. A plea of excommunication, under the old law, was of the same kind. It was not a complete bar to the proceeding, but suspended it till letters of absolution had been obtained. [486] In *Stephen on Pleading* (Ch. 1, p. 68, 1st ed.; and p. 47, 3rd ed.), the definition of this kind of plea is thus given: "A plea in suspension of the action is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed until that ground be removed." In *Starkie on Criminal Pleading* (1 Vol., c. 19, p. 310) it is said, "The prisoner being brought to the bar and arraigned, either stands mute or confesses the charge, or answers in one of the following ways: first, by a plea to the jurisdiction; secondly, by a declinatory plea; thirdly, by a plea in abatement of the indictment for some defect contained in it; fourthly, by demurrer; fifthly, by a plea in bar; or, sixthly, by the general plea that he is not guilty."

[Lord Campbell.—Do you contend that an objection of this sort may be made either by motion or by plea?]

If necessary, it might be contended that the objection could be made in either way. But that question does not arise here. The great distinction which divides the administration of the criminal law from that of the law civil, is, that matters of this

sort are, in the former, often dealt with on motion, and are not put on the record. But these matters of law, whether by statute or common law, may likewise be the subject of a plea, and so be put on record. An objection to the jury, or a challenge, which is matter of law, would properly, under the old law, have taken place *ore tenus*. The law has given the prisoner this right; he cannot lawfully be put on his trial without having the benefit of it; and he may claim that benefit by plea declinatory. Rules of practice cannot deprive a prisoner of [487] this right. It is not because the judges of a court have absolute jurisdiction over mere matters of practice that they can defeat a legal right, by treating it as a matter of practice. Thus, they could not by any rule declaratory of practice, say that a trial should not take place before twelve, but before six or any smaller number of jurymen. Mr. Starkie says (Criminal Pleading, Vol. I., c. 19, p. 311), "Declinatory pleas were of two kinds; first, the plea of privilege of sanctuary, claimed under certain restrictions, protection from process, and a right of being remanded if taken against his will, without being compelled to answer in any court of justice. This privilege was abolished in the reign of James I." But, while it lasted, this was the rule as to the mode of enforcing it. The same rule must apply here. Try this matter by the illustration of pleading the non-delivery of an attorney's bill. The statute does not say that that defence shall be pleaded, but simply declares that the party to be charged shall be entitled to a signed bill of costs. When the question first arose on the statute, in the case of *Brooks v. Hayne* (3 Salk. 19), the matter was pleaded, and there was a demurrer to the plea; but the plea was held good. It would be a substantive grievance to make this right of the prisoner depend on the opinion of the judges whether he was in time or not in taking the objection, instead of allowing him to take it at a fixed time, namely at that of arraignment, by putting in a plea in abatement. The plea here is good in that respect.

There was an objection taken by the counsel for the Crown in the Court below, that, supposing the plea to be good, and properly pleaded in all other respects, it was bad as being pleaded to the whole indictment, the [488] sixth count alone being that to which the objection could be applicable. The sixth count charged the offence of compassing the death of the Queen; the other counts were for levying war, and under them the prisoner would not have been entitled to a copy of the indictment and a list of the witnesses, but on the sixth count he was entitled to these benefits, and it was contended that as the plea was a plea pleaded as if to the whole indictment, and not to the sixth count alone, it was bad. That argument is founded on a fallacy. The plea is not in bar of the charge, but in delay of the trial, and consequently could not be applied to some only of the counts of the indictment, but was in delay of the trial of all of them.

It is clear, that on a prosecution of this kind in England, the prisoners would be entitled to the advantage sought to be obtained for him in this case. The object of the legislature in passing the statute of 11 and 12 V., c. 12, was to render the law in the two countries the same in this respect. That object has been defeated by a misconstruction of the statute, and the trial and judgment must be treated as erroneous.

The next objection is, that the charge contained in the first five counts, for levying war against the government, on which alone the plaintiff has been found guilty, is one which is not punishable under the act of Parliament under which this prosecution has been instituted. It is not an offence which he could commit in Ireland. The first statute declaring the offence of levying war against the King to be an offence punishable as high treason, is that of 25 Edw. III., stat. 5, c. 2,\* which, by an Irish statute, 10 Hen. VII., c. 22, [489] commonly known as Poyning's law, is said to have been made part of the law of Ireland.† It may be admitted that the statute of

\* By which, among other things, it is enacted, "That when a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen, or of their eldest son and heir, or if a man do levy war against our Lord the King, in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be probably [proveably] attainted of open deed by the people of their condition."

† The 10 Hen. VII., c. 22, is in the following terms: "there are divers good and

Edw. III. was transferred to Ireland by Poyning's law, but still the offence therein described, as levying war against the King, is not one of a character which, under that description, is capable of being committed in Ireland. The words of the statute of Edw. III. are, "levy war against the King in his realm;" but Poyning's act does not say that such an offence may be committed in Ireland, or being committed elsewhere, may be tried there. Till the time of Henry VIII., Ireland was always described as "his land of Ireland," the word "realm" being confined to England. That is the meaning which must be put upon the acts of 25 Edw. III. and on Poyning's law, construing them together, and the cor-<sup>[490]</sup>rectness of so restricting the language, is shewn by the subsequent phrase, in the statute of Edw. III., which positively marks the distinction now contended for, "or be adherent to the King's enemies, in the realm or elsewhere." Ireland might possibly come in that statute under the word "elsewhere," but certainly not under the word "realm," and if so, then as this prisoner has not been charged with being adherent to the King's enemies in the realm, and as the levying war is not in the statute of Edw. III. connected with the phrase, "or elsewhere," the indictment cannot be supported.

The last objection is, that which relates to the form of the *allocutus*. The words used are "proceed to judgment against him." The form has invariably been "judgment of death," and a departure from that form constitutes error in the proceedings. The non-observance of this form might make a difference in pleading a pardon. Suppose the Queen had issued a pardon to all persons found guilty of treason, and sentenced for such treason at Clonmel. The record here would not shew that the prisoner was within the terms of that pardon. The cases of *The King v. Walcot* (1 Tremaine's Pl. Cor. 37), and *Hampden's Case* (*ib.* 37), and *King v. Gerard* (*ib.* 38), shew that such was the form in ancient times, and there has been nothing to authorise a departure from those precedents, which have indeed been invariably followed ever since.

Mr. Segar and Mr. O'Callaghan afterwards addressed the House for Mr. Macmanus. At the conclusion of their arguments—

[491] The Lord Chancellor said, My Lords, I have had a communication from the Judges, which I think right to state to your Lordships, in order that you may determine what course you will pursue under the circumstances. The Judges having heard all the arguments which have been adduced by the counsel for the plaintiffs in error in these two cases, are unanimously of opinion that the writs of error cannot be maintained, and that the judgment of the Court below on each of these cases, ought to be affirmed. That is entirely in conformity with my own opinion, so that unless any difference of opinion should exist among your Lordships, it does not appear that we can, with any advantage, proceed further with the hearing of these cases. I am, of course, only stating my opinion as to the course which should be pursued, and your Lordships will determine whether you adopt that opinion or not.

Lord Lyndhurst, Lord Brougham, and Lord Campbell severally expressed their concurrence with the Lord Chancellor.

The Lord Chancellor.—Then the course will be to request the learned Judges to state the grounds of their opinion. For this purpose I will put a question to them. His Lordship then proposed the following question to the Judges: "Whether the plaintiffs in error have sustained the errors assigned?"

The question was agreed to.

The Judges requested time to draw up their answer. The request was granted, and the Judges withdrew from the House for nearly an hour. On their return,

[492] Lord Chief Justice Wilde delivered their opinion in the following terms:—

My Lords—I am authorized by the learned judges to report their unanimous

profitable statutes made in the realm of England, whereby the said realm is ordered and brought to great prosperity, and by all likelihood, so will this land, if the said statutes were used and executed in the same: It is enacted, that all statutes of late made within the said realm, concerning and belonging to the public weal, shall from henceforth be deemed good and effectual in the law, and, over that, be accepted, used, and executed in this land of Ireland, in all points and at all times, according to the tenor and effect of the same, and over that, by authority aforesaid, that they and every of them be authorised, proved, and confirmed in this land."

opinion that the errors assigned have not been maintained by the arguments urged at your Lordships' bar.

As to the first objection :

The judges are of opinion that the allegation upon the record, that the three judges who executed the commission in relation to the trials of the several plaintiffs in error were nominated and appointed to execute that commission, is an affirmative allegation of their authority to perform that duty, and that it is in no respect rendered uncertain or ambiguous by the subsequent statement, that the commission by which they were so authorized, nominated, and appointed was directed to them and others.

The second objection involves two points :

1st, Whether the plaintiffs in error, in respect of the 6th count of the indictment, were entitled to have a copy of the indictment, a list of the witnesses, and a list of the jury, ten days before the trial, under the provisions of the statute of William III. and the Statute of Anne.

2dly, Whether, if they were so entitled, the objection founded upon the non-compliance with the provisions of these statutes was matter properly urged by plea.

The judges are of opinion that the plaintiffs in error were not entitled to have delivered to them the lists and copy referred to in the error assigned in that respect, and therefore it becomes unnecessary to consider whether the objection was properly urged by [493] plea. The right of the plaintiffs in error to be furnished with the copy of the indictment and the lists referred to has been endeavoured to be sustained by the counsel for the plaintiffs in error at the bar upon two grounds :

1st, Upon the ground that the statute of the 36th Geo. III., cap. 7. extended to Ireland ;

2dly, Or that if that statute did not originally extend to Ireland, it was afterwards so extended by the operation of the 57th Geo. III., c. 6, and by the 11th and 12th Vict. c. 12.

The judges are of opinion that neither of these grounds can be supported.

The statute of 36th Geo. III. passed before the union, and did not bind Ireland, and therefore if it has any application to Ireland, it must be by the effect of 57 Geo. III. or 11th and 12th Victoria.

The first section of 36th Geo. III., cap. 7, enacted, that certain acts done during the life of his Majesty Geo. III., and until the end of the next session of Parliament after a demise of the crown, should be deemed treason ; and the first section of the 57th Geo. III., c. 6, made those provisions perpetual, but did not extend the operation of the statute of the 36th Geo. III. to Ireland.

The 4th section of 57th Geo. III., cap. 6. has been principally relied upon, which expressly gives the benefit of the 7th and 8th William III, and the 7th Anne, cap. 21, to persons accused of any treason made or declared by that act of the 57th Geo. III., and it is enough to say that the charge in the 6th count is not for any treason made or declared by that statute.

With regard to the statute of the 11th and 12th Vict., the only effect of that statute was to extend to Ireland certain of the provisions of the 36th Geo. III. [494] made perpetual by the 57th Geo. III. ; and the 4th sec. of the 57th Geo. III., which has been relied upon, is limited to treasons made or declared by that act, and the treason which is the subject of the 6th count was not one of them, and to which therefore it does not apply.

As to the objection, that the counts charging the levying of the war in Ireland do not charge an offence which in point of law amounts to treason :

This objection depends upon the construction of the statute of Henry VII., passing by the name of Poyning's Law.

By that statute we think that those acts which were treason in England by the statute of Edw. III. were made treason in Ireland, if committed there, and we cannot deem it necessary to say more upon the subject than that the terms of the statute admit of no doubt.

As to the objection to the *Allocutus*, we think it is the proper form.

All that the prisoner in that stage of the proceedings can properly be asked is, what he has to say why judgment should not be pronounced ; and as to precedents which go further, we deem the matter beyond the question stated to be surplusage.

The only remaining error assigned refers to the challenge to the jury. That error has not been urged at your Lordships' bar, and we think it was very properly abandoned, as the question is not open to any doubt, the language of the statute of 9 Geo. IV., c. 54, s. 9, being clear and unambiguous (see *Gray v. The Queen*, 11 Clark and Finnely, 427).

The judges have not thought it necessary to trouble your Lordships with a more detailed statement of their reasons for the opinions they entertain, as the general [495] assignments of error have been so fully and ably and satisfactorily discussed by the learned judges of the Court of Queen's Bench in Ireland, and which arguments are before your Lordships.

The Lord Chancellor:—Your Lordships having now heard the grounds of the opinion of the learned Judges, those learned Judges concurring unanimously in the judgment pronounced in the Court below, I do not apprehend that your Lordships will feel any difficulty in coming to the same conclusion as that at which those learned Judges have arrived.

In my own mind, indeed, my Lords, I have never had any doubts, from the time when I first read these papers, as to the result of these writs of error. The reasons assigned by the learned Judges in Ireland, who certainly have most learnedly and most elaborately, and in a manner highly creditable to them, investigated the several grounds upon which the plaintiffs in error rely, leave no doubt as to the correctness of their decision. They properly considered the importance of the subject which they had under their consideration, and their judgments, when carefully perused, leave not any doubt upon the mind of any lawyer as to the soundness of their conclusion. We have now, however, had a confirmation of those reasons in the opinions of the learned Judges who have assisted us in considering the cases now before the House; and if your Lordships concur in the opinion which I have formed, you will affirm the judgments of the Court below.

I therefore move your Lordships, on these grounds, that judgment be given for the Defendant in Error in each of the cases under consideration.

[496] Lord Lyndhurst:—My Lords, I am of the same opinion as my noble and learned friend who has just addressed your Lordships.

Lord Brougham:—My Lords, I entirely agree with my noble and learned friend, that the judgment ought to be given for the Defendant in Error.

I cannot express my entire concurrence, without adding my tribute of respectful commendation of the great learning and distinguished ability with which the learned Judges in Ireland have dealt with the whole of this important matter. I never, in the course of my experience, read a more able and satisfactory argument, in every respect, than that of Chief Justice Blackburne; and the other learned Judges have all, in my opinion, distinguished themselves by their ability and their learning, and their careful and elaborate consideration of these cases.

Lord Campbell:—My Lords, I cannot abstain from expressing my approbation and admiration of the very able manner in which these questions have been treated by the Lord Chief Justice of Ireland, and the other learned Judges of the Court below. I have only further to add, that I entirely concur with my noble and learned friend on the woolsack in the opinion which he has expressed.

Judgment for the defendant in error.

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[497] ADAM BURNES,—*Appellant*; WILLIAM PENNELL and Others, Assignees and Creditors of the Forth Marine Insurance Company,—*Respondents*.

[June 12, 13, 16, 1849.]

[*Mews'* Dig. i. 330; iii. 843, 999, 1517, 1520. S.C. 13 Jur. 897, 6 Bell, 541. On point as to necessity for compliance with formalities, see *Cheltenham Railway Co. v. Daniel*, 1841, 2 Q.B. 281; *Irish Peat Co. v. Phillips*, 1861, 1 B. and S. 598; *East Gloucestershire Ry. Co. v. Bartholomew*, 1867, L.R. 3 Ex. 15. As to question of shareholders' right of relief, see *Ex parte Oakes and Peek*, 1867, L.R. 3 Eq.

576. As to criminal offence by directors, see Archbold's *Crim. Pl.* 22nd ed., pp. 556-560, 1220; also *Peck v. Gurney*, 1871, L.R. 13, Eq. 113. On point as to company not being bound by representations of its members, cf. *Barnett, Hoares and Co. v. South London Tramways Co.* 1887, 18 Q. B. D. 815.]

*Fraudulent Representations—Joint Stock Company—Partner—Law Agent.*

Two actions were brought in Scotland, both arising out of the same cause. They were conjoined. The Lord Ordinary pronounced a judgment, which, in point of form, applied to one only, but which, in substance, affected both. His judgment was appealed against to the Court of Session, which made a decree, disposing, in form as well as substance, of both actions: Held, that a decree, so made, was correct.

By the deed of co-partnership of a Joint Stock Company, certain forms were to be observed by any transferee of shares, before he could become a member of the Company. A. purchased shares, and executed some of the acts required to constitute him a member of the Company; but left one of these acts unexecuted: Held, that the execution of these acts was a duty cast on the purchaser for the benefit of the Company, and that his non-execution of one of them, did not enable him, as respected the Company, to retire from his contract.

A Joint Stock Marine Insurance Company had declared dividends, which, as it afterwards appeared, were not warranted by the real condition of the Company. The law-agent of the Company, who was also a member of it, when applied to for information, mentioned these dividends as proofs of the flourishing state of the Company. The person to whom he so mentioned them became afterwards a purchaser of shares:

Held, that he could not relieve himself from his contract on account of these representations.

Held, also, that the law-agent of the Company was not its agent to bind it in such matters; nor could he bind it as a partner, for a Joint Stock Company is not, like an ordinary partnership, bound by the acts of any individual member of it.

If the Directors of a Company agree to publish false statements of the affairs of the Company, under such circumstances as shew a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted, and punished.

The Appellant in this case had been sued by the representative of the Forth Marine Insurance Com-[498]-pany, (which, by a private act, 5 and 6 Vict., c. 99, was allowed to sue and be sued by its officer), for calls due to that Company, and he had himself instituted a suit against the representatives of that Company for the reduction or cancellation of a transfer of shares in the Company, which had been made to and signed by him in December 1842. The Lord Ordinary had conjoined the actions, which thereafter came to be treated as one. The facts of the case were these:—

In the year 1839 some persons formed themselves into a joint stock company, called the Forth Marine Insurance Company, for the purpose of carrying on the business of marine insurance. It was not incorporated, but was represented by a registered officer. By the contract under which the Company was formed the capital stock was to be £100,000, divided into 4000 shares of £25 each; and the shareholders became bound to contribute the amount of their respective shares as follows,—viz. ten per cent. on the amount, or £10,000 in all, at the commencement of the business, and all the remaining £90,000, or £22 10s. of each share, were to be left in the hands of the shareholders themselves in the mean time, until the business of the company should require its capital to be paid up. They were to pay that sum at such periods, and by such instalments, as the directors for the time should appoint. The shareholders were to have the right to the profits, and be liable for the losses, and in relief to each other in proportion to their respective shares, and no person was to hold more than 100 shares.

After the expiration of the first year, the shareholders were to be at liberty to

transfer and dispose of their shares, if the purchasers or assignees should be ap-  
[499]-proved of by the directors.\* Every shareholder who disposed of his share  
of the Company's stock, was to be entitled to relief from the others of the whole  
debts owing by the company, and all obligations granted for the same; and no  
person coming to the right of said shares formerly belonging to such shareholder  
so ceasing to have right, should have any claim against the others for relief from the  
debts and obligations contracted by the Company, even although contracted previous  
to his becoming a shareholder, but he should [500] take the precise place of his  
predecessor, and become subject to all the obligations incumbent on him.

There was to be an annual general meeting of the shareholders on the third Tues-  
day in June, when the annual election of ordinary and extraordinary directors was  
to take place, and an annual abstract or statement of the company's affairs was to  
be laid before the shareholders. Special general meetings were to be called at other  
times. The business of the company was to be carried on under the direction and  
superintendence of nine ordinary directors, who might be elected by the shareholders  
at their annual meetings, from among themselves; each director was required to  
possess at least twenty-five shares of the stock of the Company. Twenty extraordinary  
directors were likewise to be annually elected at the general meeting of the Company;  
and there was to be a body of trustees, of five in number, so long as the Company  
should not be incorporated.

[501] The books were to be annually balanced on the 31st of May, and a balance-  
sheet made out, examined, docqueted, and signed by a quorum of the directors and  
manager, and laid on the table at the annual meetings in June, for the inspection of  
the shareholders, and the substance thereof was then to be read or stated by the  
chairman. It was declared to be in the power of each meeting of the shareholders,  
if they should think fit (to appoint a private committee, consisting of three of their  
number, holding at least twenty-five shares each of the company's stock, for auditing  
and reporting upon such yearly states at a future general meeting, to be called for

\* By the fifteenth Article of the Company's settlement-deed it was declared, that  
the partners should not be at liberty to transfer and dispose of the whole or any  
number of the shares held by them until the expiry of twelve months from the said  
day of \_\_\_\_\_, being the period of the commencement of this contract of  
copartnership, but that immediately thereafter they shall be at liberty to do so, and that  
either gratuitously or for an onerous consideration *inter vivos* or *mortis causa*.  
But declaring always, that in the case of a sale or a conveyance *inter vivos*, whether  
for an onerous consideration or gratuitously, such sale or conveyance shall in no case  
be valid towards making the purchaser or assignee a partner of the company, unless  
he shall be approved of by the directors, and a minute to that effect entered in the  
sederunt-book. And declaring further, that the directors shall be entitled to con-  
sider the shares so attempted to be so sold or assigned, and the purchaser or assignee  
not approved of, as still belonging to the former proprietor thereof.

The sixteenth Article gave the form of the transfer, by which the purchaser agreed  
to accept the stock, and to become a partner in the said company, and, as such, to  
fulfil etc. the conditions contained in the Company's deed of copartnership, and the  
bye-laws made in virtue thereof.

The seventeenth Article declared, that where the share or shares of any partner  
are regularly transferred or conveyed, in terms of the articles before written, or  
either of them, and that whether by the partner himself or by the directors of the  
Company, the assignation or conveyance thereof, or other deed of transference  
whatsoever, or an extract from a proper record, shall be produced to the directors,  
and entered in a book to be kept for the purpose; and such purchaser, etc. shall  
become subject to, and be bound to observe, the whole articles and conditions of this  
contract, as well as all the regulations of the Company, made or to be made in  
virtue of powers herein contained; and a minute to that effect shall be engrossed in  
the Company's books, and regularly subscribed by such purchaser, assignees, heir,  
or executor foresaid, either personally under his own hand, or by an attorney duly  
authorized to act for him; and no purchaser, assignee, heir, or executor, shall be  
deemed or entitled to exercise any of the rights of a partner until every one of these  
requisites shall have been complied with.

the purpose. That there should be no division of profits at the end of the first year; but that the clear interest and profits of every succeeding year, as these should appear at the time of each balance, after deducting fifty per cent. of the guarantie fund, should be divided rateably among the shareholders; and that in striking the amount of the clear interest and profits for division, the directors should take into their consideration the extent of risks then pending, and deduct from the said interests and profits such a proportion thereof as they should deem it prudent and requisite to set aside on account of the then pending risks.

The directors established agencies in Greenock, Glasgow, Dublin, London, and Dundee; and insurances to a very large amount were effected at their different places of business.

At the second annual general meeting, in June 1841, it appeared that the total amount of premiums for the preceding year amounted to £198,036 8s. 9d., and the amount of losses, averages, and other charges, to £111,962 12s. 7d., leaving £86,073 16s. 2d. to cover [502] unsettled losses and pending risks. On the footing that this surplus was much more than sufficient to meet the probable future loss, the meeting, after setting aside £1500 as a guarantie fund, in terms of the deed of settlement, agreed that £1500 more, being fifteen per cent on the £10,000 of the stock which had been advanced, should be divided in name of profits. It was at the same meeting resolved, that the balance of the Company's business, to be reported at the meeting in June 1842, should be confined to the business transacted between 1st June and 31st December 1841. The object of this was to leave a space of five months, to exhaust, in some measure, the outstanding risks, so that a more certain estimate might be formed of the profit and loss.

During the course of the next year, it appeared that, in consequence of the storms, of unprecedented frequency and violence, which occurred in 1841 and 1842, and the many frauds perpetrated, there would be a loss on the Company's underwriting for the two first years. This was reported to the general meeting held in June 1842. Out of the £6000 which were estimated as the clear profits on the seven months' underwriting from 31st May to 31st December 1841, the meeting resolved to divide £700, being seven per cent. on the £10,000 of stock which had been advanced; and a like sum of £700 was set aside as a guarantie fund.

The directors, on 26th July 1842, made a call for another instalment of ten per cent. on their subscribed capital, or of £2 10s. per share.

David M'Kenzie, who was a clerk of the appellant, Mr. Burnes, was a shareholder in the Company, to the amount of fifty shares thereof. He failed to pay the call which was made on him for the second instalment, [503] excepting a small sum of £7 1s. 8d., and he asked for indulgence as to the rest. This was conceded; but after some delay, the directors instructed the law-agent of the company, Mr. John Gilmour, to prosecute him for payment. Gilmour on the 5th November 1842, wrote to M'Kenzie, who on the 8th of the same month, stated, that he had communicated the demand to the appellant, whose clerk he was, and who was to be in Edinburgh on the 13th or 14th of that month, and would call on Gilmour as to the arrangement of the matter.

The appellant alleged that he saw Gilmour, who was a shareholder in the company and likewise its law agent, in order to obtain from him information as to the state of the Company's affairs; that Gilmour laid before him the balance-sheets and other documents, which professed to represent accurately the progress and success of the Company, and stated to the appellant that the affairs of the Company were flourishing, and that their stock was a valuable commodity; and that, mainly trusting to these representations, and relying upon the notorious fact, then pressed upon him, that large dividends had been made (but which he now averred to have been fraudulently made) the appellant was induced, in November 1842, to take a transfer to M'Kenzie's stock. He was informed, however, that the directors would not sanction the transaction unless the defender paid up M'Kenzie's arrear out of the price. The transfer was executed on the 2d of December, but the defender had never signed the minute in the company's books, provided by article 17th. It appeared, however, that he had paid up the residue of the call for the second instalment, with interest thereon, and was inrolled as a shareholder in the books of the company.

[504] The series of unusual storms and disasters at sea, already referred to, con-



tinued in the year 1842; and claims of very unexpected and unusual number and magnitude came suddenly upon the Forth Marine Insurance Company. The directors were not prepared with realized funds to meet all these claims; and, on the 19th December 1842, they made a call on the shareholders for a payment of a third instalment of the shares in the Company's stock. The sum so called for was twenty per cent., or £5 per share, payable by two equal instalments, on the 1st of March and the 1st of May 1843.

The accounts of disastrous losses, and consequent claims on the company, still continued to increase; and at the fourth annual general meeting of the shareholders, held on 20th June 1843, they unanimously approved of the account and balance-sheet and reports submitted to them; and, in obedience to this resolution, the additional call was made, on 22nd June 1843, for the remaining £15 per share of the capital stock of the Company, which had still been left in their hands.

The appellant had not paid either of these calls, and a suit was instituted against him in the name of George Thomson, as the manager and representative of the Company, on behalf of the Company.

The appellant, in the action brought against him, pleaded that the forms required for constituting him a partner had never been completed; that the sale and transfer were vitiated by fraudulent misrepresentation on the part of the directors of the Company, their office bearers, and law-agent. In the action brought by him against the Company, he relied, on similar grounds, to have the sale and transfer reduced and [505] set aside; to have it declared that he was not a shareholder; and to have a return of the sums which he had paid.

The respondents put in, among others, pleas in law in the following terms.

1. On the 2d July 1845, a *fiat* in bankruptcy was issued in England against the Forth Marine Insurance Company, upon which adjudication by the Court of Bankruptcy followed on the 5th of July; and William Pennell was appointed official assignee, and the process was then continued in his name.

2. The allegations upon which Mr. Burnes' defences against the action for the payment of the calls are founded, besides being at variance with the truth, are not relevant in law to protect the defender from a demand by the Company to pay up the proportion of the stock corresponding to the shares of the Company held by him.

3. The allegations upon which Mr. Burnes' challenge of the transfer are founded, besides being incorrect in point of fact, are not relevant in law to support such a challenge.

4. The defender is barred from urging these defences and that challenge, in respect that by obtaining himself enrolled as a partner of the Company, upon a transfer from M'Kenzie in his favour, and by continuing to hold that position, he has prevented the Company from compelling M'Kenzie himself to pay up the proportions of the capital due upon the shares so transferred.

On 3d July 1847, the Lord Ordinary pronounced the following interlocutor:—Having heard parties' procurators in the conjoined actions, in which the assignees on the bankrupt estate of the Forth Marine Insurance [506] Company, the original defenders in the action of reduction and declarator, and the pursuers of the action for payment, have been sisted as parties, finds that the statements made in the record by Adam Burnes are relevant to support the reductive conclusions thereof, and therefore repels the defences for the Forth Marine Insurance Company, and the third plea in law for the Company, in so far as it is in said plea maintained that the allegations upon which the said Adam Burnes founds, in support of his challenge of the writ or writs called for to be set aside, even if true, are not relevant in law to support such challenge.

The respondents presented a reclaiming note to the Lords of the First Division of the Court of Session, "praying their Lordships to recal or alter the interlocutor submitted to review, and, in the reduction and declarator, to sustain the defences for the Forth Marine Insurance Company, and the third plea in law annexed to the revised and amended condescendence for the Company, and to assoilzie the said Company from the conclusions of the said action of reduction and declarator; and, in the action at the said Company's instance, to decern in terms of the conclusion of the libel, with expenses in both actions."

The Lords of the First Division unanimously pronounced judgment, "that, in

the month of November 1842, Adam Burnes, defender in the ordinary action, and pursuer in the reduction, became a partner in the Forth Marine Insurance Company to the extent of fifty shares of the capital stock thereof: find that there are no averments on record relevant to set aside the transaction by which the said Adam Burnes became a partner as aforesaid; or to liberate him from the obligations and liabilities thereby undertaken by him to the [507] extent of fifty shares as aforesaid: therefore, in the reduction repel the reasons of reduction, sustain the defences, and decern; and in the action at the instance of the Manager of the Forth Marine Insurance Company, now insisted in by the official and creditors' assignees of the bankrupt estate of the said company, repel the defences stated by the said Adam Burnes, and decern in terms of the libel."

The appeal was brought against this judgment of the Lords of the First Division.

The Attorney General and Mr. Anderson for the appellant.—There has been a mistake committed here by the Lords of the First Division, and the case must be remitted. They have exceeded their jurisdiction. The appeal from the Lord Ordinary was made in respect of his decision in one of the two conjoined actions—that of the suit for reduction; their decision is on both. He did not decide the action itself, but merely put the parties in a position to have the disputed facts ascertained by appeal to a jury—in the judgment on the appeal the actions themselves are decided. In this respect alone the judgment of the Court below is erroneous, and cannot be sustained.

But assuming that objection not to be fatal to the judgment, then it is submitted that the judgment itself is wrong in point of law. The appellant here was not a partner in this Company. According to the 17th article of the partnership deed of 1839, he could not completely become so till he had performed certain acts, one of which is subscribing a minute in the Com-[508]-pany's books, an act which it is not pretended he ever performed. This objection could not be taken by him in the action of reduction, for that action assumes an existing partnership; but in the action brought against him by the officers of the Company, he is entitled to take it. In that action he may lawfully say that he is not a partner according to the terms of the deed; *Preston v. The Grand Collier Dock Company* (2 Rail. Cas. 335), where it was held that a transfer of shares, not made according to the specified form of conveyance, was void. Here the specified form had not been complied with, and the appellant was therefore free from all liability in respect of such transfer.

Then, as to the false representations which, he insists, relieve him from any liability on shares purchased by him, in consequence of such representations being made. These false representations were made by Mr. Gilmour, who was not only the agent of the Company, but was, besides, a partner in it, and whose acts therefore affect the Company in his double character of agent and co-partner. The principle applicable to contracts, made in consequence of such representations, seems to have been properly laid down in the judgment of Lord Fullerton, who said (20 Sco. Jurist, 241), "If any body of men, aware of the extent of their own liabilities, contrive by fraudulent misrepresentation or concealment of their true situation, to beguile another party into the association, to his loss and their gain, I see no reason why he should not be entitled to the ordinary legal remedies for obtaining the reduction of the transaction, at least as between him and the other [509] individual partners." This principle seems to have been forgotten in the decision of this case, but it is conclusive in favour of the appellant. It is a principle well warranted by the authorities, English as well as Scotch. In *Seldon v. Connell* (10 Sim. 58) the point was incidentally decided, though the case itself was determined on the form of the proceeding there, which was held to be erroneous, the suit being brought against the public officer of the Company, who was not the proper party to be made a defendant. But in *Stainback v. Fernley* (9 Sim. 556) it was distinctly raised and decided. There the directors of a Joint Stock Company, in order to sell their shares to advantage, represented in their reports, and by their agents, that the affairs of the Company were in a very prosperous state, and declared large dividends, at a time when those affairs were greatly embarrassed.

[Lord Campbell.—Such conduct on the part of Directors of a Company might subject them to criminal responsibility.]

A person who had been induced by these means to purchase shares of one of the directors was held entitled to maintain a bill against him for repayment of the pur-

chase money. There, no doubt, the defendant was a party directly benefitted by the misrepresentation. But it is not necessary that that circumstance should exist, in order to give the party injured his remedy by relief from the contract.

All the parties here are members of a partnership; and no members of a partnership can take advantage of fraudulent representations made by others of the same body. Interests obtained through the fraud of [510] another person cannot be maintained (*Bridgman v. Green*, 2 Ves. 627; *Wilson*, 58; adopted by Lord Eldon, in *Huguenin v. Baseley*, 14 Ves. 289). The fraudulent representations need not be made to the party himself. If they are made to the public, and any one party is deceived by them, he will be relieved from his contract, on proof of the misrepresentation.

[Lord Campbell.—But was Gilmour an agent of the Company to make this representation?]

He was so; he was at once the agent and the partner of the Company, and the Company is bound by his acts. In *Cornfoot v. Fowke* (6 Mee. and W. 358) the principal would have been bound, but that there was no evidence to shew that the agent knew the representation to be false. The case of *Fuller v. Wilson* (3 Q.B. 58) carries the rule further, and makes the principal liable for a misrepresentation made through an agent, though the agent did not at the time know it to be such. And though the judgment in that case was reversed, on error (3 Q.B. 68), the reversal proceeded on an entirely independent ground, namely, that of the declaration not being supported by the facts as found in the special verdict. And in *Evans v. Collins* (*id.* 78 n., and 5 Q.B. 804), given as a note to that case, it was held, that where a false representation was made by one party, who might have known, but did not know, the truth, and another party, who could not know it but trusted the representation, suffered from it, the former must "abide the consequences of his misconduct." To the same effect is *Taylor v. Ashton* (11 Mee. and W. 401; but see *Moens v. Hayworth*, 10 Mee. and W. 147), where it was held not to be necessary to [511] shew that the defendant knew the representation to be untrue. And in *Langridge v. Levy* (2 Mee. and W. 519; affirmed 4 *id.* 337), the principle which is to be deduced from these various cases had been previously laid down, though it was there applied to a different state of facts.

Mr. Rolt and Mr. Inglis for the respondents.—The objection to the jurisdiction of the Lords of the First Division, on the ground that they decided on both suits—whereas the appeal to them was only on a decision of the Lord Ordinary, affecting one of them—was not taken in the Court below, and cannot therefore be entertained here. But assuming it to be entertained, then the answer is, that it is not founded in fact; for the Lord Ordinary's decision was, in form as well as substance, given in the conjoined actions; and his declaration that the statements made on the record by Burnes were relevant to "support the reductive conclusions" in his suit, was in effect a decision that he was not liable to the Company for the calls attempted to be enforced in the other suit.

In truth, the Lord Ordinary decided both the suits in the one interlocutor, and the Lords of the Inner House simply reversed his decision, but specified the points of application of their judgment. They thought that fraud disposed of the action for calls as well as the action for reduction, and they framed their judgment accordingly. The first objection to the judgment of the Court below cannot therefore be supported.

Then as to the case itself. The principle applicable to cases where fraud is set up is the same in Equity as at Law. That principle was well laid down in *Evans* [512] v. *Bicknell* (6 Ves. 173), where it was held that to vitiate a contract on the ground of the statement of a misrepresentation, that statement must have been made with a view of deceiving some one in the particular way in which the person complaining of the statement says that he was deceived by it. That decision was followed soon after by the case of *Pasley v. Freeman* (3 Term Rep. 51), where the principle laid down was that the false representation must be made with the intent to defraud. Here there was no pretence for saying that such was the case. In *Langridge v. Levy* (2 M. and W. 519, affirmed 4 *id.* 337), the representation was false; it was so within the knowledge of the person who made it; it related to a simple fact, and not to a contingent calculation; it was made with a view to deceive, and it did deceive the party to whom it was addressed. That case, therefore, in no respect resembles the present. Nor is *Stainback v. Fernly* (9 Sim. 556) in point, for there the suit was

against the individual director, who had made and benefitted by the misrepresentation, and not against the Company. Besides which, there is this distinction running between the present case and all the cases that have been cited, that in no one of them is the question raised between a partnership and one of the partners, but it is always between party and party, the two persons having no partnership connection with each other. The case of *Winterbottom v. Wright* (10 Mee. and W. 109) shews that where the parties have, as they have here, distinct interests, the act of one will not make the other liable to damages.

[Lord Campbell.—But was not Gilmour here a [513] partner of the Company, and, as such, capable of affecting the other partners by his acts?]

He was not; for the members of this body formed a joint stock company, which is not like an ordinary partnership, because all the world knows that its affairs are managed in a particular way, and that no act of any individual partner will bind the rest.

As to another part of the case, it is contended on the other side that no partnership has been created here between the appellant and the Company, so as to bind the appellant, and the fact that he did not sign the minute in the books of the company, is relied on for the purpose of that argument. The answer is, that the stipulation that he should do so was only made for the protection of the company, and might be waived by the company without its rights being affected. *East Lothian Bank v. Turnbull* (3 Sh. and Dunl. 95). In the case of *Mangles v. The Preston Collier Company* (2 Railway Cas. 359), which followed and explained that of *Preston v. The same Company* (2 Railway Cases, 335), no note of the transfer was executed, yet the party was held liable; but here the note of the transfer has been executed, and the appellant's name has been enrolled in the books of the company. And even had that not been so in this country, the right of this appellant must have been decided by the law of Scotland, which has been declared in this House in the case of *Allan v. Turnbull* (7 Wils. and Sh. 281), where it was held that on shares assigned to bankers, the assignment being duly intimated to the company, the bankers became liable as partners, although the assignment was made in order to secure payment of a debt, and though cer-[514]-tain forms, prescribed by the contract of partnership as to transferring shares, had not been observed. This last-named case expressly recognised and adopted the decision in the *East Lothian Bank v. Turnbull*. On that point, therefore, it is clear that there must be judgment for the respondents.

There is no averment in the summons here, of fraud committed by the Directors, in declaring the dividends; but the appellant insists, that as these dividends turned out afterwards to have been unwisely made, they must be treated, so far as he is concerned, as if they were fraudulently made, for that he was deceived, by such dividends being declared, into the belief that the Company was in a prosperous condition. Such a mode of dealing with past events is an absurdity, and can form no ground for relieving the appellant from his liability.

The Attorney General in reply.—It is nothing to say here that this was a joint stock company; it was strictly a mercantile partnership, formed with a larger number of members than other partnerships, but with the absolute control in the members at large, for they might have special meetings at any time to regulate their affairs. Each partner was therefore liable, as in any partnership with the ordinary number of members. Gilmour got a benefit by these representations, which induced a solvent and a rich man, instead of a poor one, to become a member of the concern. So that, if that was necessary, the proof exists here of a benefit being the result of the misrepresentation. But no such proof is necessary. *Pasley v. Freeman* (3 Term Rep. 51). Here a member of a firm made false [515] representations. If he was an agent of the company, and if it was within his authority to make them, the firm cannot benefit by them because they are false. If he was not the company's agent, then the company cannot found any rights on acts which he had no authority to perform, especially as the appellant has not executed those instruments which, by the very constitution of the company, are conditions precedent to his becoming possessed of the rights of a member.

Lord Campbell (July 16).—My Lords, on the 28th of July, 1843, the Forth Marine Insurance Company, established in the year 1839 as a Joint Stock Company, with

transferrable shares, commenced an action against the appellant for calls, alleging that he had become a member of the company by purchasing and accepting the transfer of fifty shares, on the second day of December 1842. The calls sued for were, one ordered on the 19th of December 1842, of £20 per cent., and another ordered on the 21st of June 1843, of £15 per cent.

The appellant denied his liability as a shareholder; and on the 28th of May 1844, commenced an action of reduction against the company, and also against David M'Kenzie, for whom he had purchased the fifty shares, praying by his summons that the transfer of the shares to him might be set aside; that it should be declared that he never was a partner in the company, or liable as such; that he should be reponed and restored *in integrum*; that it should be declared that the said David M'Kenzie remained liable in respect of the fifty shares, and that the sum of £200, paid by him for the shares, should be repaid to him, with interest.

[516] No fraud was alleged against David M'Kenzie, but he made no defence, and there was a decree against him in absence.

The company making defences to the action of reduction, the Lord Ordinary very properly conjoined this action with the action at the suit of the company, for calls. In the conjoined actions there was one record, which set forth the condescendence of the company, with the answers of Mr. Burnes, and Mr. Burnes' statement of facts, with the answers of the company, and the pleas in law on both sides. The second and third pleas in law on behalf of the company, on which the case depends, were that Mr. Burnes's allegations are not relevant in law to protect him from the payment of the calls, or to support his action of reduction.

The case came on to be argued before Lord Wood, as Lord Ordinary; and he pronounced a decision which was made the subject of a reclaiming note to the Lords of the First Division of the Inner House. [His Lordship read the Lord Ordinary's interlocutor, the reclaiming note, and the interlocutor of the Lords of the First Division.]

From this interlocutor Mr. Burnes has appealed to your Lordships' house, and the first objection taken to it by his learned counsel is, that it finally disposes of both actions; whereas the Lord Ordinary had only decided a single point in the action of reduction, and had given no opinion respecting the action for calls, it being contended that the Inner House had exceeded its jurisdiction, which was confined to a review of the decision of the Lord Ordinary on the point which he had disposed of. This objection was not made in the Court below, where all the questions arising on both actions [517] were very copiously discussed, without any doubt as to jurisdiction, and it is not even hinted at in the cases laid on your Lordships' table. I am of opinion that it is wholly untenable. The reclaiming note professed, and did bring, both actions before the Inner House, and the Inner House, as the Court of Appeal, was empowered, and was bound to pronounce, the judgment which ought to have been pronounced by the Court of first instance. The Lord Ordinary, if he had thought fit, might have referred both actions at once to the Inner House, without deciding anything, and when the case came before the Inner House, upon the reclaiming note, an equally extensive jurisdiction was conferred upon the Judges there.

Another objection made by the appellant, of a formal nature, is that he had not subscribed an entry in the company's books, according to the seventeenth article of the deed of copartnery, which, upon a transfer of shares, requires such a subscription, and declares, "that no purchaser shall be deemed or entitled to exercise any of the rights of a partner, until this requisite be complied with." Although this objection was, after long argument, abandoned by the appellant's counsel in the Court below, they are not precluded from taking it here, as it is raised by the record, but I am of opinion that it was properly abandoned below, because it is untenable. Looking at the seventeenth and the preceding article, it is quite clear that the subscription in question is a duty cast upon the purchaser for the benefit of the company, and that he cannot resile from the contract because he has not performed it. If the deed of transfer stands, and Mr. Burnes had become a partner, there can be no defence to the action for calls. Every thing depends therefore on "whether the state-[518]-ments made by him in the action of reduction, are relevant to support the reductive conclusion thereof." As to that, facts must be averred with reasonable precision, facts which, if proved, would be sufficient to support the reductive con-

clusions of the summons. It is not enough to set forth general allegations of fraud, for by such allegations a party cannot take advantage of his own default. On the 2d of December 1842, there was a regular deed executed, to which Mr. Burnes was a party, and by which, with his consent, and with the privity and sanction of the company, the fifty shares were regularly transferred to him. Therefore it became his duty to see that the form specified in the 17th article was complied with. From his default, the company might have said that he was "not to be deemed or entitled to exercise any of the rights of a partner," but he is forbidden to avail himself of any such plea.

We come, therefore, to the question which the Lord Ordinary decided, apparently on the ground of the fraud charged against the defenders. Facts must be alleged which show that such a fraud has been practised by them upon him as will entitle him to the judgment which he prays.

I am first struck by a circumstance, which I do not find noticed in the Court below, that although it is sought to set aside the transfer as against M'Kenzie, it is likewise sought to fix upon him a continuing liability as a partner, and to have a decree pronounced by which, having sold his shares for £200, of which sum only a small portion came into his pocket, he would have to pay at least £1000 in respect of subsequent calls. As far as he is concerned, there really is no allegation of fraud to impeach the transaction, either in the sum-[519]-mons or condescendence. If the directors are liable to all the charges brought against them, he was sinned against as one of the innocent and betrayed shareholders. But if the directors cannot avail themselves of any defect in the case, so far as he is concerned, after the decree against him in absence, let us see what facts are alleged in respect of which the reduction is to be supported against the company.

It must be borne in mind, that the transfer now sought to be set aside, was executed on the 2d of December 1842, and that Mr. Burnes tells you that, till the preceding month of November, he knew nothing about the affairs of this company (being probably ignorant of its existence) and that he then became acquainted with it from the circumstances of David M'Kenzie, his clerk, being a shareholder, and unable to pay a call. Montrose is his usual place of residence, but he then happened to be in Edinburgh, and certain communications were made to him by Mr. Gilmour, who was the law agent to the Company, and had been employed by the Company in that capacity to sue M'Kenzie for the arrears.

Under these circumstances, the question arises whether the company is bound by the communications which Mr. Gilmour then made to Mr. Burnes respecting its commercial affairs and commercial prosperity; for if the company is not so bound, we need not consider the weight and effect of the representations then made. I am of opinion that in making these representations, he was not acting within the scope of his authority from the directors. He was employed by them only as a lawyer, to demand and sue for a debt due from a shareholder; and he had no authority to make any disclosure respecting the concerns or the condition [520] of the company to a stranger who contemplated the purchase of shares in the company.

It was hardly contended at the bar that the directors are bound by what Mr. Gilmour said or did on that occasion, merely because he was the law agent of the company; but it has been most strenuously urged that the directors are bound by all that he said and did, on the ground that he was himself a shareholder in the company. We are told that a Joint Stock Company (at least if not incorporated, and only empowered by a public act of parliament as this is, to sue and be sued by its officers) is in the same situation as any mercantile partnership consisting of two or three individuals carrying on business jointly under an ordinary deed of partnership or by a parol agreement among themselves of which the world is ignorant, in which case what is said or done by any one partner respecting the partnership business affects all the partners, although in violation of their agreement *inter se*. But why is this so? Because, carrying on business jointly under a common form, they hold out to the world that each of them has authority to manage the partnership concerns. Therefore all are bound by what each does in conducting the partnership business. All the members of the firm are liable to the *bona fide* holder of a bill of exchange, drawn, accepted, or indorsed by any one of them. But supposing that A., B., and C., entering into partnership, it is expressly stipulated that A. shall not draw, accept, or indorse bills in the partnership firm, and this stipulation is

known to X., he would have no remedy against B. and C. on a bill of exchange which he induced A. to draw, accept, or indorse. Therefore on the principle which regulates the liability of common parties, a distinction must be made between [521] a member of a common mercantile partnership and a shareholder in a joint stock company. No one will contend that a joint stock company would be liable on a bill of exchange, drawn, accepted, or indorsed by any one shareholder. Why? Because it is known that the power of carrying on the business of the company, and of drawing, accepting, and indorsing bills of exchange, is vested exclusively in the directors. This shews that, although a joint stock company is a partnership, it is a partnership of a different description, and attended with different incidents and liabilities from a partnership constituted between a few individuals who carry on business jointly, with equal powers and without transferrable shares. All who have dealings with a joint stock company know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such, has no power to contract for the company. For this purpose, it is wholly immaterial whether the company is incorporated or unincorporated. Here it is not alleged that Mr. Burnes knew that Mr. Gilmour was a shareholder, or that in respect of his being supposed to be a shareholder, he gave any faith to his representations. Mr. Burnes knew, or might have known, that there were nine directors appointed to manage the business of the company. He knew that Mr. Gilmour was not one of them, and he dealt with Mr. Gilmour merely as the law agent, employed to recover the arrears due from M'Kenzie. The doctrine contended for by the appellant would lead to the conclusion that a joint stock company is liable on any contract entered into by any shareholder within the scope of the business for carrying on which the company is established; and that any contract, regularly entered into with the [522] directors, may be vitiated by anything said or done by any shareholder, without the authority or privity of the directors. Considering the important transactions now carried on through the medium of joint stock companies, the doctrine is very alarming; but it rests on no principle, and no authority has been cited to support it. The case relied upon of *Stainback v. Fernley* (9 Sim. 566), I entirely approve of. But that was a bill filed by the purchaser of shares in a joint stock company against the vendor, who was alleged personally to have deceived the plaintiff by a false statement of material facts; and then, without affecting the interests of the company, the plaintiff sought repayment of the purchase money with interest, on re-transferring the shares to the defendant. The Vice Chancellor of England therefore rightly held that the plaintiff stated a case entitling him to relief.

We now come then to the allegations respecting the acts of the directors themselves; and if the plaintiff has been deceived and defrauded by them, and induced by them to purchase the shares by their false representations, the interlocutor must be reversed. I do not think it necessary even that the representations should have been made personally to him. If the directors have made false representations for the purpose of fictitiously enhancing the price of shares for their own benefit, and the appellant has thereby been deceived, and induced to purchase shares greatly beyond their value, the transfer of the shares, although executed, ought to be set aside. But the transfer having been executed, a clear and strong case of fraud ought to be established, and it must be shewn that the purchaser [523] of these shares was induced to purchase them by the deceit of the director.

You will observe that the misconduct imputed to these directors, resolves itself into misconduct as between them and the shareholders. The directors are not charged with any design to raise the value of the shares in the market fictitiously, for the purpose of obtaining a high price for shares to be sold on behalf of the company, or which they themselves held individually. Nor is any connection alleged between the supposed misconduct of the directors, and the purchase of the shares by the appellant. Their acts of imputed misconduct begin years before he had purchased or entertained any intention of purchasing shares, and surely it cannot be contended that the purchaser of shares in a joint stock company, when sued for calls, may get rid of his liability by shewing that at some past period the directors have misconducted themselves. Assuming that the accounts rendered by these directors to the shareholders were erroneous or false, there is no allegation that they

were ever brought to the notice of the appellant, except by Mr. Gilmour, or that he knew anything of their contents before November 1842, or that they were ever made public, or exhibited, except at a meeting of the shareholders. Suppose that an action should be brought by Mr. Burnes against the directors for a deceitful representation, whereby he was induced to purchase the shares at a fictitious value, what facts are alleged upon this record which could be used to support such an action? There are no allegations of that kind. Mr. Burnes himself attributes his unlucky purchase entirely to what passed between him and Mr. Gilmour, for which the directors are not answerable.

But looking to the accounts, they really cannot be [524] said to be false or fraudulent. It is not enough to bestow such epithets upon them, if, upon examination, they cannot be charged with falsehood. But the accounts rendered in June 1841 and June 1842, do not state what is false. There is in them no falsification of figures. They gave a true statement of the premiums received, and the adjusted losses. In a balance sheet, liquidated items can alone appear, either on the debtor or creditor side. The complaint that the balance sheet contained no statement, and made no estimate of pending risks, is absurd. Such a statement could not be introduced into a balance sheet; and if the business was prudently conducted, the greater the amount of pending risks, the more prosperous was the condition of the company. No estimate could be made of losses thereafter to occur, unless the directors had been endowed with the faculty of second sight, and could have discovered the shadows of coming shipwrecks and captures.

The grave part of the charge against the directors really resolves itself into the supposed fictitious dividends of £15 per cent., ordered in June 1841, and of £7 per cent., ordered in June 1842. I repeat what I threw out during the argument (and for which I had the high sanction of my noble and learned friend), that it is most nefarious conduct for the directors of a joint stock company, in order to raise the price of shares which they are to dispose of, to order a fictitious dividend to be paid out of the capital of the concern. Dividends are supposed to be paid out of profits only, and when directors order a dividend, to any given amount, without expressly saying so, they impliedly declare to the world that the company has made profits, which justify such a dividend. If no such profits have [525] been made, and the dividend is to be paid out of the capital of the concern, a gross fraud has been practised, and the directors are not only civilly liable to those whom they have deceived and injured, but, in my opinion, they are guilty of a conspiracy, for which they are liable to be prosecuted and punished. I am one of those who think Lord Cochrane was unjustly convicted of a conspiracy to raise, by false rumours, the price of the public securities for his own advantage, and to the injury of the King's subjects, who were deceived; but no one has gravely doubted that the imputed offence was one of a kind which amounted in point of law to a misdemeanor. There can be no doubt therefore that a conspiracy by falsehood (as by a fictitious dividend) to raise fictitiously the market value of shares of a railway company, or any other joint stock company, that the Queen's subjects may be deceived and injured, and that at their expense a profit may be made by the conspirators, would be an indictable offence.

But setting aside the objection that here there is no sufficient allegation to connect the supposed fraud with the act of the appellant, in purchasing the shares, how can it be said that the dividend was paid out of capital. The capital of the company consisted of the £10,000, paid up out of the £100,000 of the capital subscribed. The £1500 set aside for payment of the £15 per cent. in June 1841, and the £700 for payment of £7 per cent. in June 1842, were taken from premiums which had been received to a vastly greater amount. It might be imprudent to order these dividends, but it does not follow that they were ordered fraudulently, and there is no allegation that they were ordered in contemplation of the sale of any shares, either for the benefit of the company, or for the benefit of any of the direc-[526]-tors. There is no surmise even that the dividends were connected with any traffic in the shares of the company. I may observe that in such a concern as this, there must be infinite difficulty in fixing a fair dividend. In railroad companys, it must be comparatively easy, for there is no risk to calculate there, except (for which there ought to be a handsome reserve) that of killing a certain number of her Majesty's subjects.



The directors have only to take an account of receipts and outgoings, and, striking a balance according to the ordinary rules of arithmetic, to say how much is to be ascribed to each share. But the directors of a marine insurance company must look to the probabilities of war and peace, and take into consideration accounts of distant tempests, to which ships insured by them may have been exposed. If lives are insured, they must attend to the approach of the cholera, and the sanitary precautions adopted to meet it. This month there may be grounds for a good dividend, and the next month a call may be indispensable.

The fact is alleged, and not denied, that there having been a dividend ordered of £7 per cent. in June 1842, in the month of July following, a call was ordered of £10 per cent. The conduct of the directors in ordering a call so soon after a dividend, has been severely animadverted upon; but it might be perfectly justifiable, from the varying circumstances of the company, and at any rate Mr. Burnes has no right to complain of it, as a ground for the reduction of the transfer, for he himself admits that he was fully aware of it in November 1842, before he had purchased the shares, and before the transfer was executed. If such a coincidence of dividend and call be conclusive proof of insolvency, then he wittingly became a member of an [527] insolvent company, and there is no pretence for saying that he was deceived. But, in truth, he was perfectly satisfied with the bargain, till the subsequent calls were made, for which the original action was brought. I believe that his bargain was a very bad one, but he had only to blame his own want of caution in entering into it. If he had made inquiries of the directors, or the actuary, their authorized agent, to give information, he would probably have found that heavy losses had lately arisen, which could not have been properly introduced as items in any preceding balance sheet; but he was probably pleased with the amount of premiums, and calculated that these would all turn out to be pure profit.

However this may be, I concur in the unanimous opinion of the Judges of the First Division of the Court of Session, that he has not averred any facts which entitle him to be released from the engagement into which he deliberately entered as a shareholder of this company.

Looking to the facts which the appellant avers, and taking those facts to be true, I am of opinion they do not make out any case of fraud practised upon him, and that he must be left to suffer from the effects of his own imprudence. For these reasons I move that the interlocutor appealed from be affirmed, with costs.

Lord Brougham.—I entirely agree with my noble and learned friend in the conclusions at which he has arrived; and after the very able and elaborate manner in which he has gone into all the points of the case, both into the less important technical matter with which he prefaced his [528] argument, and into the merits of the case itself as to the allegations, and as to the facts proved, I so entirely go along with him in his view (with one exception indeed, with which I am about to qualify my assent), that it is unnecessary for me long to detain your Lordships.

In the first place, with respect to the preliminary objection which was taken at the Bar, which appears to me to have no force, I wish to state that I am not for reversing this decree, in respect of that preliminary objection. I mean the objection that both actions were not competently before the Lords of the First Division, when they gave their judgment; for I think that they were fully before the Judges of that Court.

I do not think it is necessary in support of the judgment below, or in support of our affirmance of that judgment, to say that the effect of a reclaiming petition was to bring both actions before the Inner House, as if they had been conjoined. Conjoining two actions is *pars judicis*, as is often said in the Scotch Law and practice, and therefore I am unwilling to say what the effect of a reclaiming note is, and whether that might be supposed to supply the defect of an interlocutor conjoining the two. It is quite unnecessary to state that, because I think this is fatal to it—which my noble and learned friend has already remarked, and upon which I rest my opinion as being a sufficient ground in itself,—that this was not objected to at the proper time and place. This objection ought, past all doubt, to have been taken in the Court below, where it was not taken; and whether the reclaiming note had so large an effect or not, at all events that note brought both interlocutors (as

I understand) before the Inner House, and with the reclaiming note the Court had to deal. The reclaim-[529]-ing note was the ground upon which the Court was called upon to decide, and it was upon the reclaiming note that the judgment proceeded. Then I say that, it is quite enough for me, in order to enable me to dispose of this merely technical objection, to say that it was not taken at the proper time and place.

As to the third technical point also, I entirely concur with my noble and learned friend.

Now we come to the argument upon the merits. There is a very great difference between a matter executory and a matter executed. Thus, for instance, if you have a bill for a specific performance, much less misrepresentation and fraud may be necessary to answer that bill and to call upon the Court to refuse to decree specific performance than would be required, after the execution of the contract, to set it aside. After the contract is executed, it would require a great deal more stringent proof of fraud, *dolus dans locum contractui*, to set the contract itself aside, than would be required to prevent its specific performance if the matter had rested *in fieri*, and had been executory merely. That was very distinctly stated in a celebrated case in this House—celebrated on account of the length of the litigation and its importance, and also on account of the position of the parties—namely *Harris v. Kemble* (2 Dow and Clark, 463), which was heard by Lord Plunket, Lord Eldon, and myself. In that case, that principle was very fully illustrated. But it is a matter past all doubt, and requiring no further argument or consideration.

But here was a contract executed. Mr. Burnes had purchased the shares, and he resists the calls made upon him by force of that contract. Under these circumstances, it would require a very strong case of [530] fraud; it would require not merely a general averment that there had been irregular conduct on the part of the directors, not only a general averment that they had behaved trickily (if I may so speak), but that there must be legal fraud, it must be *dolus dans locum contractui*. It is not enough for a man to say, If you had not given such an appearance of the flourishing state of affairs,—if you had not, by paying dividends out of capital (making the public believe that you were paying them out of profits), given this flourishing appearance to the concern by your own acts and deeds, I should never have bought my shares. That, I say, is not enough. You must shew that there has been some specific fraudulent conduct on the part of those directors,—some grossly fraudulent conduct which gave rise to the particular contract in question. It is not a general averment of *dolus*; it must be *dolus dans locum contractui*. That is the language of the Civil Law, which all nations have followed, and the general principles of which, in all matters of personal contract, constitute the law of all Europe at this moment. Now here there is no averment of any such fraud as that; and, as my noble and learned friend has well pointed out, if there had been such an averment, there is a failure of proof. Because, take the instance of the £1500, which was first paid, and of the £700 afterwards, both those dividends were paid out of premiums. It will not do to say,—If you had set down the premiums on the one side, and the actual and pending losses on the other, the gains and the losses would have so counterbalanced each other, that, striking a balance between the two at that particular moment when those two dividends were declared, they could not have been paid out of the premiums. That is not enough; that is not sufficiently fraudulent conduct, [531] happening as it did before the contract, and not connected in any way with the contract, to vitiate the proceedings to which the party may be said to have been so induced.

To illustrate the proposition that it is not every false representation by acts and deeds, whether by the conduct of an owner of property, or by the conduct of a body, such as a railway company represented by the directors, that would vitiate any contract that may be made, because those false representations by the proprietor or by the company may be said to have supplied a motive for the party contracting with them; to illustrate that proposition I will put a case.—But, first of all, let me say that I beg to be understood as going with those who view with the greatest severity the conduct of railway directors in declaring dividends which can only be paid out of capital, because I consider that that is, of itself, a most vicious and fraudulent course of conduct. It is telling the world that their profits are large.

when it may be that their profits are *nil*, or that their losses are large, with no profits. It is a false and fraudulent representation by act and deed, much to be reprobated; and I go the full length of what my noble and learned friend has laid down, that it would be a just ground, if a course of conduct of this sort were pursued, coupled with such circumstances as clearly to shew a fraudulent intent, for proceedings of a graver nature against these parties. I go along with him, too, in the illustration which he made use of, namely, that there was a clear ground in law for indicting Lord Dundonald (then Lord Cochrane) and his relative Mr. Butt and others for a conspiracy, but that the verdict was wrong, because I think the verdict was not borne out by the evidence. I mean, so far as Lord Cochrane was concerned. Mr. Johnson [532] fled, and there is no doubt that he was guilty; but Lord Cochrane and Mr. Butt, in my opinion, were not guilty, and they were erroneously convicted. I was counsel in the cause, and therefore I may be said to have viewed it with prejudice at the time; but I have since fully considered it, and I was one who gave the advice to his late Majesty to restore Lord Cochrane to his rank, as having been erroneously convicted. I never should have given that advice to my Sovereign, notwithstanding the illustrious services of that noble Lord, if I had not believed that he had been wrongly convicted. But that there was in law a conspiracy, for which a judgment of an infamous nature might pass upon the parties who were guilty in point of fact, I have no doubt, any more than has my noble and learned friend.

But, my Lords, I was just going to illustrate the point by this case. Suppose that a landlord, in order to make it appear that his tenants are very flourishing, and that his estate is very valuable, remits privately rent to his tenant; suppose he enables that tenant to live very comfortably, and even luxuriously in a comfortable farm house; and supposing all the while that this is owing to his remitting the rent, and perhaps even out of his capital doing something more for the tenant; and suppose that in consequence Lord A. or Sir John B.'s tenants are supposed to be very flourishing, and his estates to be very valuable; and suppose the consequence of that is, that after they have got this name in the world for five or six years, a man comes forward and bids for the estate, or a tenant comes forward to bid for and take the farm: it would be a very strong case to say that this little manoeuvre of the landlord to make things appear comfortable and better than they really were, would be such a fraud as [533] would entitle the tenant who had taken the farm, when he was called on to pay his rent, to say, "Oh, it was all owing to my seeing my predecessor in such comfortable circumstances that I was induced to become your tenant; therefore I will not answer your call" (the rent being in the nature of the call here). "I will not answer your call for my instalment, my next half-year's rent; it is a fraud you have committed, and therefore though I have executed the contract, you have yourself to blame." No such answer to a demand for rent could be allowed. But I do not know, if there were a bill for a specific performance of an agreement to take a lease, which had not actually been taken by the tenant, how far that would be an answer to that bill; but I am confident that no Court of Equity would, under those circumstances, set aside a contract or a lease which had been executed.

Upon the remaining parts of this case, my noble and learned friend having so elaborately argued them, I do not think it necessary to dwell. I agree entirely in the conclusions at which he has arrived; and I am of opinion, first, that there is no such fraud relevantly alleged as would be a sufficient answer to the action; and, secondly, that there is total absence of proof of such fraud as would entitle this party to have this contract set aside. I therefore entirely agree and support the motion of my noble and learned friend.

Interlocutor affirmed, with costs.

[534]

## IN COMMITTEE FOR PRIVILEGES.

The Earldom of CRAWFORD and Barony of LINDSAY [June 9, 17, July 4, 10, 1845; March 2, 16, May 8, July 30, 1846; June 22, July 5, 1847; May 16, June 28, August 11, 1848].

[*Mews'* Dig. vi. 536, 652, 915, 919, 920; x. 309, 312, 313.]

*Dignities, creation of—Course of Descent—New Patent—Evidence—Competency of Witness.*

In a claim to an ancient Scotch Dignity, if no patent or other instrument of Creation can be produced, it may be presumed that the Dignity was created by patent or charter, limiting it in the manner in which it has been actually enjoyed: And if that enjoyment be shewn to have been confined to heirs male, in exclusion of nearer heirs female, the Dignity must be held to be a male Honour, always descendible to the heirs male of the body of the first grantee.

Ancient documents of a public character, brought from the proper repository, are, in the absence of patents or Parliamentary records, admissible as evidence of the creation and existence of Peerages: And, *Semble*, that, by the law of Scotland, contemporaneous history is admissible for the same purpose.

An ancient Patent without the seal, but with the attestation thereof duly verified, is admissible evidence.

An ancient Scotch Dignity might, before the Union, be conveyed by the possessor, together with the territory thereto annexed, to another branch of the family, or even to a stranger, with the King's authority; or it might be resigned to the King, to be re-granted by a new patent, with different destinations and with its old precedence.

A witness, brought to prove a copy of an old document, should be able to read and understand the original when he compared the copy with it.

The petition of James Earl of Balcarras, presented to the Queen in 1843, claiming the above ancient Scotch Dignities (see 75 Lords' Jour. 327); and also the petition of Robert Lindsay Crawford, Esquire, presented to her Majesty in 1845, claiming the same and other Dignities (see 77 Lords' Jour. 109), were by her Majesty referred to the House of Lords, [535] and by the House to the Committee for Privileges, to inquire and report thereon.

The Committee sat, for the first time, the 9th of June 1845,\* when Mr. (afterwards Sir Fitz Roy) Kelly, Mr. Wortley, Mr. John Riddell (of the Scotch bar), and Sir John Bayley, appeared as counsel for the Earl of Balcarras. No counsel appeared for R. Lindsay Crawford, nor did he present a printed case to the House.

The Lord Advocate for Scotland, and the English Solicitor General attended on behalf of the Crown.

Mr. Kelly stated the claim of the Earl of Balcarras. His statement, abridged and corrected by the evidence, was, that Sir David Lindsay, Baron of Crawford and Glenesk—and supposed to be son-in-law of Robert II., King of Scotland,—was, on the 21st of April, 1398, created Earl of Crawford. No original patent, charter, or other written constitution of the Earldom is extant; certainly none has been found, after the most diligent search. There are, however, numerous public instruments,—besides contemporaneous history, which is admissible evidence (*Stair's Inst.*, b. iv., tit. xlii., § 16; *Ersk. Inst.*, b. iv., tit. ii. § 7. See also the Polwarth case in 1835) in

\* The Standing Order, No. 128 (now No. 86), requiring a claimant to a Peerage, within six weeks from the presenting of his petition to the House, to lay on the table his printed case, pedigree, and proofs, was dispensed with, on the claimant's petition, stating, that by reason of the length of time through which his pedigree had to be traced, and the multiplicity of proofs and authorities on which it depended, his counsel had not been able, with all his diligence, sooner to complete the preparation of his case. (77 Lords' J. 62.)

cases of ancient Scotch Peerages,—shewing that Sir David Lindsay was, at the [536] period above mentioned, created Earl of Crawford, and there is unquestionable evidence of the descent of the Dignity, for many generations, to the heirs male of his body, passing over the heirs female on several occasions. The rules of law, therefore, which have been recognised and acted upon by this House, in a great number of Peerage cases, are applicable to this, namely, that where no patent or other instrument of creation is found, it will be presumed that a patent was granted transmitting the Dignity in the line in which it has been actually enjoyed (the Sutherland Peerage Case, Lords' Jour. for 1766-71), and that when, as in this case, the enjoyment hitherto has been confined to heirs male, in exclusion frequently of nearer heirs female, the Dignity must be exclusively descendible to the heirs male of the body of the first grantee.\* Accordingly it will be shewn that the title and dignity of Earl of Crawford, upon the death of Earl David in 1406, descended to, and was enjoyed by, his son Alexander, [537] the second Earl, upon whose death, in or before 1439, it descended to his son and heir David, the third Earl of Crawford. He was also styled Lord Lindsay, a title probably anterior in date to the Earldom of Crawford, but which thereafter, for many generations, descended with it to the heirs male of the family, to the exclusion of heirs female, whence it must be inferred that the Barony also was a male Honour, and, according to the adjudged law before mentioned, it must still descend in the same manner.

David, the third Earl, was killed in battle, in 1445, leaving two sons, Alexander, called in his father's lifetime "Master of Crawford,"—a title common in Scotland to the eldest son,—who succeeded as the fourth Earl; and Walter, who became ancestor of the house of Edzell,—after mentioned as holding, in due course of law, the Earldom of Crawford. It is from that branch of the Lindsays, in the character of their direct male descendant, and also as heir male of David, the first grantee, that the Earl of Belcarras, on failure of nearer heirs male, claims to be entitled to both these Honours.

The said Alexander, fourth Earl, died in 1453, leaving two sons, David, the fifth Earl, and Alexander, named Sir Alexander Lindsay of Ochtermonsie. David, being a minor at his father's death, was ward to his uncle Walter during his minority. He was, in 1488, created Duke of Montrose (a title not now claimed), and died in or before the year 1497, leaving one surviving son (an elder son had pre-deceased, without issue), John, who became sixth Earl of Crawford, and fell at the battle of Flodden in 1513, without issue. He left two sisters, Margaret and [538] Elizabeth Lindsay, coparceners of line, and heirs at law not only of the said John, but also of all the antecedent Earls of Crawford and Lords Lindsay. Both these ladies married, and left issue, but neither of them, or their issue, succeeded to the Honours or to the estates which went to the collateral heir male, the said Sir Alexander Lindsay, of Ochtermonsie. This was the first occasion on which female heirs were passed over.

Alexander, the seventh Earl, died in or before 1517, and was succeeded by his eldest son David, the eighth Earl, who died in 1542, leaving an only surviving son, Alexander, called "the wicked Master,"—wicked for having attempted the life of his father. Having thereby incurred the crime and penalties of parricide, according to the law of Scotland, he and his posterity became virtually extinct, and the succession to the Honours, and also to the estates, which were limited in strict entail, to heirs male, opened to the next collateral heir male. That was David Lindsay of Edzell, the great grandson and lineal heir male of the said Walter, the first of that family, and direct

\* The Earldom of Cassilis and Barony of Kennedy, Lords' Jour. for 1762; Barony of Borthwick, *Ibid.*; Barony of Spynie, Lords' Jour. for 1785; and Barony and Dukedom of Roxburghe, Lords' Jour. for 1812. This rule of law, applicable to the ancient Peerages of Scotland,—all which are supposed to have been created by patents,—has probably governed the descent of the ancient Peerages of Ireland also, although it is not known how they were created: (See the Slane Peerage Case, 5 Clark and Fin. pp. 23 and 69.) But the ancient Peerages of England, anterior to creations by patent in the time of Rich II., were constituted by writ of summons to Parliament, and sitting therein, and are descendible in fee tail, that is, to the heirs general of the body of the first grantee: (See the Vaux Peerage Case, 5 Cl. and Fin. 526; the Braye and Camoys Cases, 6 Cl. and Fin. pp. 757 and 789; and the Hastings Peerage Case, 8 Cl. and Fin. 144.)

ancestor of this claimant; and his succession affords sufficient proof of the extinction of all preferable heirs male, sprung from the main or eldest branch of the family. David, having thus become the ninth Earl of Crawford, and Lord Lindsay, upon the death of the eighth, in 1542, had issue a son, also named David, to whom the dignities would in due course pass, but for the generosity of the father, who, considering that they had come to himself from the elder branch, and that the "wicked Master" had left an only son,—who, though innocent of the father's crime, yet was involved in the consequences,—determined to surrender the Dignities to the Crown, in order that they might be reconveyed, together with the [539] estates,—subject to his own life-rent and to the reversion to his descendants,—to the son of him who forfeited them. Accordingly, upon the death of David, the ninth Earl, in 1588, the Dignities returned from the collateral, to the first and principal line, and vested in David, son of the wicked Master, the ninth Earl. All this was done with the sanction of the Crown, by a sufficient instrument, to be given in evidence, and it will be further shewn that this David was summoned to Parliament by the title of Earl of Crawford, which would of itself be conclusive upon his being in lawful possession of that Dignity.

It appears, therefore, that with the one exception, the Earldom descended regularly, in the direct male line, from the first Earl to the tenth, who thus had in himself both Dignities, as if there was no interruption of the descent. He died in 1575, leaving four sons; David, Henry, John, and Alexander (created Lord Spynie by James VI.) and was succeeded by David, eleventh Earl, who was succeeded by his son David, twelfth Earl, who died in 1621, leaving only a daughter, Jane, who lived to 1663; but she did not enjoy the Dignities, which passed to the said Henry, next brother of her grandfather, and heir male of him and of her father. This was the second instance of exclusion of nearer heirs female.

Henry, the thirteenth Earl, had four sons, John, George, Alexander, and Ludovick. John died in his father's lifetime, leaving two daughters only, Margaret and Jean. They did not enjoy the dignities, which, to their exclusion—the third instance of the exclusion of heirs female,—passed to their uncle George, the fourteenth Earl, who also left only a daughter; and on his death, in 1623, his next brother, Alexander, succeeded as fifteenth Earl, to the exclusion of the daughter. He died without issue, in 1639, when his next brother, Ludovick, succeeded to both the Dignities.

It appears, therefore, that down to this period, the honours descended lineally to the heirs male of the first grantee. The temporary enjoyment of them by David, ninth Earl, forms no exception; because by the constructive parricide of the "wicked Master," he and his descendants were, as it were, rooted out of the succession, and David of Edzell succeeded, as nearest lawful heir male. On four different occasions, the heirs female of line were excluded. In the Sutherland Case, one instance of enjoyment by a female in 1514, was held to determine the course of descent of that Dignity, the original constitution of which, like the present, was unknown. The course of descent to males only, established fourfold in the succession to the Crawford Peerage, could not be changed except by some solemn counter-*rei-interventus* of later date, which was attempted thus:

Ludovick, sixteenth Earl, having no issue, and being himself the last male descendant of the original grantee, in the main line, determined, in manifest injustice to the house of Edzell, the next heirs male, to divert the succession to another branch, and with that view he, being attached to Charles I., in 1642, prevailed on him to accept a surrender of the Earldom of Crawford, and to regrant that Dignity by a new patent, with the ancient precedency, to himself and the heirs male of his body, whom failing, to John Earl of Lindsay of Byres, (the representative of a branch sprung from the main Crawford line of the Lindsays before the creation of the Earldom) and the heirs male of his body, "*quibus deficientibus, haeredibus* [541] *masculis dicti Ludovici Comitis de Crawford quibuscunque, cognomen et insignia familiae de Crawford gerentibus.*" This patent, however unjust to the Edzell branch, was perfectly valid, being founded on an unexceptionable resignation of the Dignity, and new grant by the Crown, the fountain of Honors, and it became the regulating patent of the Earldom of Crawford. The only alteration made by it in the destination of the Earldom, was the interpolation of the said Earl of Lindsay, and the heirs male of his body, on whose extinction, the Dignity was, in the very terms of the patent, to revert to the "heirs male whomsoever," of Ludovick. The Earl of Bal-

carras sustains that character, as well as the character of heir male of the body of Earl David, the first grantee.

On the death of Ludovick, without issue, the said John Earl of Lindsay succeeded, as seventeenth Earl of Crawford, and being a Covenanter, he obtained from the then Scotch Parliament a new patent,—even in Earl Ludovick's life time, and in exclusion of him,—extending the succession to his own heirs general; but that patent being void, as unauthorized by the King, and for other reasons,—not necessary to be stated,—no succession took place under it (see rescissory Acts (Scotch) of 1661). After the death of this John, in 1677, the Crawford Dignity descended lineally to his eldest son, grandson, and great grandson, the eighteenth, nineteenth, and twentieth Earls. On the death of the last of these, without issue, in 1755, leaving two sisters, heirs of line, the Dignity passed over them,—another instance of exclusion of heirs female, proving that the original course of descent to heirs male was not altered by [542] the patent of 1642,—and went to George Lindsay, fourth Viscount Garnock, who was the great grandson and direct heir male of Patrick Lindsay of Kilbirnie, the second son of John, the seventeenth Earl. This George, the twenty-first Earl of Crawford, was succeeded by his son George, the twenty-second Earl, who died in 1808, without issue, whereupon the entire male line of the Lindsays of Byres, descended from John the seventeenth Earl, having been spent, the succession opened, in the terms of the last remainder in the patent of 1642, to the “heirs male whomsoever” of Earl Ludovick, the patentee. His nearest collateral heirs male, the Lindsays, Lords Spynie, who, like him, were descended from David, the tenth Earl, having also been extinct, from the year 1685, the Earldom of Crawford reverted to the Edzell branch, which, in 1808, was represented by Alexander, sixth Earl of Balcarras, who was then the heir male and lineal descendant of David of Edzell, the ninth Earl of Crawford before mentioned, being the great great grandson of Sir David Lindsay, first Earl of Balcarras, who was the son and heir of John Lindsay, second son of the said ninth Earl of Crawford, whose first son's issue male was extinct before 1750. Alexander, sixth Earl of Balcarras,—and, *de jure*, twenty-third Earl of Crawford, though he did not take that title, being ignorant of the existence of the patent of 1642,—died in 1825, and was succeeded, in all his Honours, by his only son, the present Earl of Balcarras, who claims not only to be Earl of Crawford, but also Lord Lindsay, which latter Dignity was not comprised in or affected by the patent of 1642, but descends to this claimant, as heir male not only of Ludovick, sixteenth Earl, but also of David, third Earl of Crawford, the [543] first ascertained Lord Lindsay. The Barony has in fact been dormant since the death of Earl Ludovick.

Of the patent of 1642 there is no record, no registration, or enrolment, to be found; but the patent itself has been found, and will be produced in evidence. It has, like many ancient patents, lost its seal, but the attestation of the officer who countersigned it is perfect.

[Lord Campbell.—There are many cases of ancient instruments having lost their seals, but the attestation being appended and verified, they have been held valid.]

The genuineness of the signature of Sir John Scott, of Scotstarvet, who was the proper officer to countersign this patent, will be verified, and the whole instrument, except the seal, will be produced. A similar instance occurred in the late investigation in the Annandale Peerage.\* There the patent of the Earldom of Hartfell was admitted, although it wanted the seal, there remaining only part of the label or tag that connected the seal with the patent. Although it is perfectly immaterial to the Earl of Balcarras whether the patent of 1642 was ever granted or not, because he can establish his claim to the Dignities independently of it, as heir male of David, third Earl of Crawford, Lord Lindsay; still, as the patent has governed the descent of the Earldom for two centuries, and this claimant falls within the terms of the last remainder, to “the heirs male whomsoever” of Ludovick the patentee, he comes prepared to establish his right also under that patent.

[544] The evidence given in support of the claim was divided into six principal heads, corresponding with the branch lines of the claimant's pedigree. The first head comprised the descent of the Dignity of Crawford, in the direct line, from its creation to the date of the new patent, in 1642.

\* The claim to that Peerage—which was for a long time before the House—was in 1844 declared “not made out.” It has not been reported, because the claimant presented a new petition, which, however, has not yet come on for hearing.

To prove that Sir David Lindsay was created Earl of Crawford on, or soon after, the 21st of April 1398, Mr Carnegie, writer to the signet, produced a copy of an old Exchequer Roll of the Great Chamberlain of Scotland, taken from the original in her Majesty's General Register House in Edinburgh,—the proper depository for all such public documents. It was entitled, "*Compotum Domini Roberti Ducis Albanie, etc., Camerarii Scotie, etc.*," being an account of the Chamberlain's official receipts and disbursements, from the 3d of June 1397, to the 2d of May 1398; and it contained an item of £69 6s. 4d., for expences of the King's household at Scone and at Perth, "*tempore quo tentum fuit scaccarium, quo etiam tempore tentum fuit consilium regis ibidem, super multis punctis et articulis necessariis pro negotiis regni et reipublicae; et FACTUS FUIT DUX DE ROTHESAY, dominus David primogenitus Regis, Comes de Carric; et Dominus Robertus, germanus Regis Comes de Fyff et Menteth, FACTUS FUIT DUX ALBANIE; et DOMINUS DAVID DE LINDESAY, FACTUS FUIT COMES DE CRAWFORDE,*" etc.

Witness said that this copy was made by a clerk in the Register House, and it was compared with the original with the assistance of Mr. Home, another clerk, much experienced in reading and copying ancient writings, who first read the original, while witness perused the copy, and then read the copy while witness held the [545] original; he would not say positively that he could read and understand the original, which was in the old character, without taking more time.

The Lord Chancellor (Lord Lyndhurst), and Lord Brougham,\* and other Lords of the Committee, said they were of opinion that a witness should be brought, who could speak, from his own knowledge of the correctness of the copy.

Mr. Home was accordingly brought, and examined on a subsequent day. He said he was a writing clerk in her Majesty's Chancery Office; was conversant with the Latin, and the handwriting of the period of the date of this document; he and Mr. Carnegie compared the copy with the original, interchangeably, that is, witness reading the original, Carnegie looking at the copy, *et vice versa*. The copy was made by Mr. Lowe, a clerk in the Register House, and was a correct copy.

Mr. Lowe also was examined. He said he made this copy from the original, and had acquaintance enough with the Latin and writing of the periods as to be able to say this was a correct copy; it contained the same abbreviations as the original.

The document was then received, and Mr. Carnegie read the material passages.

Lord Brougham said, all that the committee decided was, that the witnesses were competent, and the document admissible; its effect was to be matter of future consideration, when the evidence was printed.

The claimant's counsel suggested that it would be a [546] saving of expense to the claimant, and useful to the Committee, if, instead of printing this and other documents at length, the agents for the claimant and the Crown would select for printing such parts of them as were material.

The Lord Advocate assented, and the Lords of the Committee approved of that course.

To prove that there was an Earl of Crawford in Scotland in the year 1398, a Scotch Roll of the 19th of October of that year, being the 22d Richard II. of England, was produced by a clerk from the Record Office of the Tower of London, and he read an extract therefrom, purporting to be a safe conduct to David Earl of Crawford, to come into England with thirty knights in his train. An examined copy of the extract was delivered in, and five similar Scotch Rolls were produced consecutively from the Tower (*Rotuli Scotie*, in the Tower of London), the first being of the 6th year of Henry IV. (1405), giving a safe conduct to England to the same David Earl of Crawford; the second being of the 8th and 9th Henry IV. (1407), giving a safe conduct to Alexander Earl of Crawford; a third being of the 9th and 10th of Henry V. (1421), containing the names of hostages for James the First, King of Scotland, and among them Alexander Earl of Crawford; the fourth being of the 19th of Henry VI. (1438) appointing conservators of the truce between England and Scotland, among them the said Alexander Earl of Crawford; and the fifth being a treaty in the 31st

\* Their Lordships, and also the Earl of Devon, Lord Campbell, and Lord Redesdale generally attended in the Committee. Lord Cottenham did not attend until 1847, when, being Lord Chancellor, he attended regularly.



of Henry VI. (1453) between the two kingdoms, contracted by certain commissioners, including, on the part of Scotland, Alexander Earl of Crawford (this was Alexander, not the second, but fourth, Earl). [547] The material parts of all these rolls were read, and examined copies of the extracts were delivered in.\*

Various charters, *compotums*, and other documents of a public nature, were produced from the General Register House in Edinburgh, and also deeds of entail and settlement, from family-muniment repositories, to shew that David, the first Earl, died in 1406, and left a son, Alexander, who was the second Earl of Crawford, and that he was succeeded by his son David, third Earl, who in some of these documents was also called Lord Lindsay. It appeared by the further evidence that the successors of this David in the Earldom were also respectively called Lord Lindsay, down to and inclusive of Ludovick, the sixteenth Earl of Crawford.

The *Rotuli Scotiae*, printed by the Record Commissioners, were offered to shew by one of them, with other evidence, that David, son of Alexander, the fourth Earl, succeeded him in 1453-4, and afterwards on attaining his age, sat in the General Council or Parliament of Scotland, as Earl of Crawford (the fifth) and Lord Lindsay, but were rejected, because it was not shewn that the original roll was not extant. This was afterwards produced and admitted.

[548] To prove that John, son of this David, and sixth Earl of Crawford, left two sisters, his heirs of line surviving, yet that he was succeeded in the Earldom, and also in the title of Lord Lindsay, by his uncle Alexander Lindsay of Ochtermontzie, second son of Alexander, fourth Earl, in exclusion of the sisters, an act or order of the Supreme Civil Court, dated in 1515, mentioning "Margaret Lindsay and Elizabeth Lindsay, sisters and heirs of the late (*umquhile*) John Earl of Crawford," as parties to the cause; and also an Act of Parliament or General Council held at Perth in 1513, and entered in the *Acta Dominorum Concilii*, in which this Alexander was mentioned as Earl of Crawford; and also an act of a General Council held in Edinburgh in 1515, mentioning this Alexander Earl of Crawford as heir and successor of John Earl of Crawford, his nephew, were produced from the General Register House, and were admitted. And to shew the devolution of the Crawford estates in the same manner, a deed of entail and a royal charter of confirmation thereof, obtained by David, fifth Earl, in 1474, limiting the estates to him and "the heirs male of his body, whom failing, to his heirs male whomsoever," were produced from the proper custody, and admitted.

To prove the forfeiture of the succession by Alexander, the "Wicked Master"—for himself and the heirs of his body only,—and that upon the death of his father, eighth Earl, in 1542, the dignities and estates passed to David Lindsay of Edzell, as the next collateral heir male, the record of the indictment and conviction of the said "Wicked Master" and *quasi* parricide for laying violent hands on his father, before the High Court of Justiciary in 1530, and several royal charters, including the said charter of entail of 1474, and other [549] documents, some of a public, others of a private nature, all produced from the proper repositories, were put in evidence. The subsequent resignation and conveyance of the estates by David, ninth Earl, in favour of David, son of the "Wicked Master,"—with reservation of his own life interest and of his descendants' right of succession in failure of direct heirs male of the last-named David,—was proved by a bond or obligation entered into by him, reciting the conviction, etc., of his father, and the proposed resignation by the ninth Earl; by the instrument of resignation, and by a royal charter of confirmation, all dated in 1546; and the succession of David, the tenth Earl,—so restored,—was proved by a summons to Parliament in 1554, and by special retours, dated respectively in 1562 and 1594.

\* The claimant's agents were prepared with extracts from contemporary historians, as Bower (vol. ii., p. 422, edit. Goodal) and Wynton (vol. ii., p. 381, edit. Macpherson), stating that Sir David Lindsay was created Earl of Crawford in 1398; but the counsel did not offer them in evidence, conceiving that the creation of the dignity had been sufficiently proved by the documents already admitted; nor was it certain that the Lords would admit them, having rejected similar extracts upon a claim to an English peerage. See The Vaux Peerage Case, 5 Clark and Fennelly, 538.

To prove that David, twelfth Earl, died in 1621 without male issue, leaving an only daughter, Lady Jean, his heir of line, surviving, yet that she was passed over (the second instance of exclusion of heirs female), and the estates and dignities descended to her grand uncle, Sir Harry Lindsay, of Carrieston,—who was the second son of the tenth Earl, and, being then the nearest heir male, became thirteenth Earl.

Numerous instruments—including a grant of a pension by Charles II., in 1663, to “Ladie Jeane Lindsay, onlie daughter to the deceased David Erle of Crawford,” decrees of court, special retours, acts and rolls of Parliament, and royal charters of entail,—some of which were previously adduced for other purposes,—were produced and admitted, some absolutely, and some only *de bene esse*. To prove that John, eldest son of Henry, thirteenth Earl, etc., predeceased his father in 1615, and left issue only two daughters, and that on the death of the thirteenth Earl in 1627, the estates and dignities, [550] in exclusion of these two grand-daughters and heirs of line then alive, passed to his second son, George, who then, as nearest heir male, became fourteenth Earl.

A charter by James VI., dated 1614, an interlocutor of the Supreme Civil Court in 1618, a deed of contract dated in 1625, duly registered, mentioning “George Earl of Crawford Lord Lindsay,” as a party thereto, letters of inhibition in 1627, at the instance of “Margaret and Jean Lindesayes, onlie lawfull daughters and aeris,” etc., “of *umquhile* Sir John Lindsey,” etc., were produced, with other evidence, and admitted. And in proof of the fourth instance of exclusion of females from the succession to the Honours, it was shewn by a charter of 1631, by general retours of 1639 and 1653, and by a roll of the nobles present in the Parliament of 1635,—containing a protest by “Ludovick Earl of Crawford,” in support of his precedence,—that on the death of George fourteenth Earl, leaving a daughter Margaret, his only child and heir of line, she was passed over, and her uncle Alexander, next brother of George, succeeded; and that on his death in 1639 without issue, the said Margaret still living, the dignities and estates were possessed by the said Ludovick, sixteenth Earl, who was a younger brother of the said George and Alexander.

To prove that Earl Ludovick resigned the Earldom to the Crown, in 1642, and obtained a re-grant and patent thereof,—with the original precedence,—to him and the heirs male of his body, to be procreated—he then having no children,—remainder to John Earl of Lindsay, and the heirs male of his body, remainder to Earl Ludovick’s heirs *male whomsoever*, the patent itself was offered to be put in evidence.

Objections to its reception were taken by the Attor-[551]-ney General and Lord Advocate, on the grounds that it was not registered or otherwise authenticated as genuine, and that there was no seal to it.

To meet these objections, numerous witnesses were examined, and it was shewn, *first*, that the register for the year 1642 was defective, twelve folios being wanting in that part where the patent ought to be recorded, according to the reference in the index, mentioning “*Diploma Ludovici Comitis de Crawfordie*”; *secondly*, that the patent was produced from the proper custody, having been first found among the title deeds to the Crawford estates in the muniment room of Lady Mary Lindsay, who was the sole surviving sister and heir of George, the twenty-second and last Earl, and died without issue in 1833, when all these title deeds were inventoried and taken into the custody of the sheriff and other official persons, pending a litigation in respect of the estates, and afterwards of the agents of the Earl of Glasgow, after his right to the succession to the estates, under a modern entail, was established, and by these agents the patent was produced; and, *thirdly*, that the words endorsed on the patent, “sealed the 27th January, 1642, Ro. Haldane;” and “written to the Great Seal, 25th January, 1642, J. Scottistarrvett,” imported actual sealing of the patent, or were equivalent thereto, and that the word “regrat,” also endorsed, coupled with the former words, meant that the instrument was registered. That J. Scott, of Scottistarrvett, was, in 1642, “Director of Chancery,” the proper officer to attest patents, was shewn by production of the instruments of his and his successor’s appointments; and the witnesses who spoke to the genuineness of the signature, “J. Scottistarrvett,” said they acquired and had in their minds a distinct knowledge of it from seeing it af-[552]-fixed to other ancient documents in the Register House, which were always admitted to be genuine.

The patent was held by the Committee to be admissible, and was read as follows :—

Carolus Dei Gratia, etc. *Sciatis nos dedisse et concessisse tenoreq' p'ntium dare et concedere predilecto nostro consanguineo Ludovico comiti de Crawford ac heredibus masculis de corpore suo legitime procreandis, quibus deficientibus predilecto nostro consanguineo et consiliario Joanni comiti de Lindsay ac heredibus masculis de corpore suo procreatis seu procreandis, quibus deficientibus heredibus masculis dicti Ludovici comitis de Crawford quibuscunq' cognomen et insignia familie de Crawford geren', titulum et dignitatem ad dictum Ludovicum comitem de Crawford spectan' tanquam heredem deservitum et retornatum majoribus suis antiquis comitibus de Crawford a multis retro seculis in dicto honore et dignitate; quiquidem titulus honoris et dignitatis dimissus et resignatus fuit per eum eiusq' procuratores eius nomine in manibus nostris pro hac p'nti renovatione eiusdem memorato Ludovico comiti de Crawford ac heredibus masculis de corpore suo procreandis, quibus deficientibus dicto Joanni, etc.* (The above limitations were repeated.) *Preterea nos ob multa preclara servitia nobis et nostris illustrissimis progenitoribus per dict' Ludovicum comitem de Crawford et Joannem comitem de Lindsay eorumq' predecessores prestita dedimus et concessimus tenoreq' p'ntium damus et concedimus memorato Ludovico comiti de Crawford ac heredibus masculis de corpore suo procreandis, quibus deficientibus dicto Joanni, etc.* (the limitations again repeated), *dictum titulum honorem et dignitatem comitum de Crawford secundum antiquam precedentiam aliaq' privilegia comitibus de Crawford a data eorum primae creationis in comites debita vel secundum alia diplomata et autentica scripta continen' tempora et datas dict' tituli et dignitatis comitatus per eos secundum datas eorundem omni tempore futuro fruend' ; Tenendum et habendum totum et integrum predictum titulum honorem et dignitatem memoratis Ludovico comiti de Crawford, etc.* In cujus rei testimonium p'ntibus magnum sigillum nostrum apponi precepimus. Apud aulam nostram de Windisore, 1642.—*Per Signaturam S. D. N. Regis supra script.*

The following words were endorsed: "Sealit, 27th January, 1642, Ro. Haldane," and "written to the Great Seall, 25th January, 1642, J. Scottistarrvett."

Under the second head of evidence were comprised documents of various kinds,—as, deeds and charters of entail and confirmation, infeoffments, special and general [553] retours, Parliament rolls, Exchequer rolls and charters, decrees of Court and adjudications, etc.—showing the death of Ludovick, the 16th Earl of Crawford Lord Lindsay, in or about 1648, without issue, and the succession of John Earl of Lindsay (of the Byres Branch), as 17th Earl of Crawford (with the original precedence), under the first remainder in the patent of 1642, and the descent of the Earldom to his eldest son and grandson and great grandson, the 18th, 19th, and 20th Earls, on the death of the last of whom, leaving only sisters his heirs, the Earldom passed over them to the male descendants of the 17th Earl's second son, namely, George, 4th Viscount Garnock, the 21st Earl, and on his death to his son George, 22d and last Earl, who died in 1808, leaving Lady Mary Lindsay, before mentioned, his sister and heir.

No objection was made to the admission of these documents.

The evidence under the third, fourth, and fifth heads, consisting principally of similar documents, went to extinguish the representatives of the several branches of the Lindsays, prior in right to the Balcarras, (the claimant's) branch; and, first as to the Spynie Branch, descended from a younger son of the 10th Earl of Crawford, the counsel for the claimant proposed to put in, among other evidence, minutes of proceedings before the House in 1785, upon the claim of Colonel Fullarton to the Barony of Spynie, wherein it appeared that the then Attorney General, on behalf of the Crown, had admitted the correctness of the pedigree exhibited by that claimant, showing that the last heir male of that branch was dead.

The Committee, upon objection taken by the Lord Advocate, decided that such an admission was of no [554] value in the present case. Their Lordships, however, received the minutes, *quantum valeant*, for other purposes, especially the final resolution of the House, which was "that, although the original creation of the Barony of Spynie had not been shewn, yet it appeared from the evidence that the descent was limited to heirs male, and consequently that Colonel Fullarton, claiming through a female, had no right to the peerage." From this resolution, and from the non-appearance of any heir male on that occasion, the Counsel for the claimant

in the present case argued, that it should be presumed that the heirs male in the Spynie line were long extinct; *de non apparentibus et de non existentibus eadem est ratio*. In the Roscommon Peerage Case (6 Clark and Fennelly, 127), Lord Redesdale said, that non-claim by heirs male in that case was just ground to presume that none existed.

The evidence, after extinguishing the younger sons of the 7th and 8th Earls, proceeded to the extinction of the male descendants of the eldest son of David of Edzell, 9th Earl.

The Attorney General submitted, in respect to several of the documents offered in evidence for that purpose, that proofs should be given of the genuineness of the signatures.

The Committee held, that as the documents had all the appearance of old official instruments, and came from the proper custody,—the custody in which they would be, if genuine,—they ought to be admitted, with liberty, however, to the Attorney General to show afterwards, by reference to authorities, that further proof of their genuineness should be given.

[555] The claimant's counsel, in reply to a question from the Attorney General, said they had no evidence shewing the existence or extinction of several persons named in the Pedigree; that those names were inserted because they were mentioned in Peerage Books, in which it was also stated that they had died without issue.

The Attorney General submitted that Peerage Books were not to be received in evidence, and, if they were to be so offered, notice thereof should have been given.

Lord Lyndhurst, and other Lords of the Committee, said that as the Peerage Books, in which alone those persons' names were found, stated also their deaths without issue, they were in fact extinguished by the same evidence that raised them, as Lord Redesdale said in another case (the Roscommon Peerage, 6 Clark and F. 129-30).

The Reverend David Lyell, a witness aged seventy-six, descended from a female of the elder Edzell line, said he heard from his father and aunts, who all died at great ages before the year 1800, that David Lindsay, who died in 1744, was the last male heir of that line, and that the estates belonging to that family came by purchase to the families of Lord Panmure, Lord Balcarras, and the Fotheringhams. The ancient title deeds to the estates were produced from the muniment chests of those families, in further proof of the extinction of male heirs of the Edzell branch, and much parol testimony leading to that conclusion was given by witnesses who were descended from females of that branch, and spoke of conversations and traditions in their families.

In proof of the extinction of the Lindsays of the Garnock branch of the Byres line, the following evidence was given;—first, proceedings in 1746, in [556] an administration of the goods of Charles Crawford (of that branch), “a bachelor,” granted to Neal McNeal of Ugadale, “the husband and lawful attorney of Margaret Crawford, sister and next of kin of the deceased,” were produced from Doctors' Commons. Next the power of attorney signed “Margaret Crawford,” authorising her said husband to sue out the administration, was produced from the Ugadale charter chests, and received. Then two letters, produced from the Ugadale chest, purporting to have been written by Margaret Crawford to relations, one of them dated 1764, being signed by her, were offered to be put in.

The counsel for the Crown objected to the reception of these letters, first, because they were not produced from the proper custody,—which they contended was the custody of the persons to whom they purported to have been written, or their descendants; and, secondly, because the hand-writing was not verified.

The witness who produced them said he found them with the power of attorney, and other documents and letters signed Margaret Crawford, in the muniment chest of the McNeals, of Ugadale. They were without post-mark or folding, and appeared to be drafts or reserved copies,—though not so marked,—in holograph of the party, whose signature, “Margaret Crawford,” was to one of them. He considered it possible that the one dated 1764, and signed, was a draft, and that a copy was written and sent to the party (Lord Bute), to whom it was addressed.

Another witness (Mr. Melville, from the General Register House in Edinburgh), much accustomed to documents in old handwriting, said he had, on a former day, most carefully and repeatedly inspected the signature “Margaret Crawford,” to the

power of attorney [557] (before received), so as to be able, from the knowledge acquired by him of the character of the handwriting from such inspection of that signature, and of the same signature to other documents, to say, without immediate comparison or reference to it, that these letters, particularly the signature to one of them, were written by the same hand.

The Committee received both letters, at first *de bene esse*, subject to argument at a future sitting, as to their absolute admissibility. Their Lordships, at a subsequent sitting, held, without hearing any argument, that the letter signed "Margaret Crawford" was admissible as a declaration of the state of the family by a member of the family.

The second letter appearing afterwards to be very material to meet objections made by the Lord Advocate to the incompleteness of the extinctions in the Garnock line, Mr. Melville was again brought, and being examined, and cross-examined at great length, he answered to this effect; that from having repeatedly examined the letter last admitted, and the signature to it, as well as the signature to the power of attorney previously admitted, he had such knowledge and distinct impression in his mind of the handwriting, that he should be able to say whether or not any other letter shewn to him was written by the same person, and that, without immediate comparison of the signatures or letters. This letter being then shewn to him, he said "he believed, in fact he had no doubt, it was written by the same person who wrote the letter signed 'Margaret Crawford.'"

The Committee, after hearing the question of the admissibility of this letter argued at great length, by the [558] counsel for the claimant and for the Crown,\* decided that it was admissible as a declaration, like the former, of the state of the family, and, in that view of it coming from the proper custody.

The evidence adduced under the sixth and last head, went to shew the descent of the claimant from David Lindsay, of Edzell, ninth Earl of Crawford and Lord Lindsay, through his second son John Lindsay, of Balcarras, whose lineal male descendant, James, 5th Earl of Balcarras, and grandfather of the claimant, became, in 1744, the nearest heir male of the Lindsay, of Crawford and Lindsay of Edzell lines, on the death, without issue in that year of David Lindsay, the then male heir of both lines.

Lord Lindsay, the claimant's eldest son, examined as a witness, said he had given much attention to genealogies and pedigrees, especially those of his own family. He produced a MS. book on the subject, written partly by his great-grandfather, fifth Earl of Balcarras,—*ante litem motam*,—for the use of the family, and not to prove a claim to dignities or property, and continued by his daughter, Lady Anne Barnard, who bequeathed it to the claimant. Witness had become perfectly acquainted with the handwriting of the 5th Earl, by perusal of *leases and other documents signed by him and duly witnessed, and acted upon as genuine*, be-[559]-sides letters to Lady Barnard, which bore internal evidence of having been written by him. The witness being declared competent, read, by direction of counsel, several passages from that part of the book, written by the said Earl, one of which was that "Lindsay Earl of Balcarras was heir male of the Lindsays of Edzell, extinct in 1744, who were heirs male of Lindsay Earl of Crawford."

Lord Brougham.—This is certainly a very curious book; but how is it to be admissible evidence? It is proved to be in the hand-writing of the Earl by whom it purports to have been written, but it is still a private document, kept in *retentis*, not exhibited in the family to all beholders, and it therefore fails to have those characteristics which make such exhibited documents evidence.

Sir F. Kelly.—It is offered as evidence on this principle, that it is a statement by a deceased member of a family in a matter of pedigree of that family.

\* The arguments were in substance the same as those reported on a similar point in the Fitzwalter Peerage Case, 10 Clark and Fin., pp. 196 and 197; and the cases and authorities there mentioned were referred to; and the authority of the decision in that case itself, against the reception of such evidence, was urged by the counsel for the Crown, who also cited *Doe v. Suckermore*, 5 Adol. and El. 703. The claimant's counsel cited *The Bishop of Meath v. The Marquess of Winchester*, 4 Clark and Fin. 445, for receiving the letter as a declaration of the state of the family by a member of it.

Lord Campbell.—There is no doubt about the correctness of the principle.

Lord Brougham.—An entry of a fact within the party's own knowledge, is evidence.

Lord Lyndhurst.—Any declaration made by him *ante litem*, and without suspicion of motive, is evidence.

The Lord Advocate.—This stands on the same ground on which Mrs. Margaret Crawford's letters were received.

Sir F. Kelly.—The Earl, who made these entries, died in 1768, and, therefore, could not have made them with any view to a claim to a dignity, which was then, and until 1808, in another family; he was born about 1690, and, therefore, besides being, as it appears by the book, a great genealogist, he may be presumed to be [560] acquainted from 1705 with the state of his near relations, and those of whom he writes lived, as appears, *aliunde*, between 1705 and 1744. These entries are, therefore, admissible as declarations of facts which were within his own knowledge.

On that ground the Committee held them to be admissible.

(July 5, 1847.) Mr. Stuart-Wortley, in proceeding to sum up the evidence, first reminded the Committee that the Earl of Balcarras claimed the Earldom of Crawford, as lineal heir male of the body of David, the third Earl, who was the only son of Alexander, the only son of Sir David, the first Earl. He also made out his claim as collateral heir male, or "heir male whomsoever," of Ludovick, the 16th Earl, who, upon his resignation of the Earldom in 1642, obtained from the Crown a new charter, limiting that dignity, first, to the heirs male of his own body, remainder to John Earl of Lindsay, of the Byres,—a remote branch of the Lindsays,—and the heirs of his body, "whom failing, to the heirs male whomsoever" of the said Ludovick. The heirs male of the Byres branch having become extinct on the death of George, 22d Earl of Crawford, in 1808, the Earldom descended under the ultimate remainder to the nearest collateral heirs male of Ludovick, in which position it is clearly shewn by the evidence that the claimant stands.

Of the ancient Barony of Lindsay there was no patent extant, but ancient instruments had been put in evidence, shewing that David, the third Earl, bore that title, in addition to the title of Earl of Crawford; that Alexander, his son, and David, his grandson, the fourth and fifth Earls, bore it; that David, the ninth Earl,—of [561] the Edzell branch, and immediate ancestor of the claimant,—bore it, and that the title was ascribed to succeeding Earls in Acts and Rolls of Parliament, and instruments under the hand of the Crown, down to Ludovick the sixteenth Earl. But the claimant's right to the Barony depended exclusively on his descent, as heir male of the body of David, the third Earl, whereas the Earldom may be claimed by him in that character or as next collateral heir male of Ludovick, the sixteenth Earl, under the ultimate remainder in the patent of 1642.

The creation of the Earldom in 1398 was proved, by unquestionable evidence, although there was no patent found, nor any other instrument shewing the limitations. In that case the rule of the House was, where nothing appeared to mark the course of descent, to presume that the limitations were to the heirs male of the body of the original grantee (per Lord Mansfield, in the Spynie Peerage (Maidment's Report); and Lord Eldon in the Annandale Peerage, cited in Sir H. Nicolas' report of the Devon Peerage, pp. 56-7), or, if in the course of the descent, a certain mode of enjoyment of the Peerage was established, even by a single instance, as in the Sutherland Peerage (*vide ante*, note, p. 536), then the presumption of law was, that such enjoyment was according to the limitations in the patent. But the course of descent of both these Peerages was minutely traced, and it was shewn by the clearest evidence that heirs female,—heirs of line and heirs general of the deceased possessor and of the first grantee,—were passed over on many occasions, proving that these are male honours, and must ever descend to heirs male only, and so far fortifying the [562] presumption which, without any evidence of the descent, this House would entertain.

The creation of the Earldom in 1398, at Perth, has been proved by the *compotum*, which is a form of account, and discharge of a public officer. The recognition of David Earl of Crawford in the same year, is proved by the instrument of safe conduct given to him by Richard II. of England, to journey to London with a large retinue.

to meet Lord Wells in a tournament on London Bridge,—in which the chroniclers of the time relate that the illustrious Earl vanquished his far-famed rival.

The creation of the Earldom, and the existence of the Barony also, in David, the third Earl, having been proved, it was not necessary to trace the descent of them step by step; it was sufficient to call attention to those successions which were marked by the exclusion of heirs female, and to events which disturbed the regular course of descent, and to show how that disturbance is accounted for, and how it strengthens the claimant's case.

The third Earl left two sons, Alexander, who succeeded him, and Walter, who became the head of the Edzell line, and was the ancestor of the claimant. Alexander was succeeded by his son David, fifth Earl, who was, in 1488, created Duke of Montrose, with descent to his heirs male,\* but that creation was revoked by the Crown, and the Dukedom was limited to him for his life only. It was proved that this fifth Earl's [563] eldest son had two sons and two daughters, and that his eldest son predeceased him, without leaving issue, and that he was succeeded by his second son, John, who perished in battle at Flodden, without issue, leaving his two sisters heirs at law of him and of the fifth Earl, and of all the preceding Earls. The honours, however, did not go to them, but passed to their uncle, Sir Alexander Lindsay of Ochtermontzie. That instance of exclusion of females would be sufficient to establish the course of descent of these honours to male heirs only, as the single instance of the succession of an heir female to the Earldom of Sutherland (in 1514), was held in 1772 to define that dignity as descendible to female, as well as male, heirs. The evidence in this case shews several other instances of the exclusion of females; but at a date, prior to them, a very remarkable disturbance occurred in the descent of these honours: David, the eighth Earl (eldest son of the last named Alexander, seventh Earl), was not succeeded by his son Alexander, "Master of Crawford." The word "Master" in Scotland means heir apparent;—but this Alexander, having obtained an unhappy reputation, was called "the Wicked Master," from his having, with other wicked associates, committed great outrages, and used violence to his father, which, by the law of Scotland, is constructive parricide. The record of the indictment and proceeding on it for that offence, has been put in evidence, and it appears by it that the accused "came under the pleasure of the Crown," which means, that they pleaded guilty. The words of the record, after stating the offence charged, are "*pro quibus criminibus dictæ personæ in voluntate Supremi Domini nostri Regis, tunc personaliter presentis, devenerunt.*" The legal consequence, to "the Wicked Master," of this confession of guilt,—equal to [564] conviction,—with judgment following on it, was that he forfeited, as well for the heirs of his body as for himself, all right to the succession to his father (Craig. Jus. Feudale, lib. iii., dieg. 6, s. 3). That he was guilty of constructive parricide, and thereby "forfeited and lost all right to the honours and estates," is acknowledged by his son, who was restored to them, and is recorded in a solemn instrument executed by him, and which is in evidence. It further appears that the father, eighth Earl, determined to convey his estates, subject to his life-rent, to his nearest relation and heir, David Lindsay, descended in the third degree from Walter of Edzell. The very deeds carrying that determination into effect have been put in evidence. There is then a charter of King James, dated 1541, confirming the conveyance of the estates, and the destination thereof, to David of Edzell, "*Dilecto nostro Davidi Lindesay de Edzell et heredibus suis subscriptis omnes et singulas terras et Baronias subscriptas, videlicet (they are enumerated), quæquidem terræ Baroniarum, etc., fuerunt consanguinei nostri Davidis comitis Crawfordiarum per prius hereditarie,*" etc. How the dignities passed to this David,—who undoubtedly enjoyed them,—the claimant and his agents, with all their diligence, have not been able to prove distinctly. The estates only were conveyed by the deeds and royal charter. It was not unusual, in former times, in Scotland probably, as in England, for titles of honour to accompany the possession of estates, or it may have been,—though there is no proof of it,—that David, eighth

\* The noble claimant, after the decision in his favour in the present case, petitioned the Queen to be declared entitled to the Dukedom also, and his petition has been by her Majesty referred to the House, but there has yet been no sitting of the Committee on it.

Earl, resigned the honours,—as Ludovick, the sixteenth Earl, certainly did in 1642, —to the Crown, and the Crown regranted them to David, the new possessor of the [565] estates. It is certain that he, after the death of the eighth Earl, and while the “Wicked Master” was living, took the title and sat in Parliament as Earl of Crawford, and there is in evidence a precept or summons to Parliament in 1554, directed to him by Queen Mary, not only as Earl of Crawford, but also as Lord Lindsay: “*Maria Dei gratia regina Scotorum dilecto nostro consanguineo Davidi comiti Crawfordiae domino Lindesay salutem. Quia ordinavimus Parliamentum, etc., precipimus quatenus sitis ibidem in dicto die coram nobis in dicto nostro Parlamento,*” etc. The Parliament Rolls given in evidence shew that this David sat in that and in other Parliaments. This evidence then amounts to conclusive proof and recognition of both Dignities being in David of Edzell,—who was the father of John Lindsay of Balcarras, from whom the present claimant of those dignities is lineally descended,—and the reasonable presumption is, either that they were re-granted to him by the Crown on the resignation of the eighth Earl, or that on his death they passed to him by regular descent, as his next heir male, after the forfeiture of the succession by the “Wicked Master;” because in that case he actually became the next heir of David, the eighth Earl, being the lineal heir male of the body of David, the third Earl, and that is the most probable solution of the matter. The subsequent restoration of the estates and honours to David, son of the “Wicked Master,” is proved by various documents, first, a reconveyance of the estates by the ninth Earl, who, although he had sons of his own, capable and of right entitled to succeed him, yet taking compassion on the innocent son of the “Wicked Master,” adopted him as his own, and reconveyed to him the whole of the estates, reserving his own life interest. There is, [566] next, a charter of Queen Mary, confirming the reconveyance to the grandson of the last (the eighth) Earl: “*Dilecto nostro Davidi Lindsay nepoti* (which here means grandson) *quondam Davidis Crawfordiae comitis ultimi defuncti omnes et singulas terras, etc.* (they are enumerated), *quaequidem omnes, etc., fuerunt Davidis nunc Crawfordiae comitis perprius hereditariae,*” etc.

There is then a regular sequence of conveyances and confirmations, first from David, the eighth Earl, to David of Edzell, ninth Earl, and from him to David, the eighth Earl's grandson, who became tenth Earl. There is also a solemn bond and obligation, before referred to, as executed by this David, with the advice of his guardians and relatives, and other great persons in 1546, in the Cathedral of Brechin, and wherein he narrates the whole of the transactions to this effect: first, “that in consequence of the ingratitude of his father, and wrongs by the late Alexander, Master of Crawford, to the late Earl his father, through which he, the said Alexander, by law forfeited the succession, the said late Earl resigned all his lands, etc., and heritage of the Earldom of Crawford into the late King's hands, for infestment thereof to be made to David now Earl of Crawford, *nearest heir of tailzie,*”—(a declaration very important to the present claimant, as a recognition that his ancestor, David of Edzell, ninth Earl, was next heir to David, the eighth Earl, the elder branch of the Lindsays)—“yet David, now Earl of Crawford, moved by pity, etc., has adopted me as his son, and has resigned all the said lands into our Sovereign Lady's hands, for inheritable infestment to be made to me and my heirs male of my body, which failing, to the heirs male of tailzie of the said David, now Earl, specified in [567] the infestment of fee and charter tailzie, lately made by our late Sovereign to him; therefore I with consent of my curators (named) bind and oblige myself, my heirs, etc., to be good sons to David, now Earl, all the days of his life,” etc. The bond then goes on to bind him, in case of his failing in duty as aforesaid to the then Earl, to resign to him all the said lands, etc. No evidence can be more satisfactory than that narrative in proof and explanation of the disturbance that took place on that occasion, in the descent of these honours.

This David proving dutiful, as he pledged himself, to his benefactor, was, on his death, restored to the honours as well as the estates; for there is in evidence a Roll of Parliament shewing that he sat therein as Earl of Crawford in 1558; and there are other instruments shewing that he enjoyed the title of Lord Lindsay. He was succeeded by his son David, eleventh Earl, who was succeeded by his son David, twelfth Earl, who having an only daughter, there then occurred a second instance



of the titles passing from female heirs, by the succession of the twelfth Earl's uncle, Sir Henry, on whose death they again passed over the daughters of his eldest son, predeceased, to his second son George, the fourteenth Earl, whose successor was, not his daughter, his only child and heir at law, but his younger brother Alexander, who, dying without issue, was succeeded by his next brother Ludovick, the sixteenth Earl. There is unquestionable evidence before the Committee of these several successions of male heirs, in exclusion of females, heirs at law. There are altogether four instances of such exclusions, establishing, beyond a possibility of doubt, that these ancient Dignities were descendible only to heirs male.

[568] The next point requiring particular notice, is the disturbance in the descent of the Earldom on the death of Ludovick, the sixteenth Earl, which happened thus:—He was in great favour with King Charles the First, and so also was his kinsman, John Lindsay of Byres, created Earl of Lindsay in 1633. It appears that Earl Ludovick having no children to succeed him, was prevailed on by his said kinsman to resign the honours of Crawford to the King, who thereupon granted a new patent, varying the course of descent, which, by the law of Scotland before the Union, was competent for the Crown to do, as appears from the observations of Lord Brougham in the Devon Peerage (Sir H. Nicolas' Rep. 53)—

The Lord Advocate, in answer to questions from Lord Brougham, said the Crown might have dealt with honours on resignation of them by the holders, as he might with landed estates, and there were in Scotland many instances of honours being surrendered to the prejudice of parties entitled to succeed under existing patents, and being re-granted to others; but to effect that, not only the consent of the Crown, but such consent exhibited by sign manual, was necessary (English and Irish Peerages cannot be lost, except by attainder or *express* words in an Act of Parliament. See the Earl of Waterford's Case, 6 Cl. and F. 133).

Mr. Wortley.—The patent effecting the purpose in this case has, after a great deal of inquiry and examination, been received by the Committee (*ante*, p. 552). It is dated in 1642, and limits the Earldom, with its ancient precedence, to Earl Ludovick, and the heirs male of his body, remainder to John Earl of Lindsay and the heirs male of [569] his body, remainder to *the heirs male whomsoever of the said Ludovick*, etc. It is important to notice the last remainder, as it is under it the claimant makes his title to the Earldom, although he might, if this patent never existed, make out his claim as the heir male of the original grantee. It appears from the evidence that, after the death of Earl Ludovick without issue, his successor, the said John Earl of Crawford and Lindsay, sat in Parliament with the ancient precedence of the Earls of Crawford. Having afterwards changed sides, and joined the Parliament, he obtained, in 1648, when King Charles I. was prisoner in Carisbrook Castle, from the Barons of the Exchequer in Scotland, another patent, limiting these honours, on failure of heirs male of his body, to the heirs female of his body, thereby introducing a limitation unknown in the ancient descent of the Earldom of Crawford, and not contained in the patent of 1642. The patent of 1648 was inoperative, being without the King's sign manual, though it was granted in his name, and accordingly Colonel Campbell, descended from an heir female of this seventeenth Earl, after having taken certain proceedings (see 2 Shaw and Dunl. 737; and 2 Wils. and Sh. 440), in order to establish his title to the honours and estates under the new limitation, was advised ultimately to abandon his claim as hopeless. The descent, therefore, of the Crawford Peerage is to be governed by the patent of 1642, limiting it to heirs male, and therefore after descending from the seventeenth Earl to his eldest son, and from time to time lineally to the nineteenth and twentieth Earls, it passed, upon the death of the latter without issue, not to his sister, who was his heir at law, but to George, fourth Viscount Garnock, the nearest [570] collateral male heir, who was descended in the fourth degree from Patrick Lindsay of Kilburnie, second son of the seventeenth Earl. This George, twenty-first Earl of Crawford, was succeeded by his son George, the twenty-second and last Earl, who died in 1808, without issue, leaving a sister, Lady Mary Lindsay, who died in 1833. She enjoyed the Crawford estates from her brother's death, under a recent entail, under which it passed, on her death, to the Earl of Glasgow, but the Peerage has been dormant since 1808.

The noble claimant was not aware of the patent of 1642 until 1834, when Lady Mary Lindsay's executors, finding it in her muniment chest among the titles to the

estates, communicated it to him; and thus the non-claim since 1808 is accounted for. Lapse of time, however, is no bar to a claim of Peerage; a much longer lapse occurred in the Devon case (Sir H. Nicolas' Rep.; 2 Dow and Cl. 200; 5 Bligh, 220), and in several others, which have been since before the House (the Camoys, the Braye, and the Beaumont Peerages, 6 Clark and F. [868]; and the Hastings Peerage, 8 Cl. and F. 144). The discovery of the patent in 1834 led forthwith to an investigation and to an accumulation of a mass of evidence which will remain to all time a monument of the industry and intelligence of the very learned counsel (Mr. John Riddell) who directed and arranged it, and was thereby the means of elucidating this long and illustrious descent.

Mr. Wortley then proceeded to point out the instruments evidencing the extinctions of the several branches of the Lindsays, prior in right to the claimant; first, the Garnock and Kilburnie branches of the Byres line, and that line also; then the Spynie branch of the elder [571] line of the Lindsays, shewing that the proximate right of succession to both dignities, after Ludovick, was in the representative of that line, if the Earldom had not been carried by the patent of 1642 to the Byres family. And, finally, after detailing the evidence, both parol and documentary, of the extinction of the elder branch of the Lindsays of Edzell, by the death of the last male representative in 1744, he deduced the pedigree of the claimant from John Lindsay of Balcarras, sprung from the Edzell branch, concluding that he was not only the lineal descendant and heir male of the first Earl of Crawford, but also the "heir male whomsoever" of Ludovick, the sixteenth Earl, under the patent of 1642.

The Barony of Lindsay did not pass under that patent: it remained dormant, ever since Earl Ludovick's death, in the heirs male of the third Earl and first Lord Lindsay; and the claimant, being now proved to be the lineal descendant and direct heir male of his second son, the male representatives of the first son being shewn to be long since extinct, is clearly entitled to the Barony as well as to the Earldom.

With respect to the claim of Robert Lindsay Crawford, which has been noticed in the course of the evidence, and shewn to be unfounded, it must be so considered by the Committee, as he has virtually abandoned it, having taken no step beyond the presenting of a petition to the Crown (*vide ante*, p. 534).

The Lord Advocate objected to the evidence as defective in four points. First, as to the title of Lord Lindsay,—which was claimed as a substantial Peerage, [572] there was no charter or patent of its creation, no more than of the Earldom of Crawford. There was, however, he admitted, sufficient proof of the creation of the Earldom in 1398, in the *comptum* and other documents of that date. There was no proof at all of the creation of the minor title, nor of its existence anterior to Alexander, the fourth Earl, except by one instrument, dated in 1466, in which David, the third Earl, is also called "Lord Lindsay." That his son Alexander, fourth Earl, was also Lord Lindsay, is sufficiently proved by an instrument dated in July, 1451, in which he is styled "*Comiti de Craufurdie et Domino de le Lindessay*;" and that his successors, down to, and including, Earl Ludovick, enjoyed the minor title also, is not disputed. The question then is, Who was the first Lord Lindsay? The claimant suggests the probability that that title was anterior to the Earldom, and insists that David, the third Earl, bore it, because he is called, Earl of Crawford Lord Lindsay, by his grandson, the fifth Earl, in a charter of confirmation, dated in 1466. In several other deeds he is called Earl of Crawford only, while his son Alexander, and grandson David, fifth Earl, are there named by both titles.

Lord Lyndhurst.—There is in one deed a positive assertion of the title, the others are merely silent.

Lord Brougham.—May not the omission of the second title be owing to the discretion of the professional man who drew the deeds? Is it usual on all occasions to mention all the titles of a peer?

The Lord Advocate.—The mention of the second title in a single deed, made long after the death of Earl David, appeared to be but slender evidence of the existence of it in him. If that title existed first in Alex-[573]-ander, fourth Earl, the claimant, who is not descended from Alexander, but from his brother, a younger son of David, does not make out his claim to the Barony, unless he can shew that it was an honour descendible to heirs male general.

With respect to the Earldom of Crawford,—of the existence and destination of

which there is no doubt,—the claimant puts his right to it on two grounds; first, as being lineally descended from the first Earl, who died in 1406, and, secondly, he claims it by virtue of the ultimate limitation in the patent of 1642, as the nearest heir male of Ludovick, the sixteenth Earl. It will conduce to clearness if those two claims be reduced to one, and they do resolve themselves into one, for there is no question that the patent of 1642 is the regulating patent. To establish the claimant's right under that patent, he must shew that all the male representatives of the Byres line, entitled under the prior limitation, are extinct. The descendants of the seventeenth Earl, the first Earl of that line, formed the two branches of Garnock and Kilburnie. The evidence of the extinction of the male heirs in these branches was not satisfactory.

The claimant is further bound to extinguish the male heirs in the main line from Alexander, the seventh Earl of Crawford, especially the Spynie branch, and after that he has to prove the extinction of the male heirs in the main Edzell line, before the Balcarras branch of that line can be admitted. The pedigree of the claimant in this branch is clear enough.

There is one part of the case of greater curiosity than importance, about the transfer of the honours from David, the eighth Earl, to David of Edzell, the ninth Earl, and the return of them from him to David, son [574] of the "Wicked Master." It is said that he pleaded guilty of an attempt to murder his father. Although that is a capital crime, there is no authority for holding that it involved what the legislature of Scotland made the special crime of parricide,—forfeiture of the estates and honours. Craig, to whose book reference is made, is not sufficient authority. The probability is, that all parties desired to get the "Wicked Master" out of the succession, and that there was some arrangement,—to which the Crown must have been a party,—by which David of Edzell, a near relation, took the estates and honours, and after five years, restored them to David, the tenth Earl, from whom they descended in the ordinary course.

With regard to the resignation and re-grant of the Earldom in 1642, there is no question that by the law of Scotland it was quite competent for the tenant of an honour to resign it into the hands of the Crown in favour of another party; and if the Crown chose to accept that resignation, and re-grant the honour to that party, such resignation did not extinguish the honour, but merely altered the course of descent, substituting new heirs, who took their place in Parliament in the precedence of the former holders of the honour. There were cases of such resignations and re-grants; and in one case, in which a resignation was made before the Union, and the re-grant was made after the Union in the terms of the resignation, it was held that the Crown was prevented, by a clause in the articles of Union, from acting upon the resignation, as it could have acted previous to the Union. There is no doubt that Earl Ludovick was completely in *titulo* to resign this honour in 1642; and that the Crown accepted the resignation, and re-granted the honours, as it legally might, by [575] charter in favour of those heirs in whose favour the resignation was made. That charter from that time regulated the descent of the Earldom, without any regard to its destination or descent previous to the year 1642.

(May 16, 1848.) Sir F. Kelly said, that, in deference to the opinion of the Lord Advocate, and to the doubts and difficulties suggested by him at the last meeting of the Committee, and apparently acquiesced in by their Lordships, the claimant's counsel and agents had since made every practicable effort to remove all objections, and the further evidence which had been collected would, it was submitted, satisfactorily and conclusively establish the claim. Having stated in detail the nature of the supplementary evidence thus collected, for extinguishing the male descendants in the several branches mentioned by the Lord Advocate, he said, with respect to the existence of the Barony of Lindsay in David, the third Earl of Crawford, that he considered the fact to have been made out to the satisfaction of the Committee by the deed of confirmation, in which he is named by both those titles—

The Lord Advocate.—The difficulty was that the widow of that David, in the deed of mortification which is recited in the confirmation, called him Earl of Crawford only, while she called her son, the fourth Earl, "Earl of Crawford and Lord Lindsay."

Sir F. Kelly said, he was prepared to put the matter beyond doubt, by the production of another document, in which David calls himself by both those titles.

The supplementary evidence of extinctions before referred to having been given, the last-mentioned document was then produced from the charter chest of Lord Forbes of Castle Forbes,—it was dated in 1443, and pur-[576]-ported to be a mandate from David Earl of Crawford (third Earl), and “Lorde de Lindissay,” as principal sheriff of Aberdeenshire, to Sir Alexander Forbes, “our depute,” etc. The document was held to have been produced from the proper custody, and was admitted.

The Lord Advocate, at a subsequent sitting of the Committee, said the last document produced in proof of the Barony of Lindsay being in David, the third Earl, from whom the claimant traced his descent, completed the evidence on that point, to his entire satisfaction. He was also satisfied with the supplementary proofs given of the extinctions in the Byres branch. But with respect to the Spynie and Edzell branches, the doubts which he entertained on a former day were still unremoved.

After a discussion between the counsel on both sides, and observations thereon by Lord Lyndhurst, Lord Brougham, the Earl of Devon, and Lord Campbell, to the effect that as it was admitted, on the claimant's side, that he had further evidence relating to these branches in his power, it might be difficult for the Committee to come to a decision in his favour without production of that evidence.

Sir F. Kelly said, that, although he felt the most perfect confidence in the completeness of the claimant's case as it then stood, upon every point, he and his learned friends who were with him could not be insensible to the importance of the slightest suggestion from their Lordships, or from the Lord Advocate. He was himself of opinion that no additional light could be thrown on the case, that it could not be either weakened or strengthened by the result of further inquiries; still, as enough of the session yet remained to admit of further inquiry, and of a decision of the Committee be-[577]-fore its close, he would, if their Lordships would grant the opportunity by an adjournment to not a distant day, direct further inquiries on those two points to which the Lord Advocate directed attention.

Lord Lyndhurst.—The case is now so simplified, that we should easily be able to dispose of it before the end of the session. The Byres branch of the case appears to me to be clearly made out.

The Lord Advocate reminded the Committee that the pedigree was long and intricate, and therefore incumbered with many difficulties, which imposed on him the necessity of carefully watching the proofs, but in all the steps he had taken, he did not exceed what his duty required.

Sir F. Kelly.—Certainly. He now understood that no further evidence was necessary, except touching the extinction of the Spynie branch.

The Lord Advocate would not say a word of the necessity of the evidence, but he still held his objection with respect to the Spynie branch, unless evidence be brought to remove it. Nor was he satisfied that the Edzell branch was extinguished.

Sir F. Kelly.—Upon that branch all the evidence that was possible had been given, and on that the case must stand.

(July 18, 1848.) At a subsequent sitting of the Committee, further evidence of the extinction of male heirs of the last Lord Spynie, and of the Edzell branch also, having been given, the Lord Advocate said he was perfectly satisfied that the extinction of all the lines was proved, and that the claimant had established his pedigree.

Lord Lyndhurst (August 11).—My Lords, this case has now occupied, I think, in the progress of the evidence, a period of about four [578] years. I have observed, and watched very carefully, the evidence as the parts of it have been successively laid before your Lordships. I have read the evidence from time to time; and I have made objections upon different points as the evidence proceeded, which objections have been successively cleared up. I am now in a condition to say, that so far as I am concerned, I am satisfied that the pedigree has been established. Under these circumstances, I shall move your Lordships to report in favour of the claimant.

The Lord Chancellor.—I have little to add to what my noble and learned friend has stated. I have paid every attention to this case: it is very long and very complicated; and it has required very considerable attention to be paid to it; and the

result of that consideration of it is, that I concur entirely in the opinion that my noble and learned friend has expressed.

It was then "resolved that it is the opinion of the Committee that James, Earl of Balcarras, had made out his claim to the honours and dignities of Earl of Crawford and Lord Lindsay," which resolution was reported to the House, and affirmed.

[579] DANIEL BECKHAM,—*Plaintiff in Error*; WILLIAM WALKER DRAKE and JOHN SURGEY,—*Defendants in Error* [May 11, 14, 1847; July 6, 26, 1849].

[*Mews'* Dig. ii. 326, 1137; ix. 832; x. 551. S.C. 13 Jur. 921; and, below, 9 M. and W. 79; 11 M. and W. 315; 12 L.J.Ex. 486; 7 Jur. 204. See *Rogers v. Spence*, 1846, 12 Cl. and F. 700, and note thereto; *Wadling v. Oliphant*, 1875, 1 Q.B.D. 150; *Emden v. Carte*, 1881, 17 Ch.D. 172; *In re Roberts* (1900), 1 Q.B. 122. Cf. also *Spurr v. Cass*, 1870, L.R. 5 Q.B. 659; *Calder v. Dobell*, 1871, L.R. 6 C.P. 490.]

A. entered into an agreement with B. and C. to serve them for seven years, at fixed wages, at the rate of three guineas weekly, "the party making default to pay to the other the sum of £500 by way or in nature of specific damages." A. was dismissed; he became bankrupt, and after the bankruptcy brought an action of assumpsit on the agreement, to which the defendants pleaded his bankruptcy—

Held, that this plea was an answer to the action, for that the right of action in respect of this breach of the agreement passed to his assignees.

This was a writ of error upon a judgment of the Court of Exchequer Chamber reversing a judgment of the Court of Exchequer of Pleas, in an action on promises. The action was brought by Beckham against Drake, Surgey, and Knight, upon an agreement dated 23rd October, 1834, made between William Moxey Knight and John Surgey, of Bishop's Court, Old Bailey, in the city of London, typesetters, of the one part, and Daniel Beckham of the other part. The agreement recited that Beckham had been for some time in the employment of Knight and Surgey, as their foreman in the carrying on of their trade, and that the said parties were mutually desirous of continuing their connection together for the term of seven years from the date of the agreement. The parties then agreed that Beckham should serve Knight and Surgey, and the survivor of them, for and during the term of seven [580] years, to commence and be computed from the day of the date of the agreement, as their foreman, and should, to the best of his power, promote and advance their success and prosperity in the same. And also, that he should not, during the said seven years, engage in the same or any other business, either on his own account or on account of or for the benefit of any other person, without their consent in writing, first had and obtained for that purpose. Knight and Surgey, for the considerations aforesaid, agreed, that they, or the survivor of them, would employ Beckham as their foreman during the said seven years, if they, or either of them should so long live, paying him wages after the rate of three pounds and three shillings of lawful money weekly. And it was mutually agreed and declared by the parties thereto, "that in case either of the said parties hereto, shall not well and truly observe, etc., the covenants, etc., herein on their respective parts contained, that then, and in such case, the party so failing or making default shall and will pay to the other of them the sum of five hundred pounds, by way or in the nature of specific damages."

The declaration contained two counts: the first count was special upon the agreement; the second count was upon an account stated.

Drake and Surgey severally pleaded, first, "non-assumpsit;" and secondly, that Beckham became bankrupt after the accruing of the causes of action and before the commencement of the suit, whereby the causes of action became vested in his assignees. Knight suffered judgment by default. Beckham joined issue upon the pleas of "non-assumpsit," and demurred to the pleas of bankruptcy. Drake and Surgey joined in demurrer. The issue in fact was [581] tried and a verdict was given for the plaintiff, damages £100 (9 Mee. and Wels. 79).

The demurrers were argued before the Judges of the Court of Exchequer, who, at the sittings after Trinity Term, 1841, gave judgment for the plaintiff upon the demurrer to the pleas of bankruptcy (8 Mee. and Wels. 846). The defendants brought a writ of error in the Exchequer Chamber, and, after argument, the judgment of the Court of Exchequer was reversed (11 Mee. and Wels. 315) by the unanimous judgment of the Court of Exchequer Chamber.\*

The present writ of error was then brought.

[582] Mr. Martin and Mr. Stammers for the plaintiff in error.—The sole question which it is now intended to argue (for that arising out of the form of the contract to which two only of the defendants were originally parties, will not, after the unanimous decisions of two Courts, be further contested) is, whether the plea of the bankruptcy of the plaintiff affords a sufficient reason for depriving him of his right of action in this case. That will depend on the construction to be given to the 12th and 63rd sections of the 6 Geo. IV., c. 16.† [583] Applying to those sections the ordinary rules of construction, nothing but the personal estate of the bankrupt, and such contracts as directly relate to property, can be said to fall within them. Contracts which relate, not to the property but merely to the personal services of the bankrupt, will not

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\* This case was likewise before the Court of Common Pleas in 1837. In June, Beckham became bankrupt, but obtained his certificate before November. Early in Michaelmas Term a rule for security for costs was obtained. After argument by Mr. Stammers for the plaintiff, and by Mr. E. V. Williams for the defendant, the rule was discharged (4 Bing. N. C. 74). In giving judgment Lord C. J. Tindal said, "The plaintiff commences an action when he is a solvent person: he afterwards becomes bankrupt and obtains his certificate: it is not till after he has obtained it that application is made for security for costs, and there is no proof that the assignees undertake to go on with the action, but the affidavit in support of the application discloses the contrary." The defendant Drake, who was sued as a dormant partner, pleaded specially that the agreement on which the action was brought was made by the plaintiff with Knight and Surgey alone. There was a demurrer to this plea. The demurrer was argued in Hilary Term, 1838, and judgment given for the defendant, and that judgment was afterwards affirmed. (See 4 Bing. N. C. 243; 1 Scott N. R. 675; and 1 Man. and Gr. 738 in Error. But see 9 Mee. and W. 79, where the decision of the Court of Common Pleas is controverted, and the affirmance of it is explained.)

† 6 Geo. 4, c. 16, s. 12, enacts, "that the Lord Chancellor shall have power, upon petition made to him in writing against any trader having committed any act of bankruptcy to appoint such persons as to him shall seem fit, who shall have full power and authority to take such order and direction, with the body of such bankrupt, as also with all his lands, tenements, and hereditaments, etc., as well copy or customary-hold as freehold, which he shall have in his own right before he became bankrupt, as also with all such interest in any such lands, tenements, and hereditaments as such bankrupt may lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandize, and debts, wheresoever they may be found or known, and to make sale thereof in manner hereinafter mentioned, or otherwise order the same for satisfaction and payment of the creditors of the said bankrupt.

The 63rd section enacts, "that the commissioners shall assign to the assignees for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him, before he shall have obtained his certificate, and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt wheresoever the same may be found or known, and such assignment shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured, had been made to such assignees; and after such assignment neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London, or otherwise, but such assignees shall have like remedy to recover the same in their own names, as the bankrupt himself might have had if he had not been adjudged bankrupt.

pass, and, as a necessary result, the right of action for a breach of any such contract will not pass; for there can be no difference between the contract itself and the right to sue for a breach of it. It must be admitted that in some of the cases the language of the courts has been sufficiently equivocal to raise some doubts as to the construction of these clauses of the bankrupt act. But with respect to real property the question has been settled; *Smith v. Coffin* (2 H. Bl. 444) decided that a real action passed to the assignees by the usual words of a deed of assignment in bankruptcy. But for an injury done to real property in the tenancy of the bankrupt the right of action would not pass, nor would the ordinary right to maintain trespass *quare clausum fregit* pass to the assignees; *Clark v. Calvert* (3 B. Moo. 96; 8 Taunt. 742), *Rogers v. Spence* (12 Cl. and Fin. 700). The case of *Hancock v. Caffyn* (8 Bing. 358), which was an action for damages for an improper distress levied by the bank-[584]-rupt, supports this argument, for the right of the assignees to maintain such an action appears there to be confined to cases where the property of the bankrupt is injured. In *Wright v. Fairfield* (2 Barn. and Ad. 727) the question was whether an action for breach of contract for non-delivery of stone passed to the assignees, and the Court held that it did. There again the subject-matter was a contract in relation to property, and the opinions of the Judges there were directed to personal property only. But it is clear that any contract which involves the exercise of the personal skill of the bankrupt himself, as the consideration for any promise made to him by a defendant, would not pass. The contract here related to the personal labour and skill of the bankrupt, to which the assignees could by no possibility have any title whatever. The assignees cannot enforce a contract for the performance of work which depends on the bankrupt's skill and labour, though they might be entitled to the sum received on account of that contract if the work had been actually performed and the money paid. Thus, if an artist was under a contract to execute a painting, and he became bankrupt, the assignees would neither have the right nor the power to compel him to perform that work, though if it had been performed, and he had been paid for it, and the money was in his possession at the time of his bankruptcy, it would form part of his assets. *Gibson v. Carruthers* (8 Mee. and W. 321), where the law was most fully considered, clearly establishes this distinction. There Lord Abinger, who differed from the other Judges in the Exchequer, put this case of a contract for the personal labour of the bankrupt, and illustrated it by the case of Sir Walter Scott and his [585] contract to write works of fiction, asking (8 Mee. and W. 344) whether, supposing Sir Walter Scott had become bankrupt, "the solvent booksellers would have been content to pay their £4000, and take the risk of publishing a novel written by the assignees of the novelist." The present contract is of the same character as that referred to in Lord Abinger's judgment. The performance of it depends on the personal skill and ability of the bankrupt. If he had not been previously dismissed from the service, his bankruptcy would not have affected the performance of his labour, nor would it have released them from their contract. He would have been entitled to his salary for the week after the assignment; *Williams v. Chambers* (10 Q.B. 337).

There are many rights of action which do not pass to administrators or to assignees of a bankrupt. The seduction of a servant is one instance of the kind; *Howard v. Crowther* (8 Mee. and W. 601). Actions for assault and for slander, (except, perhaps, slander affecting only the trade of the bankrupt and directly diminishing the profits of his trade,) trespass to the person, negligence in the cure of bodily infirmity or wounds, and for not safely carrying, are other instances of the same kind. But without mentioning these, the last two of which, though founded in contract, partake in their nature of torts, there is one which is distinctly in the class of contracts, namely, an action for breach of a promise to marry. Such an action is clearly personal alone. It is true that an administrator did once attempt to maintain such an action, *Chamberlain v. Williamson* (2 Maule and S. 408), but failed. That case is a strong authority for the plaintiff in error here, for if an administrator cannot maintain an [586] action in respect of the breach of a purely personal contract with the intestate, though his estate might be benefited by its performance, most certainly assignees cannot do so in respect of a purely personal contract with the bankrupt, for an administrator is more directly and absolutely the representative of the person of his intestate than assignees are of the bankrupt. Yet the argument which will, no doubt, be much relied

upon by the other side, exists in such a case, namely, that to maintain the action might be for the benefit of the estate, so that the exception now mentioned proves that the law does not always look to the indirect consequences by which the estate of the bankrupt may be increased. In one case, where £570 were ultimately recovered in an action for not safely carrying by a railway, there was no pretence that the right of action passed to the assignees, and yet the estate of a bankrupt would have been largely benefited by such damages. The benefit to the estate therefore is not the only matter to which the law looks, but rather to the principle whether the right is, or is not, founded in something of a purely personal kind. The true rule is this, that if the contract goes directly to the increase of the personal estate, as in *Wright v. Fairfield* (2 Barn. and Ad. 727), then the right of action on it will pass; and, again, if the breach of such a contract occurs before the bankruptcy, the right of action for that particular breach will pass. But if the contract is for labour to be performed, involving the exercise of the contractor's own personal skill, except so far as a debt has been created by the exercise of that personal skill before the bankruptcy, that will not pass. The damage here is likewise purely personal, the injury being to the bankrupt himself in the loss of the means of subsistence to which he is entitled, and in [587] the loss of time in looking after other employment. The cases of *Chippendale v. Tomlinson* (4 Doug. 318; Cooke's Bankrupt Laws, 260, 431), where Lord Mansfield says "the assignees cannot let out the bankrupt," *Silk v. Osborne* (1 Esp. 140), and of *Hesse v. Stevenson* (3 Bos. and Pul. 565, 578),—in the last of which it was expressly said that the assignees cannot take the profits of the bankrupt's daily labour,—clearly establish the principle of this distinction; and in *Williams v. Chambers* (10 Q. B. 337-345), it is distinctly affirmed by the Court that there is "no authority in which it has been held that the assignee of a bankrupt or insolvent could sue for the price of the personal labour of the bankrupt or insolvent after the bankruptcy or insolvency, as a debt due directly to the assignee himself as upon a contract made with him." The same rule was likewise established in *Ex parte Walters* (2 Mon., Dea. and De Gex, 635), where it was held that a man was not liable to account to his assignees for money received by him as a surveyor for valuing, such money being received in respect of his personal labour.

The argument that the assignees would be entitled to the money if it was in the bankrupt's actual possession, that this admits a right of action in them, and that two rights of action vested in different persons cannot exist in respect of the same matter, is not always and necessarily correct. Two rights of action may exist together, even though in one of them no more than nominal damages might be recovered. In *Williams v. Millington* (1 Hen. Bl. 81, 85), Lord Loughborough declares the possibility of two actions for the same cause, and says, "It is not a true position that two persons cannot bring separate actions for the same cause. The carrier [588] and the owner of the goods may each bring an action on a tort; the factor and owner may each have an action on a contract." This declaration is founded on very ancient authority. In Bracton (Book III., fo. 114) it is said, "*Ex uno facto injurioso plures possunt oriri actiones poenales in causa civili.*" An instance of this occurred in the case of *Turner v. Ford* (15 Mee. and Wels. 12), where a piano in the hands of a bailee was seized for rent due from him, and where Mr. Baron Parke said (15 Mee. and Wels. 215), "I am inclined to think that if the act of conversion had amounted to pound breach, the defendant would have been liable in damages to the landlord, and also to the owner of the property for damages for the conversion."

[Lord Campbell.—That was a case of two actions in respect of separate rights. But I want the case of two actions by different parties in respect of the same right. The bankrupt and assignees sue in respect of the same right.]

Such a case is unknown in practice, but the principle which governs one case governs the other; and in the judgment delivered by a noble and learned Lord in this House in the case of *Rogers v. Spence*, it was said (12 Cl. and Fin. 720), "It may possibly be that the law will give an action to the bankrupt for the personal injury which has been sustained by him, and will give an action to the assignees for the injury which has been done to the property: as for example, in the case which has been put during the argument, of the owner of a ship being on board, and the ship being run down on the high seas, and the ship going to the bottom and the owner escaping



and afterwards becoming bankrupt; it is possible that he may maintain an action for the personal injury done to him, and that the assignees may maintain an action for [589] the injury done to the property." Here the principle exists on which the right to bring these two actions is founded. It is the principle of a distinct right being vested in the bankrupt in virtue of a purely personal matter. The existence of such a right shows the judgment of the Court below to be erroneous.

Mr. Peacock and Mr. Hugh Hill (Mr. W. Morris was with them), for the defendants in error:—

It is impossible to contend that the assignees take no interest in the profits of the bankrupt's labour, and if they do take an interest in them, they can sue to recover these profits. They are certainly entitled to that which adds to the value of his estate. The defendant here broke his contract with the bankrupt. Had he paid the bankrupt the money, that money would have been assets in the bankrupt's hands for the benefit of the creditors. The damages that arise from the breach of the contract also belong to them. Suppose the bankrupt had served for six years at a thousand a year, but had not received the money, and at the end of the next half year had become bankrupt, there can be no doubt that the assignees would be entitled to recover all the money then due, as well the money for the last half year as for the six preceding years. Their right to recover it in respect of a wrongful dismissal must be the same as in the case of the services being actually performed but not paid for. The case of *Chippendale v. Tomlinson* (4 Doug. 318) does not disprove this proposition, for it merely establishes that under such circumstances the bankrupt may sue, his assignees not interfering. The expression attributed to Lord Mansfield in the abstract given of this case in Cooke's Bankrupt Laws (1st edit. 260), [590] that "the assignees cannot let out the bankrupt," means no more than that they cannot contract for his future labour, a doctrine that no one presumes to doubt; but if he has already, and before his bankruptcy, made a contract for that labour, they are entitled to recover for a breach of that contract by which the amount of his assets is diminished.

The question whether more than nominal damages could be recovered in the action, as in cases where the bankrupt personally and the bankrupt's property suffer from the same act, does not in the least degree affect this case, for, if so, this absurdity would follow, that, in order to ascertain the right to maintain the action itself, there must be a verdict given, that is, a verdict ascertaining and fixing in respect of what cause of action it was pronounced, and that not till then could the right to maintain the action be decided. The law cannot allow such an absurdity.

[Lord Campbell.—By the law of Scotland the damages would be divided: so much would be given for the injury to the property, and so much for the injury to the person.]

No such distinction is made by the law of this country. If a man sues for a debt, he cannot join in that action any claim for damages for injury to his feelings through having been kept out of it. In the case of *Startup v. Cortazzi* (2 Crom., M. and R. 165), the rule as to the time at which the damages arise on a breach of contract is ascertained, and that rule shows than nothing of feeling can enter into consideration in such a case. That was an action for not delivering linseed at a given time. A portion of the price of the linseed had been advanced, and it was held that repayment of the money advanced, with simple in-[591]-terest upon it, and payment of the difference between the contract price of the seed, and the price at the time when it ought to have been delivered, would be the right measure of damages. It was the loss of profit at the time of the breach that the plaintiff there was held entitled to; and in this case, he was no more entitled to vindictive damages for dismissal from employment, than in that, for any injury to his feelings by the non-delivery of the seed. The subject was fully discussed in *Brewer v. Dew* (11 Mee. and W. 625), which is a very strong case on the side of the defendants in error. There the plaintiff brought an action of trespass for seizing and taking his goods under a false and unfounded claim of a debt. The allegation was that he was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house; and it was held that the plaintiff alone might sue, because there the jury could give vindictive damages for the injury to the plaintiff's personal feelings. The power to give vindictive damages was the test applied by the Court. Apply that test here, and the right of the bankrupt to maintain this action fails entirely, for here the jury could not give vindictive damages, and consequently the right to maintain the

action is one which exists for no other purpose than the increase of the funds of the estate, and therefore passes to the assignees. That principle was adopted in this House in determining the case of *Rogers v. Spence* (12 Cl. and Fin. 700, 718). It is upon such a principle that a right of action for an injury to a man by being run over, by being assaulted, by a breach of promise to marry him, by criminal conversation with his wife, or by the seduction of his daughter, would not [592] pass to his assignees. In all these cases the damages are vindictive in their nature. No previous property existed in them before the wrong committed, and his estate might not have been the better if he had not been run over, or assaulted, or if the promise to marry him had been performed, or if his wife had remained faithful, or his daughter been unseduced. In all these instances the right to damages is in consequence of a purely personal wrong, and exists for the compensation of his bodily or mental feelings. For that reason alone the right of action does not pass to his assignees. But here, if the contract had been performed, the estate of the bankrupt would have been thereby benefited, and the breach of it did not affect his feelings but his property. *Chamberlain v. Williamson* (2 Maule and S. 408) is therefore inapplicable here. In *Gibson v. Caruthers* (8 Mee. and W. 321) it was held that the assignees were entitled to maintain the action for a breach of contract entered into with the bankrupt before his bankruptcy. The right to sue for unliquidated damages on a contract with the bankrupt undoubtedly passes to the assignees. *Porter v. Worley* (9 Bing. 93). And that being the rule, the party who sets up an exception to it must show that those damages are entirely given for the wounded feelings of the plaintiff, and are what have been called vindictive damages.

The fallacy in the argument on the other side lies in confounding this, which is an action of contract, with an action of tort. The rules applicable to the latter species of action have no application here. A contract for personal labour has been attempted to be distinguished from a contract relating to property, and has been confounded with an action arising out of matter [593] relating to personal feeling, yet no two things can be more different from each other. This fallacy has been attempted to be supported by reference to the cases of actions for injuries to real property, which, it has been said, will not pass to assignees, and *Clark v. Calvert* (8 B. Moore, 96; 8 Taunt. 742), and *Rogers v. Spence* (12 Cl. and Fin. 700), have been relied on to support this proposition. It is true that actions of trespass will not pass; but the general proposition that actions in respect of injuries to real property, while in the bankrupt's possession, will not pass, is not true. Suppose the property was in a tenant for life, and a stranger took away the soil, so as to injure the interest of the tenant for life, the right of action for that would pass to his assignees. The rule of construction as to bankrupt statutes is to be found in the 21 Jac. I., c. 19, where it is said that such laws "shall be largely and beneficially construed for the aid, help, and relief of creditors." In *Ryall v. Rolle* (1 Atk. 365, nom. *Ryall v. Rowles*; 1 Ves. 369, 371), the same thing is declared, and it is determined that "goods" shall mean all choses in action. The bankrupt statutes have in this respect been put upon the same footing as statutes relating to the Crown.

The exception to this rule has been where the bankrupt was entitled to sue for damages for an injury to his person, or his personal feeling. No such cause of action exists here—the only cause of action is one which relates to the diminution of his personal estate; and though his personal labour may be mixed up with that, still the right of action passes to his assignees, *Crofton v. Poole* (1 Barn. and Ad. 568). That case is directly in point, and it is well warranted by all the authorities. The judgment [594] of the Court below is in accordance with those authorities, and is therefore correct.

Mr. Martin, in reply:—The contract here is one of a peculiar nature. It is a contract to serve, not to furnish or to produce an article of commerce, and consequently it has nothing in it of the nature of a contract to sell goods: it is not a mixed contract of work and materials; it is one of a purely personal nature. The distinction between the two classes of cases is strongly taken in *Crofton v. Poole* (1 Barn. and Ad. 568), which, in truth, is a strong authority for the plaintiff in error. It is also taken by the bankrupt laws themselves, which subject to their operation, a man who works on certain commodities, and sells them, and in that way lives on the profits of

his labours, but which do not subject to their operation the man who merely lives on the wages he receives for his labour.

There is no particular rule of construction as to the statutes on bankruptcy: they are not to be construed favourably or unfavourably to one class of persons or another, but, like other statutes, according to their plain and obvious meaning; *Benson v. Flower* (Sir W. Jones, 215).

All the cases show that the contract to pass to the assignees must be a contract in respect of property, and not of labour, and here no property was affected, and there could be no injury to the personal estate. What the bankrupt received weekly, he would be entitled to for the maintenance of himself and his family, and that money would not go to form part of his general estate.

The Lord Chancellor said that he proposed to give the learned Judges the record in this case, and to ask [595] them whether, on that record, they thought the plaintiff in error or the defendants in error entitled to judgment.

This was agreed to, and Lord Chief Justice Wilde, in the name of the Judges, requested time to consider their answers.

On the 6th of July, 1849, the Judges delivered their opinions:—

Mr. Justice V. Williams.—The question which in this case your Lordships have submitted for the consideration of the Judges is, whether the plea of bankruptcy is a good bar; which depends on the further question, whether the right of action on which the plaintiff below has declared did or did not pass to his assignees; and I have to give my opinion to your Lordships that it did pass, and consequently that the plea is good.

The case plainly depends on the construction of the Bankrupt Act, 6 Geo. IV., c. 16, ss. 12 and 63. The sixty-third section confers on the assignees "all the present and future personal estate" of the bankrupt; and the question appears to me to be whether this right of action passed to them as part of his "personal estate." It may be observed that the same section proceeds to confer on them "all debts due or to be due" to the bankrupt; and at one time it seems to have been doubted whether this did not narrow the construction of the expression "personal estate;" but this doubt appears to be set at rest by the decisions of the cases of *Wright v. Fairfield* (2 Barn. and Ad. 727); *Hancock v. Caffyn* (8 Bing 358); and *Porter v. Vorley* (9 Bing. 93).

The right of action on which the plaintiff below has declared is founded on a breach of contract incurred [596] before the time of the bankruptcy, and consequently it can hardly be disputed that at that time it formed a part of "the personal estate" of the bankrupt, in the ordinary acceptation of that expression. "The authorities," said Lord Abinger, in delivering the judgment of the Barons of the Exchequer, in *Raymond v. Fitch* (2 Cr., Mee. and Ros. 596), are uniform, that the personal representative may sue, not only for all debts due to the deceased by specialty or otherwise, but for all covenants, and indeed all contracts with the testator, *broken in his lifetime*; and the reason appears to be, that these are choses in action, and are parcel of the personal estate in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee."

It has been said indeed, and truly said, that the rights of an executor are not so limited as those of an assignee of a bankrupt: for that the executor represents the deceased as to all his contracts and personal rights, whether they are available as assets for the payment of his debts or not; but an assignee takes only those beneficial matters belonging to the bankrupt's estate which may be applied for the purpose of distribution amongst his creditors. Inasmuch, however, as the right of action in question, if held to pass to the assignees, is plainly capable of being turned into profit for the benefit of the creditors, it seems to follow that the distinction above suggested ought to have no effect on the present inquiry, however material it might be, if the contest was that some portion of the bankrupt's personal estate did not pass to his assignees by reason of its not being distributable among his creditors, but, nevertheless, would [597] certainly vest in his executors, though it would not be assets in their hands, by reason of not being vendible, as in the instance of the next presentation to a vacant ecclesiastical benefice.

Assuming, however, the general rule to be, that a right of action in respect of a breach of contract already incurred at the time of the bankruptcy forms part of the personal estate of the bankrupt, and so passes to his assignees, it has been argued, on behalf of the appellant, that the present case must be regarded as an exception to that

rule, inasmuch as the damage recoverable in respect of this breach of contract must be in part compounded of the personal inconvenience to the bankrupt himself caused by such breach, and that the case must therefore be governed by the principle which excludes both executors and assignees from suing in respect of breaches of contract where the damage consists of personal suffering. It certainly has been established by a series of authorities, ending with the case of *Rogers v. Spence* in this House (12 Cl. and Fin. 700), that no action can be maintained, either by an executor or by an assignee, to recover damages for bodily or mental sufferings or personal inconvenience sustained by the deceased or by the bankrupt; the foundation of which is, perhaps, that it would in many cases be attended with extremely harsh and unjust consequences if the discretion, as to whether a redress for wrongs of this nature should be sought, was to be intrusted to any one but the very person who has received the injury.

But it does not appear to me that any damage would be recoverable in this action in respect of any personal suffering or personal inconvenience sustained by the [598] bankrupt. The declaration is evidently framed in order to enable the plaintiff to recover as liquidated damages the sum of £500, which the agreement stipulates shall be paid, in the way of specific damages, by either party who shall break the agreement, to the other; and although judgment has in fact been obtained for a smaller sum, and the £500 have therefore in the result been regarded as a penalty, and not as liquidated damages, still the declaration expresses no claim for damages in respect of any personal suffering or inconvenience caused to the plaintiff by the breach of the agreement declared on: and it may here be remarked, that if the statute 8 and 9 Will. III., cap. 11, s. 8, had never been passed, the plaintiff would have been entitled, on proof of the breach of the agreement assigned in the declaration, to recover the whole £500, even though it be a penalty, and not liquidated damages; and that, notwithstanding that statute, if the action had been brought in debt, the plaintiff would still be entitled to have judgment entered for the whole £500, although he could only take out execution for such damages as the jury should assess on the breach assigned. If then the claim in respect of such a breach can thus be made the subject of an action of debt, it seems difficult to maintain that the assignees are not the proper parties to enforce such a claim.

But it has been further argued, that the right of action in question does not pass, because the contract does not relate to the personal estate of the bankrupt, but to his person, being for the employment of his personal skill and labour; and it cannot be doubted that where a contract remains to be executed, and cannot be executed without the co-operation of the bankrupt, his assignees cannot enforce the contract, at all events unless they can procure him to co-operate. But this [599] doctrine seems to have no application to a case like the present, where, at the time of the bankruptcy, the breach of contract had already occurred, and where, consequently, whether the action for damages in respect of that breach is brought by the bankrupt himself or by his assignees, he is not bound by the contract to bestow any of his skill or labour in order to sustain the right of action.

But it has been further objected, that damages are substituted for specific performance, and that where there can be no specific performance there can be no action for damages; and it has been asserted, as a general proposition, that unless the contract itself, if unbroken, would have passed to the assignees, the right to sue for a breach of it cannot pass to them. But if these arguments are sound, they will apply equally to the instance of an executor. Now, it can hardly be contended that the right of action in question would not pass to the executor; and yet it is obvious that the executor could not specifically perform the contract, nor would the contract itself, if unbroken, pass to him. So in the case of a covenant real, that is, which runs with the land and descends to the heir, if it has been broken, and the substantial damage has taken place in the lifetime of the testator, his executor must sue upon it; but if no breach occurred until after the death of the testator, the right of action would be in the heir.

On the whole, then, I can discover no good reason why the words "personal estate of the bankrupt," in the sixty-third section of the Bankrupt Act, should not include the right of action in question; and it would, I conceive, be a violation of the general scheme and policy of the bankrupt law (not to be permitted without [600] some cogent cause) if the bankrupt should be allowed the power of depriving his creditors of the fruits of this right of action, which was a right absolutely and completely vested in

him before the time of his bankruptcy, and is capable of being turned into profit for their benefit.

My answer, therefore, to the question of your Lordships, is, that the defendant below is entitled to judgment.

Mr. Baron Platt.—In this action the plaintiff sought to recover damages for the defendants' breach of a contract into which they had entered to employ him for the term of seven years as foreman in a business requiring his personal skill and labour. That breach was committed by the defendants dismissing him altogether before the expiration of the term.

The defendant Drake, amongst other things, pleaded that after the cause of action had accrued, and before the commencement of the suit, a *fiat* in bankruptcy had issued against the plaintiff, under which the plaintiff had been adjudged a bankrupt, and assignees of his estate and effects had been duly appointed, and, as such assignees, they became entitled to the cause of action and damages in the declaration mentioned.

To this plea the plaintiff demurred. The question therefore raised by these pleadings is, whether the right of action against the defendants, which vested in the plaintiff before his bankruptcy, passed under the *fiat* to the assignees.

The assignees under a *fiat* in bankruptcy take "all the present and future personal estate of the bankrupt, and all the debts due to him," (6 Geo. IV. ; cap. 16, s. 63). This description may well include, not only [601] personal chattels, and debts properly so called, but all rights of action having relation to those subjects, such as for abstracting, converting, or injuring personal chattels, or for such breaches of contract relative to the personal estate of the bankrupt as prevent that estate coming to the hands of the assignees, or depreciate its value, and all beneficial contracts of sale or purchase of goods and merchandize. *Hancock v. Caffyn* (8 Bing. 358), and *Gibson v. Carruthers* (8 Mee. and Wels. 32), shew the principle on which such contracts and rights of action have been held to pass.

But these injuries, contracts, and breaches of contracts respectively bear a direct relation to the moveable estate of the bankrupt, and differ wholly in that respect from injuries to the bankrupt's person or reputation, injuries to him in his character of father, master, or husband, or the breach of a promise to marry, or of a contract to cure him of a disease or heal a wound; in which cases, although the right of action may have vested before the bankruptcy, it would not pass to the assignees, because the cause of action relates immediately to the person, and not to the estate of the bankrupt.

Following this distinction, and applying it to the case awaiting the judgment of your Lordships, I should have thought it difficult to say that the breach of a contract to employ an individual during a definite time in a service requiring his personal skill and labour (committed by discharging him before the expiration of the stipulated period) did not primarily and immediately relate to the person of the servant.

In the judgment in the Court of Exchequer Chamber [602] it is stated, that in the present case, although the contract was for the personal skill and labour of the bankrupt, the breach of that contract did not appear to cause him any other injury than the diminution of his personal estate; and that in this case the injury to the person, if any, was a consequence of the injury to the personal estate. And from these premises the Court concludes that the injury to the personal estate was in this case the primary and substantial cause of action. But surely in point of law the breach of the contract by dismissal is the injury, and the loss it might occasion to the plaintiff is the consequence of that injury.

If the bankrupt had continued in the service, could the assignees have sold the benefit of the contract? Could they have performed it? They certainly could not, for the personal skill and labour of the bankrupt are so involved in the performance of his part of the contract as to render it impossible for them or their vendee to render the stipulated service, which alone would give value to that contract, unless the bankrupt himself, as well as his estate, had passed to his assignees under the *fiat*, and he had thereby become their slave.

If at the time of the bankruptcy the consideration had been executed, and the right of the bankrupt had been to recover remuneration for past services, or if he had recovered a judgment in an action brought to recover damages for the breach in respect of which he seeks to recover in the present action, the remuneration and judgment would have passed as debts to the assignees. But in this case, in which the con-

sideration is not executed, and damages alone can be recovered, the mere vesting of a right of action in the bankrupt before the bankruptcy cannot be sufficient.

The subject to which that right primarily refers must [603] be taken into consideration. If it primarily refers to the personal estate alone, it would pass to the assignees. If it refers to the person of the bankrupt only, or to the person and estate jointly, I am of opinion it would not so pass.

The present action is brought upon a breach involving personal injury to the bankrupt, inseparably united with pecuniary loss resulting from that breach. I think the Court of Exchequer rightly decided that it related to the person; that for the refusal to employ the personal skill and labour of the bankrupt the damages would be compounded partly of the personal inconvenience to himself, and partly of the consequential loss to his personal estate, by reason of his not being able to earn so much in another employment; and that the plaintiff was entitled, notwithstanding his bankruptcy, to sue on the contract. My answer, therefore, to the question proposed by your Lordships, is, that the plaintiff in error is entitled to your Lordships' judgment.

Mr. Justice Erle.—This was an action on a contract for hiring and service, whereby the plaintiff was to serve for seven years, and the defendant to pay weekly wages during that time; and the breach was a dismissal during the seven years. The plaintiff, after this breach, and before the commencement of the action, became bankrupt; and the question is, whether this cause of action passed from the plaintiff to his assignees.

The general principle is, that all rights of the bankrupt which can be exercised beneficially for the creditors do so pass, and the right to recover damages may pass though they are unliquidated; *Wright v. Fairfield* (2 Barn. and Adol. 727), *Kearsey v. Carstairs* (2 Barn. and Adol. 716).

[604] This principle is subject to exception. The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property. Thus it has been laid down that the assignees cannot sue for breach of promise of marriage, for criminal conversation, seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by process of law; also the right of action does not pass in respect of wages earned by the bankrupt upon a hiring after the bankruptcy, *Silk v. Osborne* (1 Esp. 140); also the right of action cannot be made to pass to the assignees in respect of contracts uncompleted at the time of bankruptcy, by their adoption and completion thereof, where the personal service of the bankrupt himself is of the essence of the contract. The authorities are collected in the report of *Beckham v. Drake* (8 Mee. and W. 846). The grounds that were there assigned for holding this case to be within the exception, were, first, because the contract relates to the person, being for the employment of the personal skill and labour of the bankrupt; and, second, because the damage for a breach of it would be compounded partly of the personal inconvenience to the bankrupt, and partly of the consequential loss to his personal estate by reason of his not being able to earn so much in another employment.

Before stating my reasons for dissenting from these grounds, I would premise that one side of a contract being either consideration or promise, according as one of the parties is either plaintiff or defendant, when the [605] question is whether the assignees of a bankrupt contractor can sue for a breach of a promise broken before the bankruptcy, the nature of the promise is alone to be considered; and when the question is whether the assignees have a right to adopt an unexecuted contract, and after the bankruptcy to complete the consideration for the purpose of enforcing the promise, the nature of the consideration is alone to be considered. Thus, in respect of promise, the assignees of a patient, if bankrupt, could not sue a surgeon for a breach of his promise to use due care in treating a wound, because the damages are assessed by reference to bodily annoyance; but the assignees of the same surgeon, if bankrupt, might sue the patient on his promise to pay remuneration for attendance, because the promise relates to property; and the assignees of a bankrupt could not sue on a breach of promise to marry, but the same assignees might, in my judgment, for the same reason, sue for a breach of promise to pay a given sum in case of refusing, on request, to complete a contract of marriage. Thus also, in respect of consideration,

the assignees of a painter might not have a right to adopt an incompleted contract to paint a picture for a sum, and complete it, because the personal skill of the contractor would probably be of the essence of the contract; but the assignees of the bankrupt purchaser, being ready with the money which was to be the consideration, might adopt the contract to pay, and sue the same painter, if he refused to complete and deliver the picture according to his promise. As to the right of the assignees to adopt the contract where the duty of the bankrupt is to pay money only, see *Gibson v. Carruthers* (8 Mees. and W. 321).

[606] In the present case, then, the promise of the defendant is to be considered; and the promise is, to continue the relation of master and servant for seven years, and pay wages. As to that part of it respecting the continuance of this relation, it has no reference to the feelings of the bankrupt, so as to be analogous to the promises and causes of action which are decided to be excepted, and it is not the substance of the promise which is considered in the award of damage; but as to the other part, namely, the paying of the wages, it is the consideration for the promise of service. The substance of the promise, then, for the breach of which this action was brought, relates immediately to the property of the bankrupt, being for the payment of money, and therefore the first ground above mentioned, namely, that the contract relates to the person, is true only in respect of the consideration for the promise, which is personal skill and labour, and not in respect of the promise itself, and which is alone important on the present occasion; and for that reason the first ground fails.

It also appears to me that the other ground, viz., that the damage is compounded partly of the personal inconvenience to the bankrupt, and partly of the consequential loss to his estate, is in substance incorrect. The measure of damages for the breach of promise now in question is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved, and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment; *Elderton v. Emmens* (4 Com. Bench Rep. 498, n.; 6 Com. Bench Rep. 160; 17 Law J., C.P. 307). Upon these principles, in the present case, if the place of foreman in a type-foundry could not probably be again obtained without delay, and if the wages in the contract broken were higher than usual, the damages should be such as to indemnify for the loss of wages during that delay, and for the loss of the excess of the wages contracted for above the usual rate; but no allowance would be made in the nature of *pretium affectionis*, nor any reference to any pain that might be felt by the bankrupt on the ground that he was attached to the place.

If the breach of promise had arisen because the defendants had retired from business, the action would have lain; but if the defendants, in answer to the claim of damages, had proved that another person carried on the same business, and offered the plaintiff the same situation at the same or higher wages, the claim for more than nominal damages would, in my judgment, be at an end, and the plaintiff would not be allowed to prove that the change of employer was a source of regret personal to himself, and to obtain compensation for such regret.

Indemnity for the loss of his bargain in respect of his labour would be settled on the same principle as for the loss of a bargain in respect of common merchandize. If goods are not delivered or accepted according to contract, time and trouble as well as expense may be required, either in getting other similar goods or finding another purchaser, and the damages ought to indemnify, [608] both for such time, trouble, and expense, and for the difference between the market price and the price contracted for. Loss of time and trouble would be occasioned by a breach of contract in respect of goods, as well as by a breach of contract in respect of employment; but they are such time and trouble as have a known merchantable value, and the compensation is measured wholly regardless of the considerations which guide where bodily or mental pain is the direct object of contemplation.

Assuming then that the promise alone for the breach of which the action is brought is to be attended to in deciding whether the cause of action would pass to the assignees of a bankrupt or be within the exception, I have now submitted my

reasons for dissenting from the grounds assigned for judging that it was within the exception.

If the consideration for such promise could also be legitimately considered in reference to such a question, it affords an additional reason for that dissent.

The skill and labour of an industrious man are in the nature of his stock in trade; they would in general be the source of a continuous profit, which could be foreseen, and might be prudently relied on as a ground for giving credit, and the creditors therefore have reason for saying that the benefit of all contracts relating to that source of value, on which they may have relied when they gave credit, ought to pass to them. At all events, the reason assigned in deciding some of the cases to be within the exception does not apply, namely, that the creditors cannot legitimately have looked to the pain of the bankrupt from a broken limb, or wounded affection, or blasted character, as a source of profit, they being in their nature casual and unforeseen, and uncon-<sup>[609]</sup>ected immediately with property. There is a manifest distinction between damages from such sources as these last mentioned and damages in respect of contracts for labour, which is the ordinary and constant lot of a large portion of society.

Upon the whole then, both because the promise for the breach of which this action was brought appears to me to fall within the class of those relating to property rather than of those relating to the person, and because the measure of damages appears to me not to have immediate reference to the personal inconvenience of the bankrupt, that is to say, not to any pain to him in respect of his body, mind, or character; and also, if the consideration for his promise is to be considered, because it appears to me in its nature to belong rather to the class relating to property than to the person, I think that the defendant is entitled to the judgment.

Mr. Justice Cresswell.—The answer to the question submitted by your Lordships to the Judges depends upon the effect which ought to be given to the twelfth and sixty-third sections of the act 6 Geo. IV., cap. 16. The question is not affected by the subsequent act, 1 and 2 Will. IV., c. 56, s. 25.

In the earlier statutes, 34 and 35 Hen. VIII., c. 4, and 13 Eliz., c. 7, the words describing the interests to be dealt with by the commissioners are very similar to those found in the twelfth section of the 6th Geo. IV., c. 16. In the first section of the 1st James I., cap. 19, a direction is found, that all and singular the aforesaid statutes and laws heretofore made against bankrupts and for the relief of creditors shall be in all things largely and beneficially expounded for the aid, help, and <sup>[610]</sup>relief of the creditors of such person of persons as already be or hereafter shall become bankrupt. And this direction is repeated in 6 Geo. IV., c. 16, s. 135.

In *Smith v. Coffin* (2 H. Bl. 444, 462), where it was held that the right to bring a real action passed to the assignees of a bankrupt, Mr. Justice Buller, alluding to this direction, says, "The Court is bound to construe the bankrupt laws in the most liberal and beneficial manner for the creditors. I therefore hold, that every species of right, of which by any possibility profit can be made, passes to the assignees." And Lord Chief Justice Eyre, in the same case, says, "The plain spirit of the bankrupt laws is, that every beneficial interest which the bankrupt has shall be disposed of for the benefit of his creditors."

Such being the spirit of the bankrupt laws, I apprehend that the words of the 6 Geo. IV., c. 16, are sufficiently comprehensive to give effect to it as far as the right to bring a personal action for breach of contract is concerned. In *Ford and Sheldon's Case* (12 Co. Rep. p. 1), it was held (with reference to another statute) that "personal actions are as well included within the word 'goods' in an act of parliament as goods in possession." Lord Hardwicke quotes this case, in *Ryall v. Rolle* (1 Atk. 165, 183), and then observes, "The aim of the legislature in all statutes concerning bankrupts was, that the creditors should have an equal proportion of the bankrupt's effects, as far as possible, and it was intended that this act (21 James I., c. 19) should be construed beneficially for the general creditors, and it is so declared in an unusual manner in the first clause of the act."

<sup>[611]</sup>The Court of Queen's Bench, applying the same principle of construction to the 6 Geo. IV., c. 16, held, in *Wright v. Fairfield* (2 Barn. and Ad. 727), that a right of action in respect of a breach of contract to supply goods passed to the assignees, although on a rigid construction the words of the statute might not be



precisely applicable. Mr. Justice Littledale there stated it to be his opinion that the legislature intended that the assignees should have power to sue upon contracts made with the bankrupt, and for injuries affecting his personal property. And that was an action, not for any debt or sum certain, but for unliquidated damages, to be ascertained by a jury. Again, in *Porter, assignee of Harland, v. Vorley* (9 Bing. 93), the bankrupt had before his bankruptcy let to the defendant a phaeton, which he undertook to use in a proper manner, but through his negligence it was overturned and damaged. Plea, general issue. The phaeton was not the property of the bankrupt, but one which he had hired, and the real owner repaired it, and proved the amount under the commission; but the bankrupt's estate had not paid and was not likely to pay any dividend, so that no loss to the personal estate of the bankrupt had been sustained; nevertheless, it was held that the right of action for the breach of contract committed before the bankruptcy passed to the assignees, and that they were entitled to nominal damages; and upon the same principle I apprehend that the right of action in *Marzetti v. Williams* (1 Barn. and Ad. 415; but see *post*, 641), would have vested in the assignees had a bankruptcy occurred.

It seems to me, therefore, that according to the construction which has been put upon the bankrupt acts from the 34th and 35th Hen. VIII. to the present time, rights [612] of action vested in the bankrupt before his bankruptcy pass to his assignees, either as goods or as part of his personal estate. Such being the general rule, have the courts of Westminster Hall by their decisions engrafted any exceptions upon it?

In *Wright v. Fairfield* (already referred to), Mr. Justice Littledale says, that rights of action for mere personal wrongs, and such causes of action as would abate by the bankrupt's death, would not go to the assignees; the opinion certainly of a very learned Judge, but not a decision on the point.

In *Benson v. Flower* (Sir W. Jones, 215), an action on the case for words had been brought by the party injured, before his bankruptcy, and he had recovered a verdict and issued execution, and the sheriff had levied the damages, when the assignee moved to have the money paid over to him, which was refused by the Court, which decided "that before judgment an action on the case for words cannot be assigned by the statute, but after the judgment, when this is reduced to a certainty, it may be assigned; so may the money of the bankrupt, and this money, if he had received it; but before he has received it, and while it remains in the hands of the sheriff, it cannot be assigned." In Comyns' Digest (Tit. Bankrupt D. 16), this case is cited as an authority for saying that the commissioners may sell moneys due to the bankrupt on a judgment. The same case is reported twice in *Cro. Car.* (166 and 176), and by those reports it appears that the ground of the decision was that the money in the hands of the sheriff was *in custodia legis*, and ought to be paid to the party who could acknowledge satisfaction on the record, which [613] was the bankrupt only, as the bankruptcy occurred between the issuing and return of the writ of execution. *Benson v. Flower* therefore is not an authority for the decision of the present case. But the dictum of Mr. Justice Littledale in *Wright v. Fairfield*, and the decision of the Court of Exchequer in *Howard v. Crowther* (8 Mee. and Wels. 601), are authorities for saying that rights of action for injuries to the person or feelings of a bankrupt do not pass to his assignees; and where the cause of action is of such a nature that it would die with the party, there is much reason for saying that it cannot be severed from his person during his life, and vest in an assignee under the bankrupt laws. Probably the true ground has been suggested by Mr. Justice Williams.

In *Clark v. Calvert* (8 Taunt. 742), *Rogers v. Spence* (13 Mee. and Wels. 571, *affd.* 12 Clark and Fin. 700), and *Brewer v. Dew* (11 Mee. and Wels. 625), it was decided that rights of action for trespass to land or goods in the actual possession of a trader do not pass to his assignees if he becomes bankrupt, because those rights of action are given in respect of the immediate and present violation of the possession of the bankrupt, independently of his rights of property, and are an extension of the protection given to his person, and the primary personal injury to the bankrupt is the principal and essential cause of action.

On the one hand, therefore, we have it established, that by the bankrupt laws it was intended that every right vested in the bankrupt of which profit could be made,

including rights of action, should pass to the assignees, and on the other, that the right to recover a [614] satisfaction in damages for a personal injury is to be excepted out of that general rule. It remains to be considered whether the present case falls within the rule or the exception.

The declaration, after setting out the whole of the agreement entered into, assigns as a breach that the defendants would not employ the plaintiff, or suffer him to remain in their service for the seven years mentioned in the agreement, but wrongfully and unjustly, without any reasonable or sufficient cause, dismissed and discharged him from their service, and so, "the plaintiff says, the defendants did not perform their agreement, but therein made default, and thereby, and according to the said agreement, and their promise, became liable to pay the said sum of £500 in the agreement mentioned, and thereby fixed and agreed on as specific damages on such breach and default." The plaintiff therefore does not complain of any personal injury, of any personal suffering or inconvenience, occasioned by the defendants' breach of contract. He claims damages merely by reason of that breach. He claims indeed £500 as liquidated damages; but, according to *Kemble v. Farren* (6 Bing. 141), that sum must in this case be treated as a penalty. If the plaintiff could have claimed that as an ascertained sum payable on the breach of contract by the defendant, it seems to me that it would have been impossible to contend that the right to it would not have passed to his assignees as part of his personal estate; but in that case the money would still have been payable as a compensation in respect of the very same breach of contract that is now in question, the only difference being, that in that case the damages would have been ascertained [615] by agreement of the parties, whereas now they are left to be ascertained by a jury. And although the sum mentioned in the agreement is in this case a penalty, and cannot be claimed as liquidated damages, an action of debt might have been maintained for it when the contract was broken, *Winter v. Trimmer* (1 Sir W. Bl. 395). *Harrison v. Wright* (13 East. 343), and but for the statute 8 and 9 Will. III., c. 11, the plaintiff in such action would at law have been entitled to judgment and execution for the whole sum. The penalty then on the breach of the contract became a debt, and, as it seems to me, passed under the assignment to the assignees, and they might have sued for it, although bound to assign breaches under the statute 8 and 9 Will. III., cap. 11.

It is true that the party to such an agreement has an option, either to sue in debt for the penalty or in assumpsit for unliquidated damages; but I apprehend that such a party becoming bankrupt after breach of the contract, cannot, by electing to sue in assumpsit, deprive his assignees of the right to sue in debt, or render the other contracting party liable to two actions. The case of *Chippendale v. Tomlinson*, in Douglas (4 Doug. 318), reported in Cooke's Bankrupt Law (pages 260, 431), does not appear to me to have any bearing on this question. That was an action by a bankrupt for his work and labour done after the bankruptcy. I agree that a contract for the future work and labour of the bankrupt cannot be made by the assignees; they cannot hire him out (as was said by Lord Mansfield), and, as a consequence, the assignees cannot, after bankruptcy, adopt and enforce a contract made before the bankruptcy; for the application [616] of the personal skill or labour of a bankrupt; but I do not think it thence follows that, where a contract to employ a trader has been broken before his bankruptcy, the assignees cannot sue upon that breach, it having been established that rights of action in general are vested in the assignees.

Upon the whole, it seems to me that this case falls within the general rule, and is not within any of the established exceptions; and that even if nominal damages only are to be recovered, the right to sue for them is in the assignees, according to the decision in *Porter v. Vorley* (9 Bing. 93), although no actual loss may have been sustained by the bankrupt's estate.

Mr. Justice Wightman.—It appears to me that the judgment of the Court of Exchequer Chamber in this case was right, and that the plea of the bankruptcy of the plaintiff was an answer to the action.

The action was in assumpsit, to recover a sum of £500 agreed to be paid by the defendants to the plaintiff in case they broke a contract made by them with him to employ him for seven years, as their foreman, in the business of type-founders and

letter-press printers, at three guineas a week; the defendants discharged the plaintiff from their service before the bankruptcy; refused any longer to employ him; and there was a perfect right of action in him in respect of such breach of the agreement at the time of his bankruptcy; and the question is, whether that right of action passed to his assignees.

By the 6th Geo. IV., c. 16, s. 63, all the present and future personal estate of the bankrupt, and all the debts [617] due to him, pass to the assignees. Those words have a very comprehensive signification, and include not merely goods and chattels, and debts properly so called, but rights of action for breaches of contract which in any way affect the personal estate of the bankrupt; and, in short, as expressed by Lord Tenterden in *Wright v. Fairfield* (2 Barn. and Ad. 727), "every beneficial matter belonging to the bankrupt's estate." There are, however, some exceptions to the generality of the right of the assignees. In cases where the personal estate is only affected through some wrong or injury to the person or the feelings of the bankrupt, and the loss or gain to the personal estate would be greater or less according to the compensation given for such injury, whether by breach of contract or otherwise, the right of action would not pass to the assignees. Rights of action for breach of promise to marry, for torts to the person, for libel or slander, are instances of exceptions to the general rule. It may be also that the right to enforce unexecuted contracts will only pass to the assignees in cases where the assignees themselves could perform that which the bankrupt himself was to perform, as held in the case of *Gibson v. Carruthers* (8 Mee. and Wels. 321).

The present case, however, does not fall within any of the exceptions. The cause of action was complete at the time of the bankruptcy; there was nothing to be done on the part of the bankrupt but to bring his action, and recover the £500, or so much of it as the jury might be disposed to give him. Neither the person nor the feelings of the bankrupt were affected, except so far as the breach of contract affected his personal estate. The refusal to employ the plaintiff at a salary [618] of so much a week no doubt affected his personal estate; and upon the general principle I am disposed to think that the judgment of the Exchequer Chamber was right, as none of the exceptions appear to apply to this case.

There is, however, another ground upon which I think the judgment of the Court of Exchequer Chamber right, though it is not given as a reason in the judgment. The parties mutually agreed that either party failing to perform the agreement should pay to the other the sum of £500 by way of or in the nature of specific damages. It may be admitted that since the cases of *Astley v. Weldon* (2 Bos. and Pul. 346), and *Kemble v. Farren* (6 Bing. 141), it can hardly in this case be contended that the £500 could be recovered as agreed and liquidated damages, but that that sum is a penalty only. But I am not aware of any objection in point of law to an action of debt being maintained for the amount of the penalty, subject to the provisions of 8 and 9 Will. III., c. 11, s. 8, which applies, according to its terms, "to all actions for penal sums for non-performance of any agreement contained in any indenture, deed, or writing."

If the penalty had been imposed in an indenture between the parties, I apprehend there can be no doubt but that an action of debt might have been maintained for it, subject to the provisions of that statute; and I cannot distinguish between the case of a penalty in an instrument under seal and a penalty in an instrument not under seal. The penalty is in legal contemplation the debt, subject to the provisions of the statute so far as they may be applicable; and it is to be observed that the statute is not confined by its terms to actions for [619] penal sums in instruments under seal, but is general, and would include all actions for any penal sum in any instrument whatever.

In this view of the case the right of action is for a debt, and therefore within the very words of the Bankrupt Act, and would pass to the assignees; and the form of the action can make no difference. I am, therefore, of opinion that the judgment of the Exchequer Chamber is right.

Mr. Baron Rolfe.—After full consideration of this subject, I see no reason to abandon the opinion I formed when the case was originally brought before the Court of Exchequer. The sum of £500, though spoken of as a sum to be recovered by way of liquidated damages, is certainly to be treated merely as a penal sum, and

not as the amount to be recovered for any breach (whether more or less important) of any of the stipulations of the contract. The right of the plaintiff therefore under the contract, if there had been no bankruptcy, would have been, not to recover a sum of £500, but to recover such a sum as a jury should consider a fair compensation for the injury resulting from his unlawful dismissal. Is the right to recover such a sum part of his personal estate within the true intent and meaning of 6 Geo. 4, cap. 16, sect. 63? I think it is not.

The general rule is, that all rights of action in respect of injuries to the bankrupt's estate pass to his assignees. They take the *estate*, and, as incident to it, all rights of action relative to the estate, whereby it may be increased or improved. This was the ground of the decision in *Wright v. Fairfield* (2 Barn. and Adol. 727). On the [620] other hand, they do not take (so to say) the person of the bankrupt, and so neither can they maintain actions whereby his person is to be compensated for injuries it may have sustained. This was the principle on which the decision proceeded in *Howard v. Crowther* (8 Mee. and Wels. 601).

Then under which of these classes does the present case range itself? I think under the latter. The only breach alleged is, that the defendants did not employ the plaintiff or permit him to remain in their service for the residue of seven years, but wholly refused so to do, and wrongfully dismissed and discharged him. Now for this breach the defendants are liable to make compensation in damages, even though it could be shown that the personal estate had received no injury, or even had been benefited by their act. Suppose for instance, that it had been shown that the employment of the plaintiff by the defendants was of a very healthful and agreeable nature, and that in consequence of his dismissal he had obtained a more lucrative but at the same time an unwholesome and much less agreeable occupation: there would have been in such a case no injury, but rather a benefit to the personal estate, and yet it is clear there would have been a breach of contract on the part of the defendants, and so a right of action against them by some one; not certainly by the assignees, for they as representatives of the estate would not have sustained damage, but by the bankrupt himself, with whom the contract was made, and who would be the only party injured.

This seems to me to be precisely the present case. There is nothing to show that the breach assigned in the declaration caused any injury to the bankrupt's [621] estate. It is not even averred that the defendants did not regularly pay the weekly wages stipulated for. The grievance complained of is simply the refusal to employ the plaintiff, and the dismissal of him from the service of the defendants. Any compensation to be recovered for this wrong appears to me to be connected solely with the person of the bankrupt, and not to be an incident to his estate. The right of action therefore remained in him, and did not pass to his assignees as part of his personal estate.

For these reasons I am of opinion, in answer to the question propounded by your lordships, that the plaintiff in error, who was the plaintiff in the action, is entitled to judgment.

Mr. Justice Maule.—I am of opinion that the defendants in error are entitled to judgment.

This was an action on a contract by which the defendants agreed to employ the plaintiff as their foreman in their business of type-founders, etc. for seven years at certain wages, containing a clause by which the parties agreed that if either of them should fail to perform the agreement, the party failing should pay to the other the sum of £500 by way or in the nature of specific damages. The breach complained of in the declaration was, dismissing the plaintiff from the service before the end of the seven years, and refusing to employ him further. It appears by the record that after the right of action accrued, the plaintiff became bankrupt, and the question of his right to judgment depends on whether such a cause of action passes to the assignees of a bankrupt. There is no doubt that the right to bring an action for an injury to the person, character, or feelings of a bankrupt, does not pass to the assignees, and that the right to bring an action for the payment of money [622] agreed to be paid to the bankrupt does pass. And it appears to me that the present action is in effect an action on a contract to pay money. The clause by which, in the event that has happened, the master agreed to pay the servant £500, is certainly

in its terms an agreement to pay money, and though the construction which the law requires to be put upon it prevents the whole sum from being payable when it would be more than a reasonable compensation for a failure of performance, it is not thereby rendered wholly inoperative, but it retains the effect of binding the failing party to pay such part of the sum as may be reasonable in respect of the failure. Such a clause is still therefore a clause binding to the payment of money, whether the amount be ascertained or not; and it appears to me that the right to recover a pecuniary demand so expressly stipulated for, passes to the assignees as part of the personal estate of the bankrupt, whether the amount be ascertained or not. Thus, although a right of action for not marrying or not curing, in breach of an agreement to marry or cure, would not generally pass to the assignees, I conceive that a right to a sum of money, whether ascertained or not, expressly agreed to be paid in the event of failing to marry or to cure, would pass. The agreement of the parties that money shall be paid as compensation makes, as it seems to me, the right to recover that money a part of the personal estate of the bankrupt, as much as a recovery, before the bankruptcy, of a judgment in an action for an injury to the person or character of the bankrupt, would do.

Mr. Baron Parke.—The question proposed by your Lordships is, whether the plaintiff or the defendant in error is entitled to judgment.

It was my duty to deliver the judgment of the Court [623] of Exchequer, consisting of my brothers Alderson, Rolfe, my late brother Gurney, and myself, when this case was decided by that Court (8 Me. and W. 846), and to assign the reasons which induced me to form the opinion then expressed. The discussion of the case on the writ of error at your Lordships' bar, and the subsequent consideration of it, and of the judgment of the Exchequer Chamber, have induced me to think that the reasons so assigned by me are insufficient.

One of the causes that has led me to doubt the propriety of that decision is, that a *penalty* is given for the non-performance of this agreement: for it is clear that, according to the cases of *Kemble v. Farren* (6 Bing. 141), and others, though the sum of £500 is said to be for "specific damages," it is to be construed as a penalty; and whether that penalty would vest in the assignees under the circumstances of this case, is a question which I propose afterwards to consider. But I assume for the present, that the case is in the same position as if there was no penalty; on which footing it has been argued at your Lordships' bar and in the court below. I would premise that it is not necessary to say anything upon a question discussed in the court below, whether all the defendants are liable upon a contract, though in writing, made by one in reality on his own behalf, and as agent for the others. There is now no doubt upon this point; both the Courts below concur in this respect; nor was it disputed in the argument here. The principal question in the case on the above-mentioned assumption is, whether the right of action for a breach before bankruptcy of such a contract as this, for the personal services of the bankrupt, passes to the assignees.

[624] The general question turns on the 6th Geo. IV., c. 16, s. 63, which must be construed with the aid of the twelfth section, and with that of former decisions upon the repealed statutes relative to bankrupts. By that section, "all the present and future *personal estate* of the bankrupt, wheresoever found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed to, or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same shall be found or known, are assigned, and such assignment is to vest the property, right, and interest in such debts, as fully as if the assurance whereby they are secured had been made to the assignees, and they have the former remedy to recover as the bankrupt would have had."

A former section (12) enabled the Lord Chancellor to appoint commissioners, with full power and authority to make such order and direction as to the lands, moneys, fees, offices, annuities, goods, chattels, wares, merchandizes and debts, wheresoever they may be found or known. The two sections are to be read together.

It is not disputed that the rights of the assignee under the statute law are not identical with, nor are they so extensive as those of an executor, who stands in the place of his testator, and represents him as to all his personal contracts, and is by law his assignee (Wentw. Off. Exor. 100), and therefore may maintain any action in his right which he himself might (Bac. Abr. Exors. N.). That must be understood to

mean any action on a *contract*, for an executor never could sue for wrongs to his testator; "*actio personalis moritur cum persona*." And with respect to contracts, [625] some exceptions have been introduced by modern decisions; *Chamberlaine v. Williamson* (2 Maule and S. 408), *Kingdon v. Nottle* (1 Maule and S. 355, and 4 id. 53), as explained by Lord Abinger in the case of *Raymond v. Fitch* (2 Cr., M. and R. 588, 599), and the executor cannot sue upon contracts the breach of which is a mere personal wrong. The executor takes all the other personal rights of a testator, as a consequence of his representative character, whether they are available for the payment of debts or not, for his liability to pay debts is the consequence, not the object, of the appointment. The assignee is created by statute, for the purpose of recovering and receiving the estate, and paying the debts of the bankrupt, and takes only what the statute gives for that purpose. What then does it give? It clearly gives in the section above mentioned, not merely all personal chattels, securities for money, and debts properly so called, but all unexecuted contracts which the assignee could perform, the performance of which would be beneficial to the bankrupt's estate. These are "*personal estate*." The assignee takes, in the language of Lord Tenterden in *Wright v. Fairfield* (2 Barn. and Ad. 727), all "the beneficial matters" belonging to the bankrupt; or, as Mr. Justice Buller said, "anything belonging to the bankrupt that can be turned to profit." *Smith v. Coffin* (2 H. Bl. 444).

This contract, if unexecuted, would clearly not have passed to the assignees. But the question is, not whether the contract, but whether the right of action for the breach of it before the bankruptcy, passed. The words "*personal estate*" clearly comprise all chattels, [626] chattel interests, and all the subjects mentioned in the twelfth section; and they also comprise *some* rights of action which are not properly debts, and would not pass under the word "debts," but do pass under the description of "*personal estate*."

For instance, some actions for torts do pass. Actions for injuries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignee, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this.

On the other hand, rights of action for injuries to the person, or reputation, or the possession of real estate, do not pass. Actions of assault, for example, and for defamation, actions on the case for misfeasance, doing damage to the person, for trespass *quare clausum fregit* (*Rogers v. Spence* (13 Mee. and Wels. 571; affirmed in this House, 12 Cl. and Fin. 700)), actions for criminal conversation with the wife, for seduction of the servant or daughter of the bankrupt, are not transferred to the assignee, even though some of these causes of action may be followed by a consequential diminution of the personal estate, as where by reason of a personal injury a man has been put to expense, or has been prevented from earning wages or subsistence; or where by the seduction the plaintiff has been put to expense; *Howard v. Crowther* (8 Mee. and Wels. 601). But with respect to contracts; rights of action for the breach of such as directly affect the personal estate, whereby the assignee is prevented from receiving part of it, or its value is diminished, are certainly transferred; as for example, rights of action on a beneficial [627] contract, whereby one engaged to sell and deliver goods to the bankrupt, and which, if performed, would have put him in the possession of the goods, or a contract with another to carry or take care of the goods of the bankrupt which are lost, or injured, and thereby diminished in value.

On the other hand, actions for the breach of contracts personal to the bankrupt, unaccompanied by an injury to the personal estate, as a contract to carry him in safety, to cure his person of a wound or disease, or a contract with a person, who subsequently becomes bankrupt, to marry, are certainly not assigned. This is conceded; but it is questioned on the part of the defendant in error, I think without sufficient ground, whether the assignee would not be entitled to sue in any of these cases, if the personal estate was consequently damaged, as where the bankrupt was put to expense by the breach of contract, or lost the power of earning money.

What then is the proper construction of this section of the act, according to its words and the several cases decided upon it? The proper and reasonable construction appears to me to be, that the statute transfers not all rights of action which would pass to executors, (for rights incapable of being converted into money, such as

the next presentation to a void benefice, pass to them), but all such as would be assets in their hands for the payment of debts, and no others—all which could be turned to profit, for such rights of action are *personal estate*. Of such the executor is assignee in law; and the nature of the office and duty of a bankrupt's assignee requires that he should have them also. But rights of action for torts which would die with the testator, according to the rule, "*actio personalis moritur cum persona*," and all actions of contract affecting the person only, [628] would not pass. Of such the executor is not assignee in law; and whatever may be the reason of the law which prohibits him from being so, seems equally to apply to a bankrupt's assignee.

According to this rule, the description of contracts upon which the right of action is transferred, would include, but would not be restricted to, such as directly affect some chattel or subject of property which would pass to the assignees, or to such as would, if they had been performed, have produced such property, which alone, it was argued at your Lordships' bar, would be transferred by the statute; and this was in accordance with the view I took in the court below. I think, upon subsequent reflection, that this is too narrow a construction of the statute, and that it applies to all contracts for the breach of which an executor could sue, which could be turned to profit for the payment of creditors. And if this be the true construction of the statute, if *all* the damages for this breach of contract could have been recovered by an executor, the assignee could recover them, and the plea would be a good plea in bar.

But if part was recoverable for the personal inconvenience of the bankrupt, a different question presents itself. I think this contract cannot be said not to relate in any part to the person of the bankrupt, but that his personal inconvenience and trouble in looking out for a new employment would be part of the damages recovered. If so, that part could not be transferred to the assignees, and ought not to be lost; the right to those damages, which would be lost in the case of a testator's death altogether, continues in the bankrupt. It is upon this point that the case appears to me to turn. Who then are to sue for the breach of contract where part belongs to the assignee, part to the bankrupt? [629] Who would have to sue if the contract was to cure the bankrupt of a disease, and give him a sum of money, and there had been a breach of both parts, which appears to me to be a similar question? It is extremely difficult to say in whom the right of action would be.

Either the right of action on the contract must be divided, and each sue, or the right of action altogether must remain in the bankrupt, or altogether be transferred to the assignees, or both must join, the contract being entire, to sue for the damages. In the first two cases the plea would be good, in the last two bad; for in the first it would be no answer to the entire cause of action; in the second, it would be no answer to any part. I should feel considerable difficulty in deciding the question, but this case does not depend upon it, for I have now to consider what the effect of the penalty is.

This subject was not discussed at your Lordships' bar, and was little adverted to in the court below.

At common law the penalty would have been forfeited, and, being a sum certain, would have passed to the assignees; for, at the time of the bankruptcy it would have been uncertain whether the defendant would ever have filed a bill for relief, supposing he could have done so; and a sum certain, defeasible on an uncertain event, would have been, until defeated, personal estate, and would certainly vest in the assignees. But the question is, whether the statute 8 and 9 Will. III., c. 11, has not made an alteration. That statute in effect makes the bond a security only for the damages really sustained. If all the damages would be recoverable by the assignees, the penalty would pass; if none, the penalty could not be levied, and therefore could not be available for the payment of creditors, and probably would not pass to the assignees. If part of the damages [630] could be recovered by the assignees, and part not, the question is different. The penalty would then be a security for damages partly belonging to the assignees, partly to the bankrupt. It would be like the case of a bond to the bankrupt conditioned not to assault him, and to pay him a sum of money, forfeited in both respects before the bankruptcy; and I have had some difficulty in saying whether the right of action on such a bond would or would not pass to the assignees.

But it seems to me to be clear that the penalty, which is an entire thing, could not be divided, so that each could sue for a part; and it could not be predicated what part would pass to each. It follows, therefore, that either the right to the entire penalty must remain in the bankrupt, or that either both the bankrupt and the assignee must join, as being both interested, or that the right to sue goes to the assignees, in order to secure such part of the damages as is the personal estate of the bankrupt vested in them. I cannot help thinking that both ought to sue, as they would do if the bankrupt before his bankruptcy had assigned a part of an entire debt as a security to a creditor, and consequently was a trustee for him for that part. But, at all events, I do not think the right to the penalty would remain in the bankrupt; and therefore the plea is a good plea, as it shows that the bankrupt could not sue alone.

Therefore, in either view of the case, I now think the judgment of the Court of Exchequer should be reversed, and the judgment of the Exchequer Chamber affirmed. If the whole of the damages are part of the personal estate which passed to the assignees, the plaintiff was barred; if some were, and some were not, still for the reasons before-mentioned the plea appears to me to be good, and my opinion which I expressed in the court below was wrong.

[631] My opinion now, therefore is, that the plea of the plaintiff's bankruptcy is a good bar, and that the judgment of the Exchequer Chamber ought to be affirmed.

Lord Chief Justice Wilde.—In answer to the question upon which your Lordships have been pleased to ask the opinion of the Judges, whether the plaintiff in error, or the defendants in error, are entitled to judgment; I beg to state that I am of opinion that the defendants in error are entitled.

The action is brought to recover the sum of £500, which is alleged to have become forfeited and payable under the agreement between the parties, by reason of a breach of the stipulation on the part of the defendants in error to employ the plaintiff in error for a certain period, at a specified rate of remuneration; such breach of contract having occurred before the bankruptcy of the plaintiff in error, and the right of action therefore having accrued to him before his bankruptcy.

The money claimed by the declaration is not recoverable as liquidated damages, but is a sum in the nature of a penalty, in respect of which therefore, although such sum constitutes a debt at law, execution would be restrained and limited to the amount of the actual damage to be assessed by the jury.

It has not been disputed at the bar, that a right of action to recover damages for the breach of a contract, which has accrued to a bankrupt before the bankruptcy, is part of the personal estate of such bankrupt within the meaning of the statutes in bankruptcy, and will in many cases pass to the assignees; and further, that it is no objection to the assignees' right to recover such damages, that they are unliquidated. It is therefore unnecessary to refer to authorities establishing those propositions.

[632] The objection to the plea of the bankruptcy of the plaintiff in this case is, that the right of action set forth in the declaration is founded upon a contract which related to the personal skill and labour of the plaintiff, and which therefore the assignees could not have performed. I am of opinion that this objection is not well founded, but after the opinions which have been expressed by those of my learned brethren who think that the defendants in error are entitled to judgment, I shall content myself with stating generally the principles and grounds upon which my opinion is formed.

It is to be observed that at the time of the bankruptcy the contract was not *in fieri*; the performance of it was no longer a matter open between the parties, but had been determined by the actual dismissal of the plaintiff in error, by the defendants, from their service. The relation of the parties to the contract entirely changed when the defendants in error dismissed the plaintiff from their employ, and thus determined the contract—and the only open point between them at that time was the right of the plaintiff to recover damages for the previous breach of the contract; and the rights of the assignees depend upon the condition, or relation of the parties at the time of the bankruptcy, and are not in my opinion affected by the considerations applicable to the relation which had antecedently existed between the parties, and to which former relation totally different legal incidents attached; that is to say, the question whether a right of action, actually vested in the bankrupt prior



to the bankruptcy, in respect of a contract determined, passes to the assignees, is not affected by the consideration whether the contract, if it had not been determined but remained open and *in fieri* at the time of the bankruptcy, would have passed to the [633] assignees, and could have been performed by them.—The questions are totally distinct from each other; and in like manner, if salary or wages, or commission under a contract of service, are due at the time of the bankruptcy, the right to recover such wages, salary, or commission, would pass to the assignees as part of the personal estate, without regard to the consideration of whether the contract or services had had relation to the personal skill or labour of the bankrupt, or any confidence reposed in him, or whether the contract could have been performed by the assignees.

It is said this is an action personal to the bankrupt; and in one sense it no doubt is so; but not in any sense material to the question to be determined.—It is personal in the sense, that it arose out of a contract founded in the personal confidence in the bankrupt, and which could only be performed by his personal labour and skill; and in the same sense contracts are personal, made with factors, salesmen, agents of various kinds, masters of ships, bankers, attorneys, architects, engineers, and various other persons whose personal skill, knowledge, and integrity, are the inducements to the contracts. In no such contract could assignees claim to perform the contract if it remained open, unless the bankrupt would voluntarily assist them in so doing, and then not in every case; but surely it cannot be contended that the right of action for breaches of contract in relation to such employments accruing before the bankruptcy, would not pass to the assignees; and I think the consequences to the creditors under the bankruptcy of many traders would extend much beyond what have been taken in consideration, if it is law that no rights of action can pass to the assignees in respect of breaches of such contracts occurring before the bankruptcy.

[634] The right of action under consideration was undoubtedly part of the personal estate of the bankrupt; and the residue of that estate which would come to the possession of the assignees must be intended in law to be less, and must have been, in fact, less, by the defendants in error having withheld the remuneration payable under the contract.

The action is brought to recover pecuniary compensation in respect of a pecuniary injury; and it does not seem to me to be a ground why the right to recover such pecuniary compensation, should not pass to the assignees; because a case may be surmised in which a bankrupt might by possibility be entitled to recover damages for some consequential injury other than pecuniary, which would not pass to the assignees, this case presenting no ground for any such surmise.

The cases of exception to the rights of action passing to assignees seem to me to be very distinguishable from the present case.—The right of action for a trespass does not pass, because trespass can only be maintained by the party whose actual possession is intruded upon; but I apprehend that if the trespasser has done actual damage to the personal estate of the bankrupt, as well as committed a trespass upon his possession, there is no authority which decides that assignees may not maintain an action in respect of the diminution in value, or injury to the chattels, that have passed to them under the bankruptcy.

This is a case of contract, and the cases in which it has been held that the right of action for a breach of contract before the bankruptcy did not pass to the assignees, were cases where the gist of the action was not the pecuniary damage, but the injury to the feelings, and in those cases, although pecuniary damage may [635] have been incidental or accessory, it was not the principal injury, and the right to recover the incidental damages was not severable from the principal. Such cases are clearly distinguishable from a case in which the pecuniary damage, and not the injury to the feelings, is the cause of action.

A third class refers also to injuries or wrongs strictly personal to the bankrupt, such as injuries to his person or character. In such cases, it is true, pecuniary compensation is sought to be recovered; but the pecuniary injury is not the measure of the damages recoverable; and such cases also seem to me to be essentially distinguished from actions for breaches of contract, in which the pecuniary injury is



from their brethren, is calculated to inspire, I have felt very great anxiety in considering this case; but I have now come to a very confident opinion in favour of the sentiments which have been conveyed to your Lordships by seven of the Judges, differing from the minority of two.

My Lords, I am clearly of opinion that if you were to scan very minutely the sections of the Bankrupt Act, the 6th of Geo. IV., c. 16, namely, the 12th and the 63d sections, upon which all these questions turn, you would not from them, unassisted by more general views and unaided by the light of judicial decisions, come to a very clear opinion that a right of action for damages of this kind passed to the assignees. But when you come to look at the decisions upon this subject, it seems to me quite impossible to doubt that you must carry the case a little further than the very words of these sections do; or at least that you must give them, in favour of the creditors, remedially, a larger construction than otherwise, and in another case, you might be disposed to affix to them.

The case of *Wright v. Fairfield* (2 Barn. and Ad. 727), is one which clearly goes in that direction and to that point. That was an action for unliquidated damages, which had accrued before the bankruptcy by the non-performance of a contract. It was a contract with persons acting on [639] behalf of his Majesty to furnish stone and execute masonry, and on default made by the bankrupt in providing such stone, it was agreed that the other party might determine the contract. The assignees of the bankrupt sued for damages, and all the learned Judges then held that the action was maintainable. Lord Tenterden, who had tried the cause, says, "I have not been able to entertain any doubt upon this point. It appears to me, that the object of the act of 6 Geo. IV., c. 16, was to give the assignees, for the advantage of the creditors, every beneficial matter belonging to the bankrupt's estate." And all the learned Judges held, that the right of action having accrued to the bankrupt before the bankruptcy for the non-performance of the contract entered into by him with A., the damages to be recovered from A. for the non-performance of the contract with the bankrupt, passed by assignment to the assignees under his commission. Mr. Justice Littledale says, "I am of opinion that the legislature in this statute intended to give assignees all the moneys in respect of the property which they were entitled to under the former acts, and that they should have power to sue upon contracts made with the bankrupt, and for injuries affecting his property, though not for mere personal wrongs, and such causes of action as would abate by his death."

It by no means follows,—though I agree that you are to draw the line, and not to give damages for injuries which are merely personal to the bankrupt, in which the cause of action *moritur cum persona*, and would not pass to the executors, that you are not, for instance, to give damages to the assignees under bankruptcy for loss of character sustained by the bankrupt, by slander, or for the loss of service by the seduction of a [640] servant or a daughter, or for criminal conversation with the wife: although I agree that you are not to give damages in such cases to the assignees under the commission, it does not by any means follow that you are (as might be supposed from construing the 63rd, sect. with the 12th sect. of the 6 Geo. IV., c. 16, and taking that with the case of *Wright v. Fairfield* (2 Barn. and Ad. 727),) to confine yourself only to cases where mere damages are to be given. The law goes further, as laid down in these cases, and it is shewn to be this, that even where there is no actual damage proved, or even where the damage is merely nominal for a breach of contract, still if that is in respect either of property or of a proprietary right, such as service or work and labour, as in the present case, even in that case it passes.

There is the case of *Porter v. Vorley* (9 Bing. 93), where before his bankruptcy Hurland, the bankrupt, had hired a carriage of M., and let it to the defendant Vorley. The defendant sent it back to the bankrupt damaged; M., the coachmaker, repaired it with the assent of the bankrupt, and the bankruptcy having immediately ensued, M., the person who had repaired it, proved the amount due for repair under the commission. Now there no dividend was paid, and yet it was held that the bankrupt's assignees had a right of action against the defendant. And it is expressly stated by the Lord Chief Justice, in delivering judgment in the case, (the Court having taken time to consider the argument), "The consequence appears to us to be that the plaintiffs are entitled to nominal damages for the breach of a contract upon which they had the right to sue," and the verdict was so entered accordingly.

[641] Now your Lordships will perceive that that is a case of bare nominal damages, which could not be divided under the commission; and, therefore, it was not a question of property in the ordinary sense of the word, but merely of the right to sue though for nominal damages for a breach of contract, and yet it was held to be sufficient.

One of the learned Judges (Mr. Justice Cresswell), makes an observation (*ant.* 611), the whole length of which I do not quite think it necessary for me to go along with him. He cites the case of *Marzetti v. Williams* (1 Barn. and Ad. 415), and he says he apprehends that in that case, being a case of nominal damages, the right to sue would on the same ground have vested in the assignees. Now I have looked into the case of *Marzetti v. Williams*, which I argued on one side, and my noble and learned friend near me on the other, in the Court of King's Bench. It was an action for the non-payment of a cheque by a banker. It was said that Marzetti, the party whose cheque had been refused payment, though there were funds, was damaged in his character as a solvent man and trader, and that was the argument upon which we placed our main reliance. In that case Marzetti had a right, no doubt, to obtain damages, though they might be only nominal for such injury personally to himself from the defendants, the bankers, who had refused payment of the cheque. But I do not nor need I, to support this judgment, go so far as to say that that particular right would have passed, as one of the learned Judges says in this case, to the assignees under the commission.

One point which is taken here is, that part of this was personal, and part of it was proprietary; that [642] part of it was a personal injury sustained by reason of the trouble he would be put to, not only in losing employment and the gains of it from the defendants, but in looking about for another employment. I entirely agree with another of the learned Judges, Mr. Justice Williams, in the answer which he gives to that. The learned Judge who uses that argument, says, he considers that that is, as it were, the pivot upon which the decision might turn. "But," says Mr. Justice Williams, "it does not appear to me" (and I entirely go along with him) "that any damage would be recoverable in this action, in respect of any personal suffering, or personal inconvenience sustained by the bankrupt. The declaration is evidently framed in order to enable the plaintiff to recover as liquidated damages the sum of £500, which the agreement stipulates shall be paid in the way of specific damages, by either party who shall break the agreement, to the other; and, although judgment has in fact been obtained for a smaller sum, and the £500 have therefore, in the result, been regarded as a penalty, and not as liquidated damages, still the declaration expresses no claim for damages in respect of any personal suffering or inconvenience caused by the breach of the agreement declared on."

My Lords, upon these grounds, into which I need not go further, agreeing as I do with the learned Judges in general, without mooted another point raised by some of them, namely, whether in the case of *Wright v. Fairfield* (2 Barn. and Ad. 737. 732), Mr. Justice Littledale goes a little further in laying down the law,—excluding all personal claims—than is really the law: without, I say, entering into that, which I hold to be perfectly unnecessary for the decision [643] of the present case, I am of opinion that your Lordships ought in this case, in accordance with the opinions of the large majority of these learned Judges, to give your judgment for the defendant in error.

Lord Campbell.—My Lords, if this agreement had been without a penalty, and an action had been brought for unliquidated damages, I should have thought it a case of very great doubt. Because, under such circumstances, I apprehend that the action being brought after the bankruptcy, the bankrupt might have recovered compensation for what he had suffered subsequently to the bankruptcy; and if damages awarded to him, and received in respect of what had taken place subsequently to the bankruptcy, were to go to the assignees, that would really be making the bankrupt a slave, to be hired out for the benefit of his creditors. It has been settled, over and over again, that for personal labour, or anything personal respecting the bankrupt, the assignees have no claim.

But, my Lords, I really think that this case is free from difficulty, when we come to consider that this is an action upon an agreement, subject to a penalty, and that the action is brought for the penalty;—and I cannot help expressing my surprise

that in the Court below, and even at your Lordships' bar, so little attention was paid to that circumstance. It has been brought prominently before our notice by the learned Judges in their very valuable opinions. The facts of this case remove all doubt, because this agreement entitled the plaintiff to the sum of £500, upon a breach of the agreement. That was then a debt. That debt had accrued [644] before the bankruptcy, and under the express words of the 6th of Geo. IV., cap. 16, "debts due or to be due to the bankrupt, wheresoever the same may be found or known," are assigned, and such "assignment shall vest the property, right, and interest" in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees; and, "such assignees shall have the like remedy to recover the same in their own name as the bankrupt himself might have had." Well, then, the assignees clearly had a legal remedy to recover this sum of £500, or so much of it as should be considered applicable to the loss which had been sustained. It was a debt before the bankruptcy, and that debt is assigned to the assignees; and the assignees have a legal remedy for that to which the bankrupt is entitled.

On this consideration, that most learned judge, Mr. Baron Parke, entirely changed the opinion he delivered when the case first came before him in the Court of Exchequer. He then agreed with the rest of the Judges of that Court when they delivered a unanimous judgment in favour of the plaintiff, having disregarded the circumstance of the penalty. But that circumstance having now been brought to his attention, he has entirely changed his opinion, as I find in the most express words in the opinion which he delivered to your Lordships; he says, "Therefore, in either view of the case, I now think that the judgment of the Court of Exchequer should be reversed, and the judgment of the Exchequer Chamber be affirmed;" that the judgment he himself originally concurred in should be reversed, and that the judgment reversing that should be affirmed. The opinion of that learned Baron, I should always receive [645] upon all occasions with the greatest respect, but more particularly when it is reversing the opinion which he himself once entertained.

The opinions of all the learned Judges are exceedingly valuable; but there are a few words of Mr. Justice Maule's which seem to me to put the case with great strength, and which show how far the principle upon which the learned Judges proceed may be carried. He says "Although a right of action for not marrying or not curing, in breach of an agreement to marry or cure, would not generally pass to the assignees, I conceive that a right to a sum of money, whether ascertained or not, expressly agreed to be paid in the event of failing to marry or to cure, would pass." My Lords, if for not marrying or for not curing, there being a penalty, and that penalty being forfeited and being recoverable before the bankruptcy, when it is clearly and exclusively personal to the bankrupt;—if, even in that case, the right of action would pass to the assignees, and would not remain to the bankrupt after his bankruptcy, it is quite clear that such right of action in the case your Lordships have to consider is transferred from the bankrupt to the assignees.

The 8 and 9 Will. III., although it prevents the party recovering, as he might have done at Common Law, the whole of the penalty, does not at all prevent that part of the penalty which is recovered being considered in the nature of a debt; and so much is it a debt that an action of debt might be maintained for it. Instead of an action of assumpsit upon damages, an action of debt might have been maintained, and there would have been judgment for the amount of the debt.

Under these circumstances, my Lords, I have no [646] hesitation at all in concurring with the motion that the judgment of the Exchequer Chamber, reversing the judgment of the Court of Exchequer, should be affirmed.

Lord Brougham.—In the case of *Porter v. Vorley* (9 Bing. 93), there are nominal damages where there was no penalty at all. I consider *Porter v. Vorley* to carry the law further than it is at all necessary for us to go in this case; because there, although there was no penalty whatever, I think they must have considered the nominal damages as in the nature of a debt.

Judgment was then given for the defendants in error, with costs.

[647] IN THE MATTER OF THE JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 AND 1849; AND OF THE WOLVERHAMPTON, CHESTER, AND BIRKENHEAD JUNCTION RAILWAY COMPANY.\*

HENRY JAMES NORRIS, Official Manager of the said Company,—*Appellant*;  
JOHN MORFORD COTTLE,—*Respondent* [August 5, 6, and 9, 1850].

[*Mews' Dig.* iii. 1813. S.C. 14 Jur. 703. See 2 Mac. and G. 185 *sub nom. ex parte Cottle*; *Hutton v. Upfill*, 1850, 2 H.L.C. 674; *Bright v. Hutton*, 1850, 3 H.L.C. 174, 351; *Hamilton v. Smith*, 1859, 7 W.R. 173.]

*Joint Stock Companies—Winding-up Acts—Provisional Committee—Contributory.*

The mere fact of a person being a member of the provisional committee of a joint-stock company does not make him liable as a "contributory" within the Winding-up Acts.

C. consented to have his name inserted in the list of provisional committee-men of a proposed railway company, which was provisionally registered; and the name was accordingly inserted and advertised; he did not accept or apply for shares, or attend any meeting of the committee. The undertaking was afterwards abandoned:

Held, that C. incurred no liability to contribute towards payment of the debts of the Company, and was not a "contributory" within the Winding-up Acts 1848 and 1849.

In the year 1845 a Company was formed, and provisionally registered under the above name, for making a Railway between Birmingham and Birkenhead, with a proposed capital of £1,000,000, to be raised by the creation of 50,000 shares, of £20 each. Plans and sections, with books of reference, were prepared, and deposited at various offices, in conformity with the standing Orders of Parliament, at an expense which, [648] together with the charges of the several agents and others employed upon the business of the Company, exceeded the sum of £12,000.

Five gentlemen, named Samuel Harris, Thomas Upfill, Robert Wrightson, Thomas Harris, and Edward Cooper, paid from £420 to £500 each towards the expenses of attempting to carry into effect the objects of the said Company, and they were respectively sued for debts due and owing on behalf of the Company. No parliamentary contract or subscribers' agreement was ever entered into or prepared. The Company ceased in January 1846, and the undertaking was abandoned.

In October 1849 the said Haines, Upfill, Wrightson, Harris and Cooper, presented their petition to the Lord Chancellor, praying that the Company might be absolutely dissolved and wound up under the provisions of the Joint-Stock Companies Winding-up Acts, 1848 and 1849, and that it might be referred to one of the Masters of the Court to wind up the affairs of the Company under the said acts. The necessary advertisements having been published in the London Gazette and in London and local newspapers, according to the provisions in the said acts contained, and the said petition having been duly served, and supported by evidence according to the requisitions of the same acts, the petition came on to be heard on the third day of November 1849, before the Vice-Chancellor of England, when an order was made in the terms of the prayer of the petition.

William Brougham, Esq., the Master to whom the order was referred, appointed Henry James Norris official manager of the Company under the provisions of the said Acts; and having made the [649] necessary inquiries, he, on the 22d of March, 1850, made his certificate as follows:—

"In the matter of the Joint-Stock Companies Winding-up Acts, 1848 and 1849,

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\* This, and the case which next follows, are reported out of their turn, on account of the urgent demand for them in the Masters' Offices. For the same reason the hearing of them was advanced by the House of Lords at the end of the session, with consent of the parties, Lord Brougham, the only law lord then in town, consenting to sit *de die in diem* in order to dispose of them before the prorogation.

and of the Wolverhampton, Chester and Birkenhead Junction Railway Company.

"I, William Brougham, Esq., the Master etc. charged with the winding up of this Company, do, at the request of the official manager, etc., hereby certify that he has made out and left in my office a list of contributories of the said Company, as required by the said acts, and that I have proceeded to settle the said list as required by the said acts, and that the name of J. M. Cottle, of Leamington, is inserted therein in the character of a provisional committee-man; and I certify that I have been attended by the respective counsel and solicitors for the official manager and the said J. M. Cottle, and after hearing what was alleged by them, and upon reading, by the consent of the parties, the two letters hereinafter referred to, marked A and B respectively, and an entry in the minute book of the said Company, dated October 10th, 1845, and it having been admitted before me that on the 26th September, 1845, the said J. M. Cottle, by the said letter marked A, allowed his name to be on the provisional committee of the said Company, and that the said J. M. Cottle was advertised as a provisional committee-man, but that he did not apply for or accept any shares in the said Company, and that he attended no meeting and did no act; and that by the minute of the 10th October, 1845, every provisional committee-man was to be entitled to one hundred shares, but was to hold twenty-five shares to qualify him for his office, and that a letter in the form of letter marked B, allotting him twenty-five shares was sent to him, but that the said J. M. Cottle never took the said twenty-five shares, or any share or shares, I have thought fit to exclude and have excluded the said J. M. Cottle from the said list.

W. BROUGHAM."

LETTER A.

Leamington, Sept. 26, 1845.

"Sir,—I have received from Messrs. Brown and Clarke of Coventry, the prospectus of the Wolverhampton and Birken-[650]-head Railway. I shall have no objection to comply with your request, and will thank you to insert my name, and also that of my friend, Mr. Hyde Clarke. The latter gentleman's name will be of consequence to you, as having considerable property in Cheshire, and being locally interested. Your obedient servant,

J. M. COTTLE.

Director of the Coventry, Nuneaton, Birmingham and Leicester and Direct Western Railways.

Edward Hyde Clarke, Esq., of Clarendon Square, Leamington, and Hyde Hall, Cheshire, director of the South Midland Railway."

LETTER B.

"*Wolverhampton, Chester, and Birkenhead Junction Railway Company,*

(Provisionally registered pursuant to 7 and 8 Vict., c. 110.)

Capital £1,000,000 in 50,000 shares of £20 each.

Deposit £2 2s. per share.

Allotment No. 126 G.	25 Shares.	Deposit £52 10s.
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Birmingham, 20th November, 1845.

"Sir,—I am directed to inform you that the committee of management have, in compliance with your application, allotted to you twenty-five shares in this undertaking, and that the deposit of £2 2s. per share, amounting to the sum of £52 10s., must be paid to one of the undermentioned bankers, who, upon the receipt thereof, will sign the voucher at the foot of this letter.

"This letter, with the banker's receipt, must be exchanged for scrip certificates, which will be granted upon your executing the subscriber's agreement and parliamentary contract, without which no person will be recognised as a subscriber, or be entitled to any interest in the undertaking.—I am, Sir, your obedient servant,

JOHN SMITH, Solicitor.

CHARLES W. JACKSON, Sec. *pro tem.*"

Then followed the names and styles of the bankers, and the form of receipt that was to be given to the party on paying the said deposit.

[651] The official manager, with the consent of J. M. Cottle, appealed from the

Master's certificate, and the appeal was heard before the Vice-Chancellor of England, on the 26th day of April, 1850, when it was ordered that the decision of the Master should be reversed, and that the name of J. M. Cottle should be included in the list of contributories.

J. M. Cottle then appealed against the last-mentioned order, and the Lords Commissioners for the custody of the Great Seal, who heard that appeal, by their order, made on the 15th day of July, 1850, discharged the Vice-Chancellor's order, and directed that the costs of J. M. Cottle should be paid by the official manager.

This appeal was brought against the order of the Lords Commissioners.

Mr. Bethell and Mr. Glasse for the appellant:—Cottle's name having been, with his consent, inserted in the list of the provisional committee-men, it cannot be denied that he was a member of the association, and he was therefore a "contributory" within the terms and meaning of the Winding-up Acts (11 and 12 Vict., c. 45, and 12 and 13 Vict. c. 108). The interpretation clause (section 3), in the first of those acts, thus defines the word, "contributory;" it "shall include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof." It is not necessary here to contend that these Acts create any new liability. The early decisions on these questions carried the liability of committee-men to a great extent. In *Barnett v. Lambert* (15 Mee. and W. 489), in 1846, the Court of Exchequer held a provisional committee-man liable [652] for payment of necessities supplied to the committee on an order from the secretary, without the defendant's knowledge, and although he had, in consenting to have his name put on the committee, contracted for a liability limited to the amount of his shares, and did no act on the committee beyond attending one of the meetings. The principle of the decision was, that by consenting to become a member of the provisional committee, the defendant gave the officer of that committee authority to pledge his credit for such things as were necessary for the working of the committee. That principle, however, was afterwards qualified by the same Court in the cases of *Beynell v. Lewis* and *Wylde v. Hopkins* (Mee. and W. 517), in which it was held that the mere fact of a person's consenting to be a member of a provisional committee of a projected railway company, amounted to no more than a promise to act with the other members, for the purpose of carrying the scheme into effect; that the law would not, from such consent, imply an authority to the other members, or to the solicitor of the committee, to make contracts for the party, but still his liability would be a question for a jury in an action that might be brought against him as such member. The Chief Baron, in giving the judgment of the Court, after stating the principles of the decision, and that the agreement to become a provisional committee-man meant only "an agreement to act on the provisional committee in carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and so to promote the scheme," further says, "but there are other cases in which the question does not assume so simple a form; and where there is evidence [653]—evidence that the defendant has not only consented to be a provisional committee-man, but has authorized his name to be inserted in a prospectus, not generally, but a particular prospectus, in which in some cases, certain persons are described as the acting committee, in others solicitors are named, or engineers, or secretary. If such prospectus had been so publicly circulated with the defendant's consent that the jury would presume that the plaintiff knew of it, or if the plaintiff has had it shewn to him at or before the time of making the contract, and has in either case acted upon it in making the contract, the question is, what inference ought a reasonable man to draw from the contents of that paper? This must, of course, depend upon the terms of each particular prospectus." In the present case there was a prospectus circulated with Cottle's name and consent.—

Mr. W. M. James, of counsel for the respondent, objected to any reference being made to the prospectus; it was not before the Master, and he did not refer to it in his certificate. The Vice-Chancellor and the Lords Commissioners had no prospectus before them. It was important that the Court of ultimate appeal should not admit any document to be referred to that was not before the Court below.

The Appellant's counsel.—The prospectus had been before the Master, and so it would appear by the production of his notes. He states in his certificate, among other admissions, that the said J. M. Cottle was "advertized as a provisional committee-man;"—advertized, of course, in a prospectus. Cottle himself in his letter, set forth



in the Master's certificate, says, he had received the prospectus of the railway, and adds, "I will thank you to insert my name." But whether [654] the prospectus was or was not before the Master, it was admissible here.—

Lord Brougham.—We, sometimes here, and often in the Privy Council, allow documents to be read, though they are not set out in the printed cases, nor referred to in the decree by the Court below. Probably the learned counsel for the respondent will, when their turn comes, shew why we should not look at this prospectus.

The Appellant's counsel then, resuming the argument, said there were numerous cases at law in which it was held that individual members of an association, as a club for instance, were not liable for necessities furnished to the club, but that the liability attached on each member of the committee, by the mere fact of his becoming a member; *Fleming v. Hector* (2 Mee. and W. 172), *Todd v. Emly* (8 M. and W. 505).

But though Mr. Cottle, as provisional committee-man merely, may not be liable at law, or in equity either, to contribute to the payment of all the debts, liabilities, and losses of the association, he is clearly liable, in common sense and equity, to contribute his share to the payment of such debts and liabilities as were incurred by the provisional committee for the purpose of carrying into effect the objects for which it is said that committee was formed. He could not but foresee when he requested his name to be inserted in the prospectus, that in effecting the purposes for which the provisional committee was formed, some expense must be incurred. He, therefore, was bound to contribute something, the amount or proportion of his contribution being left to be settled by the Master. That pro-[655]-position is established by the judgment of the Lords Commissioners in this case; although the same judgment in other respects is founded on a fallacy, which is manifest on the perusal of it. They said they dissented from the Vice-Chancellor's views of the law, on the ground that the cases of *Reynell v. Lewis*, and *Wyld v. Hopkins*, "established conclusively, that at law a person, by authorising his name to be placed on the provisional committee, gave no authority to any other member of the committee to enter into any contract whatever" (read from MSS., since reported, 2 Macnaghten and Gordon, 187; and 2 Hall and Twells, 385). But those cases did not lay down any such principle. The actions in them were brought for an *entire* debt against one committee-man. All that is sought against Cottle is a contribution of a rateable share of the expences. He admits his name was, by his desire, put on the provisional committee, without condition or limit, and that it was advertised. Suppose two or more persons join in any undertaking, and one of them orders goods for the undertaking, from a tradesman who knows from an advertisement that the two are so joined; although he does not, at the time, see the absent person, is not the credit given to him as well as to the person who is present? And is he not equally liable to contribute to the payment? The judgment of the Lords Commissioners, however, asserts the contrary. Suppose, again, the case of a dormant partner, although not liable to the world, because the world knows nothing of him, is he not liable to his partners for his share of expences, as he is entitled to his share of profits? The definition of this word "contributory," in the Winding-up Act of 1848, is, that it "shall include every member of a company." [656] What can it mean but that such member is to *contribute* towards payment of debts and expences? That must have been the view Lord Cottenham took in *Besley's Case*, although he found other grounds for holding him to be a contributory. "The only question,"\* his Lordship says, "is, whether this gentleman has or has not rendered himself liable as a contributory to any part of the expences incurred in this association, commencing with a provisional committee, etc. The facts that appear before me are, that Mr. Besley was originally ostensibly a member of this association, and that he agreed to his name being put down as a member of the provisional committee, for the purpose of instituting the company." Having stated the other facts, his Lordship says, "the provisional committee appoint a committee of management, and expences *which are incidental to the commencement of such proceedings, are necessarily incurred*. Other expences arise: Mr. Besley does remain a provisional committee-man. It is not necessary to consider whether that mere fact would make him liable to anybody. The case does

\* The judgment was read from a copy of a short-hand writer's notes; the case has since been reported in 2 Macnaghten and Gordon, 176; and 2 Hall and Twells, 375.

not require any observation on that part of it, because there is so much more as to render it unnecessary to consider what the effect of that would be." His Lordship states the other circumstances, and says, "But then comes this fact: it is by your name remaining, coupled with the fact of your knowing it, that your liability arises, and you act on that liability, and pay." "All the facts shew, that he considered that he was so far connected with [657] the company as to render himself liable, to some extent, to pay. Looking at the words of the act, I think he falls within the description of the act, and that the Master was right in including him in the list." It is no forced interpretation of that judgment to say, that it not only does not admit of the construction put upon it by the Lords Commissioners, but that it is all but conclusive of Cottle's liability in this case. There were several other decisions involving the principle here contended for, as *Ex parte Hollingsworth* (3 De Gex and S. 7) and *Ex parte Cooke* (*Id.* 148), before Vice-Chancellor Knight Bruce; *Ex parte Morgan* (1 Hall and T. 320; 1 Mac. and G. 225), a decision by Lord Cottenham; and also a case of *Lefroy v. Gore* (1 Jones and Lat. 571), decided by Sir Edward Sugden, in Ireland.

Mr. Rolt and Mr. W. M. James for the respondent:—It appears that this appeal is not only against Cottle's case, but also against the numerous cases decided on the same principle in the Courts of Exchequer, King's Bench, and Common Pleas, which have been referred to; there is not one expression affecting the present case in the judgment in Besley's case. The argument for the appellant comes to this, that there is here a legal liability; but that is met at once by the decisions at law; and there is nothing further to answer. If, as sometimes happens, any argument is reserved for the reply, the House will not, of course, prevent an answer, but as yet there is nothing to answer.

With respect to the prospectus, if any reference to that were to be here allowed, the rules of evidence would be violated, and great injustice might probably [658] be done. Cottle's letter, consenting to have his name put upon the provisional committee, is the only document that affects him. The prospectus, which is said to have been before the Master, but of which the Master's certificate makes no mention, could not be the same which is mentioned in Cottle's letter, for his name was not in that prospectus. Let that be produced; probably, if returned by Cottle, he accompanied it with some condition that he should not be subject to any expence.

The question is narrowed to this one point, that Mr. Cottle allowed his name to be put on the provisional committee; he attended no meeting of the committee; applied for no shares; accepted none, though some were allotted to him; did no act whatsoever in furtherance of the scheme. It was strange that while the appellant attempted to import the prospectus into the argument, he omitted from his case the minute of the 10th of October, 1845, which is mentioned in the Master's certificate as being before him. That would, if produced, shew that Cottle never applied for shares, although the secretary's letter, printed in the appellant's case, assumed that he did apply. There is no allegation that he paid any deposit, non-payment of which is equivalent to refusal to accept shares. No inference of acceptance can be drawn from the respondent's omitting to answer the secretary's letter. In the cases that have been referred to, *Ex parte Hollingsworth*, *Ex parte Cooke*, and *Ex parte Morgan*, deposits were paid, and by that and other circumstances they were distinguishable from this case.

It is clear that in this case there is no liability at law; if not, there is no liability in equity: the former is the measure of the latter. The law in these matters [659] was vague until it came to be settled by the two cases of *Reynell v. Lewis* and *Wyld v. Hopkins* (15 Mee. and W. 517), and this case falls completely within them. The judgment of the Lords Commissioners in this case, as delivered by Mr. Baron Rolfe, is perfectly conclusive. In the case of *Lefroy v. Gore* (1 Jones and Lat. 581), Sir Edward Sugden says, "I agree that unless Mr. V. could have maintained an action against this defendant, the plaintiff here has no right to call on him for contribution,"—thus making the liability at law the test of liability to contribution. Except the case of *Barnett v. Lambert* (15 Mee. and W. 489), which bound no one but the defendant there, the cases at law, though differing in their circumstances, were quite consistent with the principles laid down in *Reynell v. Lewis* and *Wyld v. Hopkins*, as *Barker v. Stead* in the Common Pleas (3 Com. B. 946), *Bailey v. Macaulay* in the

Queen's Bench (19 Law Jour., Q.B. 73), *Fleming v. Hector* (2 Mee. and W. 172), *Todd v. Emly* (8 M. and W. 505), *Wood v. The Duke of Argyll* (6 Man. and G. 928), and *Williams v. Piggott* (2 Exch. Rep. 204), in the last of which Mr. Baron Parke says, "I cannot help observing that unless something more appears than that there is a managing committee appointed by a provisional committee, the provisional committee never dream that by such appointment they render themselves liable for all the acts of the managing committee."

In *Ex parte Roberts*, decided with Cottle's Case (*vide supra*, 655), the Lords Commissioners say that, although it was an additional feature in Roberts' Case, that he attended meetings of the provisional committee, "this makes no difference in principle. The question, in every case is, not what meetings has a committee-man attended, [660] but what acts has he authorized to be done." "It is perfectly settled at law that no one present at such a meeting is bound by any resolution to which he does not expressly or impliedly consent." If a provisional committee-man, present at a meeting, be not bound, it is clear that an absent committee-man is not bound. There is no partnership in these cases, and the argument for the appellant gains no strength from the imaginary cases that were put by his counsel.

Mr. Bethell in reply.—The object of an order to wind up the affairs of a company is to pay the debts of the company, or divide their assets, if they have any, amongst them. Suppose a company to consist of five provisional committee-men only; they form the company or association. If the provisional committee-men be not members liable to debts, what is the winding-up order in such a case made for? The very announcement to the world of a provisional committee, expresses that some expences must be incurred. Did not Mr. Cottle, by allowing the announcement of his name in the prospectus advertised to the world, declare expressly that he was a member of the company? There are expences to be incurred at every step. The standing orders of the Houses of Parliament are to be complied with. Expences must be incurred in doing the acts necessary to obtain the Act for incorporating the company, and for them each member is liable, whether at law or not. Suppose a man, being a partner in a brewery, or other established trade, gives by his will all his property to his executors and trustees, directing them to continue in the business, they, by accepting the executorship, become partners; and then if the firm falls into difficulties, are these executors, having in pursuance of the directions of the will, put themselves in [661] a position of equitable liability, not to have contribution from the *cestuis que trust* under the will.

Lord Brougham.—In this case there is no partnership, and it is of no use to put cases of partnership for illustration.

Mr. Bethell.—Of course; the question could not arise if there was a partnership. But suppose three persons agree in a joint adventure at sea, one agreeing to find the ship, another to find the cargo, and the third to find the stores, and one of them purchases a ship, but the others do not supply stores or cargo, and the adventure fails, and the owner of the ship brings an action against the purchaser of the ship, and recovers the price of the ship:—are not the other two, who did not find cargo or stores, liable in equity to contribute their respective shares, in discharge of the sum so recovered? It would be easy to suppose cases in which such equitable liability would attach to a party, though he took no active part in promoting the joint concern. There are, in this case, as it were, two contracts, the one with the public, the other between the members of the committee; and in respect of the latter, each member has a right to call on the others for contribution. The liability of the members to each other is never touched on in the argument for the respondent.

Lord Brougham.—This case, my Lords, is one of the greatest possible importance, and I am withheld only by one consideration from again expressing my anxiety at having the weight of the decision cast substantially upon me, without having the assistance of the learned Judges either of law or of equity.

The course, however, which I now propose to your [662] Lordships to pursue is, not to call for the assistance of the learned Judges, for the reasons which I will shortly state to you. If your Lordships were to have the assistance of the learned Judges, of course you must have either the Judges of the Court of Chancery, or the common law Judges, or both. There is nothing whatever to require a special Act to enable this House to call for the assistance of the Judges of the Court of Chancery.

That is the opinion of Lord Lyndhurst, and Lord Cottenham; and it is very clear in my mind that though we have sometimes collaterally put it in bills, which have never received the sanction of the legislature, yet it is not essential. But suppose we desired to have the assistance of the learned Judges of the Courts below, how would the matter stand? The Master of the Rolls, a late Lord Commissioner, and the Vice-Chancellor of England, also a Lord Commissioner, are two of the Judges whose decisions are in conflict by the appeal before us; one has decided one way, the other has decided the other way. They would not form a very satisfactory body of assessors, to whom this appeal might be referred. Then there is the Vice Chancellor Knight Bruce,—for whom I have the greatest respect as a most able, learned, and indefatigable Judge, whose services to the public and to the suitors in the Court of Chancery it is impossible, in my opinion, to estimate too highly, especially during the lamented illness of his learned brother Sir James Wigram,—he is, to a certain degree, involved in this, because the next case we are to hear is an appeal from himself. He therefore becomes no longer so useful a member of the body of assessors to the House, as he would have been but for that circumstance. That consideration, therefore, disposes of all the Equity [663] Judges, because Vice-Chancellor Wigram is unfortunately unable to attend,—and indeed my most learned and excellent friend, the Vice-Chancellor of England, I lament to say, is also, from his continued indisposition, unable to attend; so that we can have no aid in these cases from the learned Judges of the Court of Chancery.

Then how is it with respect to the Judges of the Courts of Common Law? They are estopped in much the same way. The Judges of the Court of Exchequer have wavered a little, perhaps more in semblance than in substance, but at all events they are supposed to have wavered in their opinion. They decided the three cases, which have been so often commented upon at the bar, one being the leading case cited against the appellant, and on behalf of the respondent, but though they differ, they endeavour to show,—as men do in arguing upon and applying cases or resisting the application of cases,—that there are no cases supporting a contrary conclusion. That court also includes Mr. Baron Rolfe, who was one of the Lords Commissioners who decided the present case, and to him therefore the former observation applies.

Then as to the Court of Queen's Bench: that Court is said to have adopted every tittle of the argument in the judgment in Banc of the Court of Exchequer. In another of the cases cited before us, the Court of Common Pleas is involved. So that, taking all those together, I hardly ever knew a case in which the assistance of the learned Judges, as assessors to this House, would be less fruitful than in this case now before your Lordships; for which reason I am clearly of opinion that the more useful course for the House to take, will be to deal with the case without that assistance. That [664] being my opinion, I have no hesitation in advising your Lordships not to call for the assistance of those learned Judges, unless anything shall occur in the course of the argument upon the next case to alter the opinion which I now entertain.

I have now only to beg your Lordships to postpone the final dealing with this case till after the other has been heard; and I do that, not altogether on account of any connection between them, though that is adiminiclar to the observations I have made and to the resolution which I ask your Lordships to come to, but because my constant course has been, in those long protracted sittings, not to move the judgment of the House till time was given after the argument, by the intervention of some days, to look into the whole case. That I have lately done in every case but one, a case in which there was no doubt whatever.

Lord Brougham (August 9).—The great importance of this case renders it imperatively the duty of the Supreme Court of Appeal to examine minutely the grounds of the order under review, and to consider at large the authorities which bear upon the question, as well as the principles with which it is connected, and which must govern our decision.

The question, and the only question before us, is, whether or not a person, by becoming a member of a Provisional Committee in a railway or other company, not yet completely formed, but in course of being formed,—certainly not yet in active operation,—makes himself liable to the other members of the Provisional Committee.

or to any of the officers of the association in respect of the dealings between those other members, or those officers and third parties, strangers to [665] the association. Mr. Cottle's name was excluded from the list of contributories by the Master, acting under the winding-up order made under the provisions of the two acts, 11 and 12 Vict., c. 45, and 12 and 13 Vict., c. 108. The Vice Chancellor, reversing the Master's finding, restored Mr. Cottle's name to the list. The Lords Commissioners of the Great Seal, upon appeal, reversed the order of his Honour, and restored that of the Master, excluding Mr. Cottle from the list.

I say the only question here relates to the effect of a party being, with his consent, a provisional committee-man; for although in the argument a good deal was said about the prospectus, we have not that document before us,—nor had the Master,—and if we had, it would not at all change the case or alter Mr. Cottle's position in relation to the Company. I do not say that a prospectus might not have figured, on which much might turn perhaps, but it is not the case here. Therefore the question is quite general, and in that consists its importance. It relates to the effect of a person allowing himself to be named one of the provisional committee in such a concern, without anything more.

Now, first, let us consider what is the legal liability which this allowed nomination imposes, for if it makes the party liable at all to those who contract with the committee, past all doubt, he is a contributory, within the third section of the first act. (11 and 12 Vict., c. 45.)

It appears that considerable discrepancies existed between the decisions of the Court of Exchequer on this point in the year 1846, and that the Court changed its view of the matter entirely within a very short period of time. *Barnett v. Lambert* (15 Mee. and Wels. 489) was decided in May, [666] and the Court in that case held the committee-man liable. This was the principle on which the decision rested; for although it was a fact in the case that the defendant had attended and acted as a provisional committee-man, no reference whatever is made to this circumstance in the judgment, which proceeds entirely on this; that a person who consents to be a provisional committee-man is assumed to pledge his credit for things necessary to the concern. In the month of November in the same year, the cases of *Reynell v. Lewis* (15 Mee. and Wels. 517) and *Wyld v. Hopkins* (*id.*), were decided by the same Court, and the same Judges, with the concurrence of their learned brother Mr. Baron Parke, who had not been present before, unanimously held the committee-man not liable for the acts of his fellows, the law not implying from his mere consent to be a provisional committee-man either an authority from him to make contracts by those other committee-men, or to the solicitor to make contracts on behalf of the committee, but merely a promise to act with those others to carry the scheme into effect. The publication of the prospectus with his name, was held to make no difference. In these cases, *Barnett v. Lambert* was cited in argument for the plaintiff, but it is remarkable that no reference is made to it in the judgment. It would have been more satisfactory had the learned Judges admitted at once that they erred in deciding that case, to which their decisions in the two latter are wholly opposed. But this silence is much more to be commended than the practice sometimes followed in cases of erroneous judgments afterwards departed from; I mean that of endeavouring to find out special circumstances to dis-[667]-tinguish the several cases, for the purpose of making it appear that the decisions are reconcilable. Much bad law is thus occasionally introduced, and not soon got rid of. Parties are encouraged to try points which ought to be considered desperate, and the Courts which consult those conflicting cases are not seldom misled in search after authority. No Judge ought to be ashamed, after erring, to acknowledge his error; still less has a Court any reason for so misplaced a shame, so unseemly a reluctance, to admit that the dispensers of justice are subject to the common lot of erring humanity. The rule laid down in those two later cases, by the Court of Exchequer, has since been followed by the unanimous concurrence of both the other Courts of Common Law. The Court of Common Pleas, in 1847, in *Barker v. Stead* (3 Com. B., 946); and the Court of Queen's Bench, in *Bailey v. Bracebridge* (19 L. Journ. 73), *Bailey v. Haynes* (*id.*), *Bailey v. Macaulay* (*id.*), and in *Wilson v. Holden* (15 Mee. and W. 577), in 1849, entirely adopt the cases of *Reynell v. Lewis* and *Wyld v. Hopkins* in the Court of Exchequer, and Lord Chief Justice Denman says, in delivering the judgment of the

whole Court in the cases before it, that there is not a single passage in those judgments of the Court of Exchequer from which the Judges of the Queen's Bench dissent (19 L. Journ. p. 81).

We have thus the clear and unhesitating opinion of all the Judges of the Common Law Courts against the liability at law; and we have now to see how far that has been held on the other side of Westminster Hall, as either doubtful in a legal view, or insufficient to negative the liability of the provisional committee-man in equity and on equitable views. With this purpose we are referred to Lord Cottenham's decision in *Besley's Case* (*vide ante*, note, p. 656). But on a full consideration of what his Lordship said when he gave his judgment, I must deny that he intended either to depart from the doctrine laid down on the other side of the Hall in regard to the legal liability, or to state that the mere fact of consenting to be a provisional committee-man imposed an equitable responsibility. In the course of the argument he certainly evinced a leaning towards that opinion; but this was early in the discussion, and he prefaces his judgment by stating that the case does not require him to decide whether or not the mere fact of the defendant remaining on the provisional committee, after expences are necessarily incurred, would, were there nothing more, make him liable to anybody; for, says his Lordship, "the case does not require any observation upon that part of it, because there is so much more as to make it unnecessary to consider that." These circumstances, upon which the decision turns, are his attending meetings when a managing committee is appointed, which reports on expences incurred; his joining in an order for liquidating those expences; his paying his share towards that expenditure, and his still consenting to allow his name to remain on the committee. His Lordship's view is that his name was known by him to continue there; that his liability arose from thence, and that he paid his share, acting on that liability;—by which, I take it, his Lordship means to imply an admission, as it were, on the provisional committee man's part, of his liability.

[669] It is quite as unnecessary, in the present case, to consider whether or not his Lordship's opinion respecting those special circumstances is well founded, as it was for him in that case to consider the consequences of a mere consent to be on the provisional committee; because the circumstances of payment, or of joining in any order to a managing committee, are here wholly wanting. I may, however, observe that the mere fact of payment, on which the decision in *Besley's Case* mainly turns, seems not sufficient of itself to raise either a legal or an equitable liability. A man might submit to pay a certain sum, and refuse to pay more; he might submit for peace sake, and also to avoid trouble and contention; he might even admit he was properly charged to a certain amount, in consequence of his having concurred in an order respecting a certain small expenditure, while he denied his liability *ultra*, and denied his general liability altogether. But into this it is unnecessary to enter, because the question now before us is relieved from the embarrassment of all such special circumstances,—to which I must add that I have consulted with my noble and learned friend who gave that judgment, and I find two things from him distinctly; *first* of all, that he did not consider that case to be inconsistent at all with the non-liability at law laid down in the two Exchequer Cases, and subsequently in the Common Pleas and Queen's Bench cases, for that he decided it upon circumstances which did not occur in those cases; and, *secondly*, that he utterly dissents, as I do, from the doctrine of the legal liability being no test or measure of the equitable liability, or the general liability upon the whole, so to speak; and why do I say this? Because his Lordship expressly says, "Had those special circumstances occurred [670] in the cases at law, and had those cases at law decided against the liability at law, I should not so have decided *Besley's Case*." I reckon that to be a most important circumstance, and therefore I felt myself authorised, and indeed bound, to state it openly as the opinion of his Lordship. I have been favoured with his Lordship's own note upon the subject. Therefore, my Lords, no aid whatever is derived from *Besley's case*, in any way in which it can be regarded,—to which it is fit I should add that the case itself is appealed from, and it is appointed to be reheard by the Lord Chancellor, who has since succeeded Lord Cottenham.

But the appellant contends that a party joining others in an adventure or other concern, may become liable in equity to them, though not liable at law either to them or to third parties. Here we must distinguish as to the capacity in which such

a liability is alleged to be incurred. In the present case there is no partnership. All authorities hold that such an association is not a partnership; *Walstab v. Spottiswoode* (15 Mee. and W. 501) and *Reynell v. Lewis* (id. 517), so often referred to, lay this down in express terms. No such partnership is made between the provisional committee-men and the managing committee, nor is any such connection seriously contended for in the argument of counsel here. They rather put it as an implied authority of principal to agent, as an authority given to contract for the party, and to pledge his credit. But if so, there is no question of equitable, as distinguished from legal, liability; for if there is any such authority by implication, the principal is bound at law, and the exception so often referred to in the two Exchequer cases, that the provisional committee-man is [671] not liable unless he has authorised the committee or its servants to pledge his credit, either expressly or impliedly, points to no equitable liability, but to a liability strictly and rigorously legal.

It is difficult then to apprehend how the appellant can object to the doctrine laid down, in giving the judgment appealed against, that the legal liability of the party is the measure of his equitable liability. I can see no other measure; I can perceive no other ground of that equitable liability. The proposition is repeatedly urged that, a party may be bound in equity who is not bound in law;—no question he may, but this is a very unfruitful position, unless you shew some equitable obligation in the case under consideration, the legal liability being clearly gone by force of the decided cases at law.

Much confusion is imported into the argument, by the reference to contributions, as a relief worked out by proceedings in Courts of Equity. But the case is this; a right to relief by way of contribution exists at law; but it is so cumbrous, and liable to so much difficulty in working it out, and the Courts of Law are so entirely incapable of dealing with many matters which are likely to occur in all such cases, that equity is resorted to for convenience; yet it is not only not easy, it is not possible to figure a case in which equity will give contribution, unless against one who was legally liable to that which the complaining party has been sued for, and has lost. Take the old writ of contribution,—*de contributione facienda*,—as by one copartner against his companions in respect of expense incurred by suit or admission in the Lord's Court, or by tenants in common of a mill, which both are bound to repair, and one repairing it, when fallen to decay, has the writ [672] against his co-partner for his share of the expence. Here the writ expressly sets forth the common liability, and that because one has done the act, he may sue the other for his proportion to relieve him; Fitzherbert's *Natura Brevium*, p. 162. Nor can it make any difference whether the common liability is legal or equitable. If two jointly contract to do a thing, and one does it, he may have contribution against the other. Indeed were one sued in equity for specific performance, both must be made parties, but then both are liable; and if one does the thing without any suit, he has his relief against the other, in respect of both being liable; and equally liable. For observe, in this case there is a legal liability, inasmuch as each may be sued at law for breach of contract; for specific performance, no doubt he cannot be sued at law, but for breach of contract he may. The case was ingeniously put in the argument here, of a joint or common adventure, as of a voyage in which one agrees to find the ship, another the cargo, and a third the stores, and the ship-owner recovers the price of the ship against the one who purchased it; then, it is said, the others are liable for their share, unless each furnished his *quota* to the common adventure, the one the stores, the other the cargo. If they are so liable in respect of the price recovered by the ship-owner, it can only be because they have made themselves liable to their companions by an express contract to pay unless they furnish their *quota*, or by an implied contract to the same effect, and thus they are legally liable for breach of that contract, or they may be compelled in equity to perform it.

In no view which I have been able to take of this case can I perceive the least ground on which an equity can be raised as between the provisional committee-man [673] and the rest of the committee or their officers, unconnected with and independently of the legal liability of that party, as having, either expressly or by implication, authorised his companions or their officers to pledge his credit with strangers. The law has been laid down by all the courts, and it negatives any such

authority, express or implied, in a case where no fact exists save only that of a consent to be on the provisional committee.

Therefore, my Lords, in my opinion the respondent is not a contributory within the Acts, and he ought not to be put on the list by the Master. The Lords Commissioners have accordingly, in my opinion, decided right in reversing the order of the Vice-Chancellor, and directing the respondent's name to be expunged; and I therefore advise your Lordships that the judgment complained of should be affirmed, with costs.

It was accordingly "ordered and adjudged, that the appeal be dismissed, and that the order of the 15th of July, 1850, therein complained of, be affirmed; and that the appellant pay to the respondent the costs incurred in respect of the appeal, the amount thereof to be certified by the Clerk Assistant."

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[674] In the Matter of the JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849; and of the DIRECT BIRMINGHAM, OXFORD, READING, and BRIGHTON RAILWAY COMPANY.

JAMES HUTTON, Official Manager,—*Appellant*; JAMES UPFILL,—*Respondent*  
[August 6, 7, and 9, 1850].

[*Mews' Dig.* iii. 863. The decision in this case was repudiated in *Bright v. Hutton*, 1850, 3 H.L.C. 341 (*q.v.*) and cf. *Commissioners of Inland Revenue v. Harrison*, 1874, L.R. 7 H.L. 10.]

*Joint Stock Companies—Winding-up Acts—Provisional Committee—Acceptance of Shares—Contributory.*

If a person whose name is on the Provisional Committee of a Joint-Stock Company, provisionally registered, "accept" shares in the Company, although he does not pay the deposits, he is a contributory within the Winding-up Acts.

U.'s name was on the list of the Provisional Committee contained in a published prospectus of a Railway Company, provisionally registered, and, in answer to a letter from the secretary, informing him that the committee of management had apportioned one hundred shares in the company to each Provisional Committee-man, and desiring to be informed whether he would take them; he wrote a letter saying, "I accept the one hundred shares allotted me." The secretary afterwards sent him a letter of allotment "not transferrable," stating that the committee of management had allotted to him one hundred shares, and requesting him to pay the deposits thereon into one of the Company's Banks on or before a certain day, "or the allotment would be null and void."

U. paid no deposits, and did no other act in connection with the company.

The undertaking, having failed for want of capital, was abandoned:

Held, that the first two letters formed a complete contract, exclusive of the third; and that U. was a contributory within the Winding-up Acts, 1848 and 1849.

In the year 1845 a company was formed for the purpose of constructing a railway from Birmingham to Oxford, and thence to Reading and Brighton for the conveyance thereon of goods and passengers, and was provisionally registered, pursuant to the provisions of the Act 7 and 8 Vict., c. 110, by the above name. A prospectus was printed, and published, containing the names of divers persons, including the respondent, as [675] forming the provisional committee of the company; it also contained a statement of the objects of the company, and that the capital was to be £2,000,000, to be raised by the issue of 80,000 shares of £25 each.

A meeting of the Company was held the 8th October, at which there were present twenty-four members, but not the respondent; and a resolution was passed to the effect that fourteen gentlemen (who were named, but did not include the respondent), be appointed a committee of management. A larger number was at the same time appointed to be on the provisional committee, and the respondent was named among



them. Engineers and solicitors to the company were also appointed; and it was, among other things, resolved, "that until an Act of Parliament shall be obtained, the affairs of the company shall be under the control of the managing directors, to whom power is given to allot shares, and to apply the funds of the Company in payment of all expences incurred in its formation, and in the preparation of plans and sections to be submitted to Parliament."

On the next day a meeting of the managing committee was held, ten out of the fourteen attending, and it was, among other things, resolved, "that the provisional committee have one hundred shares each; that Messrs. Nias and Jones, the projectors of the Company, be paid £2000 for reimbursement of their expences up to the issuing of the prospectus, provided the parliamentary deposits be paid; that they and the solicitors, and the secretary (then appointed) and the managing committee, have allotments of shares;" (the amount was specified). At subsequent meetings of the managing committee it was resolved, that application be made to a London Bank for a loan of £2000, until the deposits be paid.

[676] On the 10th of October, the secretary of the Company sent a circular letter to each member of the provisional committee, and amongst others to the respondent, informing him that one hundred shares in the company had been apportioned to each member of the provisional committee, and desiring to know whether he would accept the same, or any and what number thereof. The respondent, in reply, wrote to the secretary a letter on the 14th, saying, "I accept the one hundred shares allotted to me, in the direct Birmingham, etc., Company.—*James Upfill, P. C.*"

The committee of management allotted to the respondent one hundred shares, and on the 18th of October, 1845, the secretary sent him a letter, informing him that the said shares had been allotted to him, and requesting him "to pay the deposit of £2 12s. 6d. per share (£263 10s.) into one of the banks undermentioned, on or before the 24th of October, 1845, or this allotment will be null and void," adding that this letter would be exchanged for scrip upon producing it, with the Bankers' receipt, at the offices of the Company, and executing the parliamentary contract and subscribers' agreement.

The respondent did not attend any meeting of the provisional committee, or committee of management, nor pay the deposit of £2 12s. 6d. per share, or any part of it, on the one hundred shares, nor execute the said contract or agreement.

Of 76,630 shares that were allotted, the deposits were paid on 4295 only; and it therefore becoming impossible to proceed with the undertaking, it was abandoned. The committee of management, collectively and individually, paid large sums of money on account of debts contracted by them in the prosecution of the undertaking, and other debts of the Company still remained unpaid.

[677] In December 1849 an order was made by the Vice-Chancellor of England, on the petition of Stopford Thomas Jones, (who was one of the projectors of the Company, and also of the committee of management,) for the dissolution and winding up of the said Company, under the Joint-Stock Companies Winding-up Acts, 1848 and 1849.

William Brougham, Esq., the Master to whom the order was referred, appointed the appellant official manager of the Company, pursuant to the provisions of the said Acts. The appellant, as such manager, made out from the books of the Company a list of the contributories for the Master, and included the name of the respondent, "as a member of the provisional committee who has accepted his shares."

The Master, in settling the list, was attended by counsel for the appellant, and by his certificate, dated the 24th of July, 1850, he stated that the minute-book of the Company, the said circular letter of the 10th of October from the secretary to the respondent, his letter of the 14th of October in answer to the secretary, the allotment-book of the Company, the said letter of allotment of the 18th of October from the secretary to the respondent, having been produced and read before him, and also the *viva voce* examination of the secretary in reference to another case,—he had included the respondent in the list as a contributory in respect of one hundred shares of £25 each.

Vice-Chancellor Knight Bruce, on hearing a motion made on the same day on behalf of the respondent, by way of appeal from the Master's certificate, ordered

that the respondent's name should be excluded from the list of contributories, and that the appellant should pay the respondent's costs of attending before the Master, and of that application.

[678] That order was the subject of the present appeal.

Mr. Bethell and Mr. Roxburgh for the appellant.—This case differs in some respects from Cottle's case. There is here a published prospectus, with a list of the provisional committee, in which appears the name of the respondent. There is also his answer to a letter from the secretary of the Company, informing him that one hundred shares in the Company were apportioned to each member of the provisional committee, and requesting to be informed whether he would take that or a less number. The respondent, by letter, answers that he accepts the one hundred shares allotted to him. These two letters constitute a complete contract, so that Mr. Upfill is not only a provisional committee-man, but has also an allotment of shares, and accepts them. It may, however, be argued here, as it was in the Court below, that another letter from the secretary imported new terms into the contract. In that letter, dated the 18th of October, and headed, "Letter of allotment: not transferrable," the secretary writes that the committee of management had allotted one hundred shares to the respondent, and he was directed to request him to pay the deposit of £2 12s. 6d. per share into one of the Company's Banks, "on or before the 24th of October, or *this allotment will be null and void.*" The respondent contends that these terms introduced a condition into the former contract, and left to him an option to take the shares or not. The authority for that argument is the case of *Duke v. Andrews* (5 Railway Cas. 496; S.C. 2 Exch. Rep. 290), which was an action of *assumpsit* for deposits on shares, for which the defendant had applied in the usual form, undertaking to accept so many or a less number, and to pay the [679] deposits, etc. A letter of allotment of sixty shares was sent to him, headed "not transferrable." The Court of Exchequer held that these words were part of the answer to the application for shares; that the application was absolute, and the acceptance of it was conditional. Baron Parke, giving the judgment of the Court, says, "We think there is no binding contract; the defendant makes an absolute proposal; but the acceptance in the letter of allotment is conditional; it contains a qualification that the contract is not to be transferrable." That case is clearly distinguishable from this; for here the first proposal came from the committee, by allotting shares to the respondent; and there is an unqualified acceptance of them by the respondent. It is further to be observed, that the condition of "not transferrable" is not annexed to the shares, but to the letter of allotment.

All the arguments and authorities which have been urged in Cottle's case are applicable to Upfill's position of provisional committee-man. The cases at law against the liability of persons in that position were actions by third parties, not members of the Companies, and are not applicable here, where the liability sought to be established is an equitable liability of one member of the committee to the other members to contribute towards payment of their common debts. In *Bealey's case* (*vide ante*, note p. 656) Lord Cottenham said "he incurred liability by permitting his name to appear as a provisional committee-man, there being a body elected by that committee who were incurring expenses necessarily incidental to the commencement of such proceedings, holding himself out as a member of that body, the provisional committee, under whose direction the managing [680] committee was acting." The cases *Ex parte Morgan* (1 Hall and T. 320, and 1 Mac. and G. 225), *Ex parte Lord Mansfield* (1 Hall and T. 37, and 1 Mac. and G. 57), and *Parbury's case* (3 De Gex and S. 43), contrasted with the cases at law of *Fox v. Clifton* (6 Bingh. 776), *Pitchford v. Davis* (5 Mee. and W. 2), and *Wontner v. Shairp* (4 Railw. Cas. 542), illustrate the distinction between liability at law and liability in equity. It appears that *Parbury* was held to be a contributory, though *Wontner*, in the same position, was declared entitled to receive back his deposits. The cases at law, being mostly actions brought by tradesmen and others, strangers to the Companies, against members of the Companies, were not applicable to the Winding-up Acts, the object of which was to settle the equities between the members of the Companies themselves. This respondent, by becoming a member of the provisional committee, and further by accepting shares in this Company, became a member of the Company, and was therefore liable, within the provisions of the Winding-up Acts, to contribute proportionally towards payment of the debts and liabilities of the

Company. It is, upon these grounds, submitted that the Vice-Chancellor's order ought to be reversed. It was extremely desirable to have an early decision, as there were no less than 8000 cases in the Masters' offices depending on the result of this case.

Mr. W. T. S. Daniel for the respondent.—The question in the appeal was of the greatest moment; there was certainly a great number of cases pending in the Masters' offices. Different Masters entertained different opinions, [681] and all were anxious for a leading case. None of the parties whom he represented wished for delay; on the contrary, they all desired an early decision, and with that view these appeals were brought up by arrangement and consent, but they all desired that the decision should be most carefully considered; and as the House could not have the benefit of the presence of the Judges, he was instructed most respectfully to state that an application was intended to be made to request the Lord Chancellor to attend—

Lord Brougham said he had the greatest respect for his noble and learned friend, the Lord Chancellor. He had just taken his seat in the Court of Chancery, and was not yet much conversant with those cases. Were he, however, to attend, he would be here like any other peer. It was not proper that a suitor here should solicit the attendance of any peer. If the parties did not wish for delay, then their objection was that only one Law Lord was present. That was not new; for he himself, when he held the Great Seal, and also after resigning it, often was the only Law Lord present to hear appeals. That had happened frequently before his time; and it was well known that Lord Giffard was specially appointed in 1824 to hear appeals then in arrear, and Sir John Leach was appointed after him.

Mr. Daniel then proceeded: The argument used to establish Mr. Uffill's liability as a contributory under the Winding-up Acts is twofold. First, it is said that he is liable by the sole fact of his being a provisional committee-man, and on that point the argument is the same as in Cottle's case; secondly, it is said his liability arises from the alleged acceptance of shares in the Company. There is certainly a prospectus in which his name appears on the provisional committee; but there is no evidence that he ever saw it, [682] or authorized the insertion of his name. In Cottle's case it was shown, by his own letter, that he consented to be put on the provisional committee. There is nothing to connect Mr. Uffill with the prospectus produced in this case, or with the contents of it. There is an extract from the minute-book of the proceedings of the Company, on the 8th of October, with the names of the persons who were present; but the name of Uffill does not appear there. It appears that at that meeting a provisional committee and a committee of management were nominated, and Uffill's name is put on the former in his absence, and, it may be assumed, without his consent, as no evidence of consent is given. It appears also that, at the same meeting, a resolution was passed that until an Act of Parliament should be obtained, the affairs of the Company should be under the control of the managing directors to whom power was given to allot the shares, and *to apply the funds of the Company in payment of all the expenses incurred in its formation*. No Act of Parliament was obtained, so that the committee of management had no power to incur debts, but were to pay all expenses out of the Company's funds. [Lord Brougham.—How were the funds to be got?] From deposits on shares, and until the deposits were paid, a loan was to be obtained from a London bank, to meet current expenses; there was a resolution of the managing committee to that effect. That no debts and no personal liability were to be incurred; but that all payments were to be made out of deposits, appears further from a resolution of the 9th of October, "that the projectors, Messrs. Nias and Jones, be paid £2000 for reimbursement of their expenses, etc. *provided the parliamentary deposits be paid*." It was then also resolved, that the said projectors, the secretary, the solicitor, the provisional and managing [683] committees should have allotments of shares; and at a meeting on the 21st of October, Jones, one of the projectors, and now the petitioner for the winding-up of the Company, was added to the committee of management. All the resolutions and proceedings of the Company shewed a manifest intention to discharge the provisional committee, and exempt them from all liability from the time that the committee of management was appointed.

The only question therefore is, whether the respondent's letter of acceptance of shares made him liable within the Winding-up Acts? The acceptance of shares in answer to a circular, does not imply "taking shares." The distinction is noticed by the Vice-Chancellor in *Bell v. Lord Mexborough* (5 Railw. Cas. p. 162). Mr. Uffill

did not take any shares; he did no act in relation to the project; in no sense could he be made liable at law for any thing done by the Company or its managers.

The proposition that there is an equitable liability, where there is no liability at law, is an assertion without authority. There is no such thing as equitable, distinct from legal, liability; there may be a liability at law which equity only can enforce; but equity does not create the liability. Mr. Baron Rolfe, in giving the judgment of the Lords Commissioners in *Cottle's case*,—a judgment which is conclusive on the first part of this case,—says (*vide supra*, n. p. 655), "All that a person does by becoming a member of a provisional committee is to signify his approbation of the scheme, and to engage that he will concur with the others in such acts as he may approve of and think conducive to the objects in view. If, indeed, he expressly or impliedly give authority to any one or more of the committee to act for him, then whatever is done in pursuance of that authority is of course [684] obligatory on him." "But the result of the cases at law, to which we have been referred, is that the mere fact of becoming a member of a provisional committee, gives no authority whatever to any one. It was indeed argued before us, that although a person by being on the provisional committee, does not make himself liable to third persons for dealings between them and other members of the committee, yet that he does become liable as between himself and such other members, to contribute rateably in respect of their outlay. But *this is an entire fallacy. The obligation to contribute is a legal obligation, and may be enforced by action at law*, though often more conveniently in equity."

The contract in this case, if contract at all, was not closed by the respondent's letter of acceptance of shares. The secretary's subsequent letter was an essential part of the contract, affixing conditions to the allotment of shares intimated by his first letter, and thereby giving the respondent an option to take the shares or not. His choice of the latter alternative was, in the argument in some of those cases, assimilated to a covenant in a lease for payment of rents, and other acts, of the non-performance of which the lessee could not be allowed to take advantage, in order to put an end to the lease. There was no similitude, and therefore no parity of reasoning, between the two cases. The letter also stated that the allotment of shares was not transferrable, a condition which would at law dissolve the contract, arising out of the previous letters; *Duke v. Andrews* (5 Railw. Cas. 496; 2 Exch. Rep. 290).

The respondent did not take any notice of the secretary's second letter; he paid no deposits; signed no parliamentary or subscribers' contract; no one signed them, because the project was abandoned for want of deposits. If the respondent had paid the deposits, there [685] is no doubt that at law he might recover them back from the committee of management; *Walstab v. Spottiswoode* (15 Mee. and W. 489), *Wontner v. Shairp* (4 Railw. Cas. 542), *Bell v. Lord Mexborough* (5 Railw. Cas. 149). How then could a Court of Equity, as Lord Cottenham said in *Bell v. Lord Mexborough*, compel him to contribute what a court of law would enable him to recover back?

The Winding-up Acts apply to three classes of companies, first, trading companies completely formed; second, companies completely formed, but which have not traded; and third, companies not completely formed, and which have not traded or done any business. To this last class the appellants would apply decisions which were pronounced in respect to the two former, as *Morgan's Case* (1 Mac. and G. 225; 1 Hall and T. 320), which belongs to the first class, and is of the very highest authority, but not applicable to the present case. The question in it was, not whether Morgan was a shareholder, but whether, having been a shareholder in an established trading company, he assigned his shares so effectually as to be relieved from subsequent responsibilities. The Court held that he had not ceased to be a member of the Company, and he was therefore held to be a contributory. Lord Mansfield's Case (2 Mac. and G. 57; 1 Hall and T. 573) belongs to the second class. He had applied for and received shares in the Universal Salvage Company, completely registered, and he paid the deposits. He refused to pay further calls, on the ground that the terms of the prospectus, on the faith of which he had taken the shares, were not carried out. He was held liable to contribute. The principle of the decision in *Beresford's Case* (3 De Gex and S. 175; 2 Mac. and G. 197; and 2 Hall and T. 388), was applicable to the second [686] point in the present case. He had been an allottee of shares in a Company, and paid deposits. He did not execute the deed of settlement of the Company by the time therein specified, and the directors, acting on the power given them

by the deed, declared his shares forfeited, and he submitted. The principal question was, whether the forfeiture of the shares was effectual, and the Master, the Vice-Chancellor, and Lord Chancellor held that it was, and that Beresford was not a contributory. Parbury's Case (3 De Gex and S. 43), and Sharpus's Case (*id.* 49) had no application to the present, but *Fox v. Clifton* (6 Bing. 776), *Pitchford v. Davis* (5 Mee. and W. 2), *Williams v. Pigott* (5 Railw. Cas. 544), were strong authorities for the respondent's now liability.

Mr. Bolt (he was not present when the respondent's counsel were called on) said, he would only recapitulate the argument, being satisfied that Mr. Daniel had left nothing for him to add. Though Mr. Ufill may be held to have been a provisional committee-man—which by itself raises no liability,—he was never a member of the Company. First, there was no effectual allotment of shares to him; secondly, if there was, he never took any. The “acceptance” did not imply “taking” of shares, and the condition in the secretary's second letter, which must be held to enter into the contract neutralized the previous acceptance. Thirdly, if it should be held that there was an allotment and acceptance of shares, there was no payment of deposits, or any other monies, without which there is no liability. Best's Case (not reported) is quite in point.

Mr. Bethell in reply.—The cases that have been cited to shew that an intended shareholder in an incomplete railway company is not liable to pay debts of the [687] Company, are not applicable to questions of liability to contribution on the winding-up of a company. One part of the argument for the respondent has been, that by becoming a member of the provisional committee he incurred no liability to contribute, because, as by the cases at law, there was no legal liability, there was no equitable liability, and therefore there was no liability at all. That point has been already discussed in *Cottle's Case*, and it is not necessary to argue it again. The second point in this case, and which was not in *Norris v. Cottle* at all, is the liability incurred by the acceptance of shares. The answer given to that is, that there was no acceptance, that the second letter of the secretary imposed a new condition on the allotment communicated by his first letter, and as the respondent did not accept the condition, he did not accept at all. The argument was not maintainable; the contract was complete by the letter of acceptance.

Lord Brougham, at the close of the argument, said it was impossible to over-rate the vast importance of those cases. They had been most ably argued on both sides. The first case (*Norris v. Cottle*) had but one point, whether the mere fact of being on the provisional committee made one liable to be a contributory within the Winding-up Acts. But in the second case there was the additional point in respect to the acceptance of shares; and that again resolves itself into two points, first, whether there was any acceptance in consequence of the condition contained in the third letter,—whether the two letters constituted the contract, or the third was necessary to complete it; and secondly, in case there was a complete contract constituted by the two first letters, and consequently a decided acceptance of shares, whether [688] that made the respondent a contributory. It was necessary to take some time to consider the authorities on this last point, and he would take an opportunity of conferring with one or two more of his noble and learned friends.

Lord Brougham (August 9).—In this case there is, to a certain extent, a similarity with the case just disposed of (his Lordship had just given judgment in *Norris v. Cottle* [2 H. L. C. 647]). It is clear that the respondent knew his name had been put upon the provisional committee; because, in his correspondence with that committee, he added to his signature the initial letters P. C. So far the two cases are identical, and, were there nothing more, this must have followed the fate of the last case. But besides his name being put, with his knowledge and consent, on the committee, he was found by the Master to have accepted his shares (meaning of stock, and as a provisional committee-man), and upon this ground he was held to be a contributory. Upon appeal, the Vice-Chancellor Knight Bruce reversed the Master's order, and directed the name to be struck out. This order of his Honour is now before us by appeal; and I must observe that I have some reason to doubt if the facts were ever fully before that learned and very able Judge.

The evidence of acceptance of shares rests upon two, or, as it is contended by the

respondents, on three, letters; one from the secretary the 10th of October, 1845, informs Mr. Upfill that one hundred shares in the Company had been apportioned to each provisional committee-man, and asks if he (Upfill) is willing to take them. His answer, on the 14th of October, says, [689] "I accept the one hundred shares allotted to me;" not *apportioned*, but *allotted*; and he shews in what capacity he accepted them, by signing with the addition of P. C. to his name, meaning Provisional Committee-man.

It is contended that there was no *allotment*, but only, by the secretary's letter, an *apportionment*. This however cannot be allowed; for whatever may be the phrase used in the secretary's letter, the answer of Mr. Upfill treats the offer made as an *allotment*; he says, "I accept the one hundred shares *allotted* to me." This, if it stood alone, would import an absolute acceptance. But there follows a third letter, four days later, from the secretary. It is headed "*Letter of Allotment.—Not transferrable.*" It states the allotment of one hundred shares, and adds that a deposit of £2 12s. 6d. on each share must be paid on or before the 24th of October, otherwise the allotment to be null and void. The letter of allotment was to be presented, and would entitle the party to obtain his scrip, on executing the parliamentary contract and subscribers' agreement.

It is contended on the part of the respondent, that the acceptance was not final and complete till the third letter, because no terms had been stated in the first and second letter. But so no terms had been stated in the third. The price, the consideration for the shares, is not stated, nor in any way referred to in any of the three letters, except that the shares are said to be £25 shares, which Mr. Upfill must be taken clearly to have known, when he became voluntarily a provisional committee-man, and accepted the one hundred shares as such.

Then it is said that the shares were, in the third letter, said not to be transferrable. If this made any difference, it is not true, for the letter does not say that [690] the *shares* are not transferrable, but only that the letter of allotment, as it is called, is not transferrable; and which could not be transferred, because the first receiver in this case took his scrip, and paid his deposit, and signed the contract in his individual capacity as a committee-man, and others received their scrip in other capacities, and their letters were not transferrable for the same reason.

Then as to the defeasance in not paying the deposit:—that could make no difference in regard to the rights given before, or in regard to the position in which Mr. Upfill stood between the 14th and 18th of October. I am therefore of opinion that the offer and the acceptance, in the two first letters, constitute a complete and absolute acceptance by Mr. Upfill of the one hundred shares as a provisional committee-man, and that he became thereby a shareholder, as far as a person at that time could become a shareholder; that he became clothed and vested with his full right to obtain the situation of a shareholder, when that should be more completely conferred on him in the progress of the concern.

It is true, that by the subsequent letter, he is directed to pay the deposit, on pain of forfeiture, and that he took no notice of that letter, and did not pay the deposit. Whether this determined his right to scrip and shares or not, it is unnecessary to inquire; he became a shareholder on the 14th, or a person entitled to be a complete shareholder by his own subsequent act; and which he could become if he chose to do what he was, by the rules of the committee he belonged to, called upon to do. It is very possible that no profit might result to him during the interval between the two letters of the 14th and 18th, or rather the day of [691] the delivery of that third letter; but if any gain had been made, he would have had his share, and he could not withdraw at his option from the liability which the holding this beneficial chance of profit imposed.

It is not, as I think, necessary to inquire whether or not this constituted a partnership; but it appears to me impossible to avoid the inference that a person who accepts shares in the joint stock of a concern, which he knew was at least preparing to carry on operations with the view of gaining profit, must be understood to do an act which entitles him, eventually at least, to share in the gains; and that he thus must be taken to give an implied authority to his companions on the committee to pledge his credit, so far as his rateable proportion in the joint stock goes, for the necessary expences of the committee in preparing the launch of the common concern. I hold

that this authority, to be presumed from his acts, inures to the effect of making him incur a liability in respect of the things done by his companions of the committee or their officers; and I can find no decision at law to exclude the application of this sound principle to the case.

If the cases in the Court of Exchequer, followed by the other Courts, had laid down another principle,—if they had held that the being a committee-man, who had also accepted shares, in no respect authorised the incurring of the expences required for the operations of the committee, in respect of the concern to which those shares appertained, I should then have been obliged to deny that there could have been a legal liability from implied authority; and it would have become necessary to consider whether or not the facts amount to a partnership. But I am of opinion that, independently of partnership, the liability exists. It may be said [692] that no partnership could be constituted by the acceptance of shares, until the Company was formed; and the cases of *Nockells v. Crosby* (3 Barn. and C. 814), in the King's Bench, and *Fox v. Clifton* (6 Bing. 776; and 9 Bing. 115), in the Common Pleas, are relied upon. Those were cases of subscribers merely, and not of persons who were by their own consent in the management of the concern. The first case (that in the King's Bench) only held that the consideration on which the money had been paid, having failed by the Company not being established, the money could be recovered back in an action for money had and received to the plaintiff's use, without deducting for the expences of a secretary's salary, which secretary, as Mr. Justice Holroyd observed, had in point of fact never been appointed. The second of the above cases only held that the application for shares, and payment of a first deposit, did not constitute one a partner who had never interfered in the concern. Neither of these cases resembles the one before us; neither of them decides that if several persons join in a plan to form a partnership, and one of them accepts a given proportion of the stock, which would give him certain rights, were the partnership formed and in active operation, he can recover back money paid by him for necessary expences in the parliamentary and provisional proceedings; or that he must not be held to give an authority, impliedly at least, to pledge his credit for the necessary provisional expences of the concern, whereof he was provisionally a member.

I therefore differ from the view taken in the Court below, and hold that the order of his Honour the Vice-Chancellor should be reversed, and Mr. Uppill's name restored to the list of contributories.

[693] I entirely agree with Lord Cottenham's first observation in giving the judgment in *Besley's* case, when he says, "I cannot for a moment entertain the idea that this Company had not advanced to that state which made it the proper subject of an order under the Winding-up Acts. It may be quite right to draw within the operation of the Acts, concerns which require the aid of the Acts,—whether you call them companies or associations, by which name they may go, is quite immaterial; because it is only the fact that it has become an association or a company within the meaning of the Winding-up Acts, which could give the Court the power to wind up its concerns" (*vide ante*, note, p. 656).

It has been held by common law Judges that the circumstances in which we have here been proceeding were for a jury; but we are, in the Courts of Equity, both Judge and jury; and as for sending an issue to be tried, nothing can be more absurd; the verdicts could not bind us, and the whole object of the acts would be defeated.

Mr. Rolt.—I do not know whether your Lordship's judgment goes to the number of the shares.

Lord Brougham.—My judgment is founded upon both circumstances. It is not that every shareholder is liable, but that the provisional committee-man, who also receives the shares due to him in his capacity of provisional committee-man, gives an implied authority, and I most distinctly must guard this, as I have so stated twice over in my judgment: it is most distinctly to be considered as not deciding the point whether any person applying for shares would be so liable, or receiving shares, would be so liable; for aught I know, *Nockells v. Crosby* might be material in that case.

[694] Mr. Rolt.—I mean, my Lord, as to the exact number of shares as found by

the Master, being one hundred. That number is got at by the resolution which apports one hundred to each of the provisional committee-men.

Lord Brougham.—No; that one hundred is got at by his own acceptance. I do not think that point was brought distinctly before us.

Mr. Rolt.—No, my Lord; there was no discussion upon it.

Lord Brougham.—I wish it to be most distinctly understood, and it is of the greatest importance, that it is upon the two facts taken together that the judgment proceeds. One of them is found at law not to be sufficient without the second, and it is a question whether the second is sufficient without the first. However, the decision of the House goes upon both points concurring, namely, the fact of the party being, by his own choice, a provisional committee-man, plus his acceptance of shares. Lord Lyndhurst has unfortunately left town, so that I cannot state how he would view this matter, but I shall be able hereafter to do so. I ought to mention that I have communicated with my noble and learned friend Lord Cottenham upon this subject, and he takes exactly the same view that I do. But that will probably have less authority on this account, that Lord Cottenham has a strong leaning upon the subject of liability, and he leans much more in favour of it than other Judges have been disposed to do, though he clearly negatives the doctrine ventilated at the bar here, rather than distinctly maintained, namely, that there was an equitable liability though not a legal liability; and that the legal liability is no measure of the equitable or general liability. To what amount the party shall in the present case be held liable, is not material; [695] if liable at all, he is a contributory, and the question brought by the appeal, and the question before the Vice-Chancellor was, whether Mr. Uphill was a contributory or not. If he was, the Master was bound to insert his name. But also he was bound to insert his name as he did, in respect of one hundred shares. To what this made him liable we have no business to consider.

IT WAS ORDERED AND ADJUDGED, “that the said Order of the 24th of July, 1850, complained of in the said appeal, be, and the same is hereby reversed, and that the decision of the Master, that the respondent James Uphill should be included in the list of contributories of the said Company, as a contributory in respect of one hundred shares of twenty-five pounds each, be, and the same is hereby affirmed, and that the said respondent be so included in such list accordingly, and that he do repay to the appellant all such costs (if any) as shall have been paid by the appellant to the respondent under the Order hereby reversed.

[696] THOMAS BENSON,—*Plaintiff in Error*; JOHN CHAPMAN,—*Defendant in Error* [July 3, 4, 1848; July 9, 27, 1849].

[Mews' Dig. xiii. 389, 1135, 1225, 1233, 1286, 1325. S.C. 13 Jur. 969; 6 Man. and Gr. 792; 5 C.B. 330. As to repairs by Master, cited in *Barber v. Fleming*, 1869, L.R. 5 Q.B. 74; *Potter v. Rankin*, 1870-73, L.R. 5 C.P. 358; L.R. 6 H.L. 122. On point as to bottomry bond, cited in *The Lizzie*, 1868, L.R. 2 Ad. and Ec. 256. Cf. also *Atwood v. Sellar*, 1879, 4 Q.B.D. 357.]

*Insurance—Freight, receipt of, by holder of bottomry bond—Total loss—Abandonment.*

It is the duty of a master, in case of damage to the ship, to do all that can be reasonably done to repair it, bring home the cargo, and earn the freight.

Where, in case of damage to a ship, the master elects to repair it, the mere fact that the expences of repair ultimately prove to be greater than the value of the ship, will not be sufficient to shew that he acted beyond the scope of his authority, or to entitle the owner in an action on a policy on freight, to recover as for a total loss.

The receipt of freight by the obligee of a bottomry bond is, in law, a receipt of it by the ship-owner, whose master has given that bond in discharge of expences incurred in the necessary repairs of the ship.

The owner of a ship insured ship and freight. On leaving Pernambuco in June



1839, the ship struck on a rock, and put back. After a survey, repairs were begun. They were continued for a long period, and the expence of them much exceeded the value of the ship and freight. The master, not being able to procure money in any other manner, was compelled to borrow on a bottomry bond, charging ship, freight, and cargo. On the 30th of December 1839, the owner, in London, on being shewn a letter addressed to the agents of the lenders on bottomry, in which the great expences of the repairs were stated, gave notice of abandonment to the underwriters on ship and on freight. The ship arrived, and the freight was duly paid to the holders of the bottomry bond, under an order of the Court of Admiralty. The shipowner sued the underwriters on freight as for a total loss. The jury found, on a special verdict, that the plaintiff had acted *bona fide* without *laches*, and as a prudent owner of the ship and freight, if uninsured, would act:

Held, that in this case, which was one of constructive total loss, the master might have abandoned at Pernambuco, but that having there elected to repair, he must be treated for [697] that purpose as the agent of the owner, whose acts bound the owner.

Held, also, that as the special verdict did not find that the owner, if on the spot, would not have repaired the ship, the Court could not infer that he would not have done so.

A partial loss of freight may be recovered on a declaration claiming a total loss.—Opinion of the Judges, p. 722.

This was an action brought in the Court of Common Pleas, upon a policy of Insurance, on the freight of the ship *Lord Cochrane*, upon a voyage at and from Pernambuco to Liverpool. The freight was valued at £2000. The plaintiff was the owner of the vessel.

The declaration was in the ordinary form, and averred a total loss of the ship by perils of the seas, a total loss of the freight, and an abandonment duly made.

The defendant pleaded, first, traversing the plaintiff's interest; secondly, denying that the ship was lost by the perils of the sea, in manner and form, etc.; thirdly, denying that the freight was so lost; fourthly, denying that the loss was occasioned by the perils insured against; and, fifthly, that the freight was abandoned. There was also a plea of set-off. Issues were taken on all these pleas.

Upon the trial of the cause before Mr. Justice Erskine, at Guildhall, in July 1842, a verdict was found by consent for the plaintiff, subject to a special case for the opinion of the Court, which was to draw all inferences that might be drawn by a jury, with liberty for either party to turn that case into a special verdict. The ship in question, being at Pernambuco, received goods on board on freight for Liverpool, in the month of June, in the year of our Lord 1839. The amount of the freight was £2200. Thus laden, the ship, on the 29th of June, 1839, set sail on the voyage [698] insured against, but while proceeding out of the harbour of Pernambuco struck on a rock and a bank, and was compelled to put back to Pernambuco for repairs. There being no dry dock at that place, nor any other means of examining the ship, to ascertain the nature and extent of the injury, except by heaving down, it became necessary to take out the cargo, and heave the ship down, in order to make that examination. This was done, and several surveys were made; and finally, the Master, in concurrence with M'Calmont and Co., of Pernambuco, to whom on leaving England he had been directed to apply for a cargo, proceeded to cause the ship to be repaired. Pernambuco is a place very inconvenient and expensive for the repairs of ships; and these repairs, which it was stated were necessary in order to make the ship navigable and capable of performing the homeward voyage, continued from the 29th June 1839, to the 4th of January 1840, and amounted to the sum of £7132 3s. 8d. Though due means were taken at Pernambuco to obtain money from persons on loan, by bottomry and otherwise, none could be obtained, until M'Calmont and Company consented to advance the sum of £7132 3s. 8d. on bottomry; and accordingly the Master, on the 6th January 1840, at Pernambuco, executed a bottomry bond to them, pledging the ship, freight, and cargo for that sum and bottomry premium at twenty per cent. On the 30th December 1839, the plaintiff was shown a letter from M'Calmont and Company, to their agents in London, which had been

received by the latter, and which contained this passage:—"Pernambuco, 14th November, 1839. The *Lord Cochrane's* repairs are likely to exceed £5000, with commissions, discharging, and re-loading cargo, etc., etc."

[699] The plaintiff, thereupon, on the same day, gave the following notice to the underwriters on the ship and on the freight,—“London, 30th December, 1839. My ship, the *Lord Cochrane*, being insured as follows:—Ship £3000, with the Indemnity Marine Insurance Company; £700 with the Dundee Marine Insurance Company; £800 with the Dundee Sea Insurance Company; freight, £2000, with the Neptune Marine Insurance Company, and having sustained damage since she sailed with her cargo from Pernambuco, and having received information that the expences incurred in relation to the accident will exceed the value of the ship and freight, and that the amount will be secured by bottomry, and that the repairs will still be incomplete, I do hereby abandon said ship and freight to the said respective insurers, according to their respective rights under the circumstances. I have further to acquaint the underwriters, that I am informed that a bill will be drawn upon me for the amount, which will exceed £5000, by the payment of which the bottomry premium may be avoided, and that I shall not accept such bill on my own account, but shall be ready to pay same for their account, upon their putting me in funds for that purpose.

For Self and Co.—Thos. Benson.”

The plaintiff did not interfere in any way afterwards in respect of either ship or freight, nor ever personally received any part thereof. The ship having received the cargo again on board (in respect of the re-loading of which certain expences included in the £7132 3s. 8d. were incurred), sailed again from Pernambuco on the 6th January, 1840, and arrived with the whole of the original cargo, which was of the value of £19,139, on [700] board, at Liverpool, on the 19th of March, 1840. Upon the arrival of the ship, proceedings to enforce payment were taken by the obligees of the bottomry bond in the Court of Admiralty; under the order of which court, the ship was sold for the sum of £1675, and the freight was collected from the consignees of the goods, and the amount of both, under an order of that Court, was paid to the obligees. Upon making up the accounts of the disbursements at Pernambuco, according to the practice between assured and underwriters in London, the amount of the proportion of the £7132 3s. 8d., and of the bottomry premium, to be borne by the freight, was settled at £569 11s. 3d.

The jurors found the first, second, and fifth issues for the plaintiff; and as to the third and fourth issues, they found the facts; and further found that in respect of all the aforesaid premises, the plaintiff and the several other parties acted *bona fide*: and that the plaintiff acted without laches, and as a prudent owner of the ship and freight, if uninsured, would act, and the questions upon the facts so found were left by the jury to the judgment of the Court. In case the Court should be of opinion that the plaintiff was entitled to recover for a total loss, the damages were fixed at £2395; but if entitled to recover only for a partial loss, the damages were to be only £569 11s. 3d. Upon the facts so found by the jury, the Court of Common Pleas gave judgment for the plaintiff for a total loss (6 Man. and Gr. 792; 7 Scott, 625; 13 Law Jour. (N.S.) C.P. 25).

The special case was then turned into a special ver-[701]-dict, and the defendant sued out a writ of error in the Exchequer Chamber, and made a general assignment of errors.

The Court of Exchequer Chamber ordered a general reversal of the judgment of the Court of Common Pleas on the third and fourth issues, holding that the adventure was not, in point of fact, abandoned, and that as it was not found, it could not be inferred that a prudent owner, if uninsured, would not have repaired, the underwriters on freight were not liable as for a total loss. And it was also held that the Court was not at liberty to refer to the finding of the jury upon another issue—that the ship was wholly lost—and to take that fact as found, in deciding whether the freight was wholly lost, and lost by a peril insured against (5 Com. Ben. 330).

The present writ of error was brought against this judgment. (The following Judges were present during the argument: Mr. Baron Alderson, Mr. Justice Patteson, Mr. Justice Coleridge, Mr. Justice Coltman, Mr. Justice Maule, Mr. Justice Wightman, Mr. Justice Creswell, Mr. Justice Erle, and Mr. Justice V. Williams.)

Sir F. Thesiger and Mr. Peacock (Mr. Barstow was with them) for the plaintiff

in error. There are two questions in this case; first, was there a total loss; or secondly, was there a partial loss, by the perils of the sea, of this freight. If either of these questions should be answered in the affirmative, the judgment of the Court of Exchequer Chamber must be reversed; for that Court pronounced a general reversal of the judgment of the Court of Common Pleas, and discharged the defendant from all liability whatever.

[702] There is a necessary connection between the character of owner of the vessel, and the title to receive freight. The interest in the freight depends on the ownership of the vessel, so that, if from any accident arising during the continuance of the voyage, the vessel should be totally lost, the title to freight, which is an accessory to the ownership of the vessel, would become likewise lost. This is the general rule, though some difficulty may arise in applying it to a case where there has only been a constructive, and not an actual total loss of the vessel. The phrase "constructive total loss" is not perhaps without objection, but it is now well understood, and it has been fully elucidated by Lord Abinger, in his judgment in the case of *Roux v. Salvador* (1 Bing. N. C. 526; 3 Bing. N. C. 266; 1 Scott, 491).

The first question to be considered here is with reference to the notice of abandonment. If the vessel is in point of fact wholly lost to the owner, whether through an actual or constructive total loss, the underwriter on freight is liable to pay without notice of abandonment. The cases of *McCarthy v. Abel* (5 East, 388) and of *Sharp v. Gladstone* (7 East, 24) do not impeach this general principle, although under the particular circumstances of those cases the owner of the vessel was held not entitled to recover the freight. Then comes the important decision of *Case v. Davidson* (5 Maule and Selw. 79; affirmed, 2 Br. and Bing. 379; 5 B. Moore, 116), which settled the law, that an abandonment to the underwriter on ship, transfers to him the title to the freight. There the vessel *in specie* came home and earned freight, and the underwriter on [703] ship having accepted the abandonment, the voyage was treated as having been performed for his benefit. Had he not accepted the abandonment, the voyage would have been performed for the benefit of the owner. This was the correct principle, and it makes the cases respecting a contingent or dubious total loss consistent with those of an absolute total loss. But it is not in all cases that this notice of abandonment is necessary; for where the ship has been so much injured by the perils of the sea as not to be repairable at all, or not repairable without an expense exceeding the value of the ship when repaired, the assured may recover as for a total loss, without giving any notice of abandonment. *Cambridge v. Anderton* (2 Barn. and Cr. 691), *Roux v. Salvador* (3 Bing. N. C. 266), *Allen v. Sugrue* (8 Barn. and Cr. 561; 3 Man. and Ryl. 9), *Young v. Turing* (2 Man. and Gr. 593; 2 Scott N. R. 752), and *Mellish v. Andrews* (15 East, 13). The plaintiff in error contends that here there was a total loss in fact, and consequently no necessity for a notice of abandonment.

If in this case there had been actual total loss, it is clear that there would not have been any necessity to abandon; but supposing the necessity to have existed because there was a case of constructive and not of actual total loss, then it is contended that notice of abandonment was duly given, and that the question for consideration relates only to the effect of that notice. It must be contended on the other side, that no effect favourable to the owner of the vessel followed from that abandonment, but rather that it has deprived him of the rights to which he would otherwise have [704] been entitled; for that now the loss must be considered to have arisen, not from the perils of the sea, but from the abandonment, and that consequently the loss was the act of the plaintiff himself. An endeavour will be made on the part of the defendant to support this argument by assimilating this case to that of *McCarthy v. Abel* (5 East, 388). But the two cases do not resemble each other, since there the rights of the owner were by a voluntary act, an act not compelled by necessity, transferred to the underwriter, who, being thus made to stand in the situation of the original owner of the vessel, was entitled to receive its earnings in virtue of that voluntary act. Here the transfer was an involuntary act, the direct consequence of the perils insured against. The case of *Idle v. The Royal Exchange Assurance Company* (3 B. Moore, 115; 8 Taunt. 755), and *Gardner v. Salvador* (1 Moo. and Rob. 116), are important to shew that in order to enable the owner to recover, it is not necessary that there should be an actual absolute total loss, but that

he may recover, if such circumstance exist, as in the present case created a necessity for the abandonment. In *Idle v. The Royal Exchange*, Lord Chief Justice Dallas, when delivering the judgment of the Court, anticipated and answered the argument relied on by the defendant in error here. His Lordship observed (3 B. Moore, 151; 8 Taunt. 778), "Here it is said that the loss arose out of the act of the owner in selling, and that the sale was not induced by any peril of the sea. But this distinction seems to me also to be a fallacy; the state of the ship which led to the sale was induced by the perils of the sea; so that though the sale arose im-[705]-mediately out of the act of the captain, yet that act was induced by a peril which had taken place and put the ship into a state in which the verdict finds that in point of fact it was proper to sell." It is in the same way a fallacy to say that the loss arose from the abandonment, and not from the perils of the sea, where the latter were so clearly the occasion of the former.

In answer to this claim, it will be said that here the ship was in part repaired, and brought home the cargo, and that the assignees of the bottomry bond receiving the freight were in the same situation as the owner, and that the receipt of the freight by them was the receipt of it by him. To raise this argument, it must be contended that by repairing the vessel, the owner declared his election to continue the voyage, and so prevented himself from afterwards claiming as for a total loss. It may be admitted that he might have repaired it, though satisfied that the expense of the repairs would exceed the value of the ship, and though he might thereby have disabled himself from suing the underwriters on freight. Here the owner has not brought himself within any such rule. It was the master who made the repairs; it was the owner who gave the notice of abandonment as soon he heard of them. The act of the master was at once repudiated by the owner. Under these circumstances, to deprive the owner of his rights, because of the repairs done by the master, would be to lay down the rule, that under all circumstances, and for all purposes, the master is the authorized agent of the owner alone, and can absolutely bind him by any act done during the voyage. There is no rule of law to that effect. The case of *Fleming v. Smith* (*ante*, 1 Ho. of Lords Cas. 513) does not proceed on that principle, but rather on its oppo-[706]-site; for there it was the acts of the owners themselves, who recognized and adopted the acts of the master, which were held to prevent them from recovering against the underwriter. No master can bind the owners except for necessary repairs; such as are required to enable the vessel to perform the voyage, and such as a prudent owner, if present, would order to be made: *Webster v. Seekamp* (4 Barn. and Ad. 352), *Cary v. White* (1 Bro. P. C. 284, edit. 1784; 5 Bro. P. C. 325, edit. 1803). These and other cases to the same effect are all collected in Abbott on Shipping (8th edit., by Mr. Serjt. Shee, 135). No prudent owner on the spot would have ordered repairs which, costing £7000, left the vessel worth only £3000 or £4000. The case of the *Alexander* before Dr. Lushington, on the 9th of March, 1842 (6 Jur. 241), is important on this point; the limits of the master's authority to bind the owner for repairs being there most clearly defined. That learned Judge said (*Id.* 242), "The result of the cases is, first, that the money must have been necessary; secondly, that it must have been applied to the use of the ship. Now the only distinction between the advance of necessaries and money is, that, though in both the *onus probandi* is the same, there is, wisely and properly, a difference in the extent of proof required. I cannot find any case in our own law which does not require that the proof that the articles furnished were necessary should come from the plaintiff, to the extent of shewing that they were what a reasonable and prudent owner would have ordered." He then notices a distinction raised in the Scotch Courts between money and other articles, and [707] says, "That distinction is wholly unsupported by any authority in English law. I think in the case of an anchor and cable, less evidence might suffice to prove the necessity, in the legal sense of the term, than in respect to other articles; but still there must be some evidence, and I think that the doctrine which casts the *onus probandi* on the tradesman or material man who provided the articles, is founded on great and important principles, and that the rule is wisely framed to prevent great abuses. To charge one man for the acts and dealings of another is, *prima facie*, contrary to natural law; but when it appears that such other person was authorized to a given extent, when the relation of principal and agent is established, then it becomes reasonable to fix the principal with responsi-

bility, but a responsibility properly guarded and restrained, by requiring the creditor to use reasonable diligence to ascertain that the want of the article is such that the owner himself would have sanctioned the purchase." If that case is correctly decided, then the act of the master here cannot be properly described as one which "the owner himself would have sanctioned."

The moment that a total loss occurs, the master ceases to be the agent for the owner alone, for the relation between them exists only in respect of the voyage, and of the vessel in the actual prosecution of the voyage. After the happening of the event which constitutes the total loss, the captain becomes the agent for all concerned. *Green v. The Royal Exchange Company* (6 Taunt. 68), and *The General Interest Insurance Company v. Ruggles* (12 Wheaton's Rep. 408, 413), in which, though the circumstances [708] of the case do not apply here, the principle stated is very clearly applicable.

The master here might, when the accident happened, have sold the vessel for the benefit of all concerned: if so, then that accident which, in the exercise of a sound discretion, compelled him for the benefit of all concerned to repair the ship, may be described as the occasion of a total loss. *Read v. Bonham* (3 Brod. and B. 147), *Doyle v. Dallas* (1 Moo. and Rob. 48), *Hunter v. Parker* (7 Mee. and W. 322), in the last of which cases Mr. Baron Parke thus sums up the law in this matter (*Id.* 342),—"The master has by virtue of his employment not merely those powers which are necessary for the navigation of the ship, and the conduct of the adventure to a safe termination, but also a power, when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned." If so, then it is clear that he had no power exclusively to bind the owner; his duty was to make sale of the vessel, and rescue all he could from the wreck, for the general benefit. It is a fact that he had the power, and this power exists only under circumstances which constitute a total loss, and his authority to repair, and his authority to borrow on bottomry depend on the same circumstances, and must be exercised under the same restrictions, and cannot therefore affect the owner alone, but must be exercised by him as a person acting for the benefit of all concerned.

The principle applicable to a case of contingent loss is declared in *Holdsworth v. Wise* (1 Man. and Ryl. 673; 7 Barn. and Cr. 794). In the report [709] in *Manning and Ryland*, it is said (1 Man. and Ryl. 682), "It is not enough to restore the ship in specie: it must be restored in an unfettered state, in a state which leaves her possession useful and beneficial to the assured." Here the ship could not be restored in that state, and the doctrine there laid down on that point is applicable here; and the case itself is similar to the present in another respect, as it shews that the master has power to bind the owner, by ordering repairs, but that when doing so he ceases to be the mere agent of the owners, and becomes the agent for all concerned. The Court of Common Pleas here, justly considered, that if the master had actually sold the ship at the time of the damage, no doubt could have existed as to the owner's right to recover as for a total loss. If so, two questions arise; first, if the owner had been present at Pernambuco, would it have been prudent for him to repair the ship: and, secondly, would he have acted prudently in not repairing? These two questions, answered as they have been by the jury, establish a case of a total loss, and shew the right of the plaintiff to recover. The judgment of the Court of Exchequer Chamber, therefore, cannot be maintained, but that of the Court of Common Pleas must be restored. And, at all events, should the House deem the judgment of the Court of Exchequer Chamber to be right, in disallowing the claim for a total loss, the judgment of that Court, which was one of general reversal of the Court below, must itself be reversed, and the claim of the plaintiff for a partial loss, which can be recovered under a declaration for a total loss (*Park on Insurance*, 600, citing *Gardiner v. Croasdale*, 2 Bur. 904; 1 W. Bl. 198; *White v. Bodinam*, 2 Salk. 629; 1 Wms. Saund. 312 e.), must be established.

[710] Sir F. Kelly and Mr. Martin (Mr. Ogle was with them) for the defendant in error.

The judgment of the Court of Exchequer Chamber is right throughout. There has not been any loss of freight in this case, for the freight has been earned and paid. It has been in substance paid to the assignee of the freight, for such was the character of the obligee of the bottomry bond, by whom, in fact, the freight was

received, and who must be taken to have received it on account and for the benefit of the owner.

The judgment of the Court of Common Pleas proceeded on a misconception of fact. It was there assumed that an actual constructive total loss had taken place (6 Man. and G. 810), and all the reasoning of the Court went on that assumption. Now, the injudicious expenditure of money on repairs, to an amount which exceeds the value of the vessel after those repairs have been completed, does not constitute a total loss, and certainly not a total loss occasioned by the perils of the sea. It may be admitted that it is the duty of the master of a ship in a foreign port to have repairs done so as to enable him to complete the voyage and bring home the goods which he has received on freight. That argument only strengthens the case for the defendant in error. For such a purpose the master is the authorized agent of the shipowner; and there is no statement in the case that the expences caused by these repairs were not lawfully due from the owner of the ship. If so, and if the master secured the payment of them by giving a bottomry bond, the person who received the freight in discharge of that bond, must be taken to have received it on the part of the person who gave the bond; in other words, of the owner of the vessel.

[711] It is a most extraordinary argument to put forward that the master is the agent, not for the owner, but for the underwriter. Yet that argument has been used here with a view to show that there was a constructive total loss in the case, and that after its occurrence the captain was no longer the agent of the owner alone, but agent for the interests of all concerned. The argument cannot be supported in law, and, in fact, the captain acted as the agent of the owner alone. The decision of the Admiralty Court that the bottomry bond was valid, for the purpose of transferring the right to freight from the owner to the obligee, shows that the master was the agent of the owner, and had authority to pledge the owner's credit.

In order to make a constructive total loss, there must be an election to make it so at the time and spot of the accident. The election having been once made, it cannot be recalled. Here the election was made by the captain, against whom fraud is not imputed, who was the agent for the owner, and who acted as such throughout. The captain elected to repair the ship, and to take the benefit that thereby might accrue; and he, the owner's agent, having so elected, the owner cannot now insist upon a constructive total loss at all. It is most essential to adhere to the rule that the owner of a vessel is not by himself or his agents to take the chance of repairing a vessel, to incur thereby an enormous expence, and then, when the chance turns out unfavourable, to throw the whole loss on the underwriters.

There was here no abandonment of freight at all, or none made in time. *Anderson v. The Royal Exchange Insurance Company* (7 East, 38). The title to the freight [712] was clogged with a lien, created by the act of the owner's captain, for the benefit of the owner. The freight certainly was not abandoned. It is a fallacy to speak of abandoning a thing to a man for his benefit, when, by a previous act of the person affecting to make the abandonment, no benefit can arise to the abandonee. Here the freight could not possibly be of benefit to the underwriter, for it had been previously assigned on bottomry for advances made to the owner of the ship. The finding of the jury on this part of the case is unintelligible. Besides, an act of abandonment does not transfer the property in the ship and freight, but merely entitles the insurer, by operation of law, to receive credit for what the ship and freight will produce; the property itself does not pass. The ship registry acts do not notice such a transfer of property, for they contain no exception dispensing with their provisions in the case of a transfer in the property of the ship occasioned by operation of law. It follows therefore that that part of the special verdict which alleges that the owner of the ship acted *bona fide*, and as a prudent uninsured owner might have acted, has no bearing on this case, while it is a very strong circumstance in the defendant's favour that the special verdict nowhere states that a prudent owner, had he been on the spot at the time, would not have begun to make these repairs with the view of rendering the ship competent to complete the voyage, and to bring home the cargo. As this House can only proceed on what is actually stated in the special verdict, it must be taken that a prudent owner would have made these repairs; and if so, then the act of election is complete, and the plaintiff cannot be allowed afterwards to recal it.

[713] This case is distinguishable from that of *Holdsworth v. Wise* (1 Man. and

Ryl. 673; 7 Barn. and Crea. 794), on which the judgment of the Court of Common Pleas was principally vested. It may be admitted as a general proposition, that where the damage arises from the perils of the sea, and where the ship cannot be put into a state of repair necessary for the pursuing of the voyage, except at an expence greater than the value of the ship when repaired, the master is not bound to incur that expence; but then there must be an abandonment, and that must be made by the owner, or his authorized agent at the time. He cannot exercise his discretion as to repairing, then bring the ship home, and earn freight, and yet claim for a total loss. If therefore, as in this case, repairs are executed by the authority of the master, and the ship brings home the original cargo, and freight is actually received thereon, it is impossible to contend that in such a case the underwriter on freight can be liable to the assured. *M'Carthy v. Abel* (5 East, 388) establishes the contrary of such a proposition.

One of the tests applicable to this case, to show that the freight received under the bottomry bond has been received by the order and for the account of the owner, is to be found in the situation of the underwriter on the ship. Suppose he had had an agent on the spot competent to act for him, and that the master had made a valid abandonment, that the underwriter's agent had accepted it, and had taken to the ship, and ordered the repairs, and brought home the goods. It is clear that he would be entitled to the freight. But how could he get it? He could only sue for the freight [714] in the name of the person with whom the contract for the freight was made, and he must therefore use the name of the owner of the ship, and would be liable to all the equities that might be set up in answer to the claim if made by the owner himself. This shows that the receipt of the freight by the assignee of the owner is a receipt of it by the owner himself, and the freight here has been received in that manner.

Whenever the freight has been received, no matter under what circumstances, the underwriter on freight is exempted from liability. *Everth v. Smith* (2 Maule and S. 278). There the expences of a detention by embargo exceeded the freight, so that the freight was on the balance of accounts wholly lost; but it was held that though the policy attached at the time of the detention, yet that freight having been afterwards earned by the vessel bringing home the cargo, the underwriter on freight was not liable. *Falkner v. Ritchie* (2 Maule and S. 290) is to the same effect, and both alike show that the election to abandon must be at once made; and that if the owner knows by any method whatever that the vessel is in a port of safety, and is in a condition to complete the voyage, he from that moment loses his right of election. The case of *Idle v. The Royal Exchange* (3 B. Moore, 115; 8 Taunt. 755) does not impugn that doctrine, for that only establishes that in a case of actual necessity, the master may justify selling the ship; and the case of the *Gratitude* [3 Rob. C. 240] proves that the master has authority to bind the owners, for there a bond given by him was enforced by the Court.

Now as to the question of the cause of the loss of [715] the freight:—suppose, which is however denied, that there has been a loss of freight, still, unless that loss has been caused by the perils insured against, no liability has been incurred by the underwriter. The owner here did not receive the freight. Why? Because it had been previously received by the obligee of the bottomry bond, through the act of the authorized agent of the shipowner. The owner would have received the freight, if the master had not pledged it at Pernambuco. It cannot therefore be said that the freight was lost by the perils of the sea, although it may be true that the act of the shipowner's agent never would have taken place had not those perils occurred. *M'Carthy v. Abel* (5 East. 388) shows that under such circumstances the loss was not occasioned by the perils insured against, and, therefore, could not be recovered. That case is decisive of the present. There the ship and freight had been separately insured. The ship had been seized under an embargo, on hearing of which the owner abandoned to the respective underwriters, who accepted the abandonment. The embargo was afterwards taken off, and the ship completed the voyage and earned freight. It was held that the owner could not recover as for a total loss of freight, which, if lost at all, had been lost, not by the perils insured against, but by the voluntary act of the assured. The only difference between these two cases, is, that in this there was an obligee of a bottomry bond, by whom the freight has been re-

ceived, while there it was received by the underwriters on the ship, who were treated by the Court as having received it "by and on [716] behalf of the assured," and it was therefore held, that no loss of freight had occurred. Unless that case is to be overruled, it must decide the present; for here the owner assigned the freight, and by that assignment, and by that alone, lost the right to receive it.

Then as to the question whether a partial loss can be recovered under this declaration. In the first place, the defendant denies that there has been any loss of freight whatever, for the whole has been earned and received, but at least there was not loss occasioned by the perils insured against; and, in the next, he contends that, for the plaintiff to recover on this declaration, the loss on the freight must be total. The finding of the jury merely assumes a partial loss, but that finding is not binding on the Court.

Mr Peacock in reply.—First, as to the denial that there has been any total loss of freight, or any loss by the perils insured against. The circumstances under which the plaintiff was deprived of the right to receive the freight constituted a total loss of freight. Assuming that the bottomry bond was a debt which the owner was bound to pay, then it is clear that that debt was occasioned by the perils of the sea, and by the enforcement of the debt so occasioned, the assured, in fact, received no freight. The observation of Lord Chief Justice Dallas, in *Idle v. The Royal Exchange* (3 B. Moore, 115, 151; see *ante*, p. 704), applies here, and a debt so occasioned and so operating, must be considered as a loss by the perils of the sea. Secondly, as to the agency, the cases of *Buxton v. Snee* (1 Ves. 155), *Milles [717] v. Fletcher* (Doug. 231), the *Gratitudine* (3 Rob. Adm. Rep. 240), and *Fleming v. Smith* (*ante*, Vol. I, p. 513), shew many instances in which the master ceases to be the sole agent for the owners, and becomes a person acting for all concerned. The case of the *Constantia* (2 Rob. Adm. Cases, *temp.* Lushington, 404), which was three different times under the consideration of the Court, establishes the same principle. The owner is not personally liable on a bottomry bond, *Johnson v. Shepper* (1 Salk. 35); but the bond is to be enforced against the ship and the freight, and, in case of necessity, the cargo.

Then as to the omission in the special verdict of a finding that if the owner had been on the spot he would not have ordered these repairs. No such finding could have been made, for, under the circumstances stated here, it is clear that a prudent and an honest owner would have begun these repairs with the purpose of completing the voyage, and so preventing a loss to any one. At that time it was impossible to know that the expence of the repairs would exceed the value of the ship. The cases of *Young v. Turing* (2 Man. and Gr. 593), and *Irving v. Manning* (*ante*, Vol. I, p. 287), establish the principle that a master, acting *bona fide* in making such repairs does not thereby preclude the owner from afterwards abandoning. The owner has the right to do so, as soon as he knows the real circumstances of the case; and here he did abandon on the very day on which the information reached him through M'Calmont's letter. At the time that he gave notice of abandonment the repairs were not completed. Finally, it is clear that the [718] plaintiff is entitled to recover something, for at all events there has been a partial loss; but it is submitted that the circumstances of this case shew the loss to have been a total loss, and that the plaintiff in error is entitled to judgment for his whole demand.

Lord Brougham.—I propose that the following questions shall be put to the judges: First, "whether on the facts stated in the special verdict, the plaintiff is entitled to recover as for a total loss of the freight?" Secondly, "Whether, upon the pleadings and the facts stated in the special verdict, the plaintiff is entitled to recover for a partial loss of the freight?" and, thirdly, "Whether the findings of the jury do not entitle the plaintiff to a verdict for £569 as for a partial loss?" It may, in the result, be the opinion of the Judges that either there has been a total loss, or none at all; but it is much better that both the questions as to total and as to partial loss should be considered by the Judges.

The Judges requested time to consider their answers, and time was given accordingly.

(July 9, 1849.) Mr. Baron Alderson delivered the opinions of the Judges.—The first question put by your Lordships to the Judges is, "Whether, upon the facts stated in the special verdict, the plaintiff was entitled to recover as for a total loss of the freight?"



We are all of opinion that he was not.

The special verdict states that the ship, with a cargo on board, left Pernambuco, on the voyage to Liverpool, on the 29th June, 1839; and in proceeding out of the harbour struck on a rock, and was obliged to put back to be repaired; that the master, after several surveys, [719] and with the concurrence of the persons to whom he had been addressed by the plaintiff to procure a cargo, proceeded to effect the repairs, which continued from the 29th June to the 4th January following; that the expenses of them amounted to the sum of £7132 3s. 8d., much exceeding the value of the ship and freight, which sum, the master not being able to procure it in any other manner, was compelled to borrow on bottomry, and executed a bottomry bond, charging the ship, freight, and cargo; that the cargo had been necessarily taken out during the repairs, but was re-shipped; the ship sailed on the 6th of January 1840, and arrived with the cargo at Liverpool; and that the obligees of the bond received the freight, under a decree of the Court of Admiralty.

The freight therefore having been earned, it is plain that the plaintiff cannot recover for a total loss of that freight, unless he can repudiate all that was done by the master, and treat the ship and freight as wholly lost at Pernambuco on the 29th of June.

The special verdict does not state *when* the plaintiff was first informed of the accident to the ship. The only information to the plaintiff which it notices is that conveyed by a letter from Pernambuco, dated the 14th of November 1839, which was received on the 30th of December in that year, and contains this passage: "*The Lord Cochrane's* expenses are likely to exceed £5000, with commission, discharging and re-loading cargo, etc." On the same day the plaintiff gave notice of abandonment of the ship and freight to the respective underwriters on each, and did not interfere in any way afterwards in respect of either ship or freight.

It is undoubtedly a rule that the facts are to be taken as stated in a special verdict, and that inferences [720] of fact are not to be drawn by the Court; but it is material to observe, that this special verdict does not state that the plaintiff abandoned when he first heard of the accident, or even when he knew that the ship was under repair, nor that, in common prudence, he would not, if he had himself been at Pernambuco and uninsured, have done precisely what the master did.

The duty of the master in case of damage to the ship is to do all that can be done towards bringing the adventure to a successful termination; to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous; and to bring home the cargo, and earn the freight, if possible.

In the absence of any finding to the contrary, we must assume that this duty was properly performed; and it may well have been so, for consistently with all the facts found in the special verdict, the expenses in the course of repairing may have been discovered to be much greater than was at first contemplated, without any fault in the master or those under whose advice he acted. Subsequent events may show that he acted erroneously, but we think it impossible to say that he acted beyond the scope of his authority, or that the plaintiff is entitled to treat him as being no longer his agent as soon as he commenced the repairs, and to consider the ship as a new ship, or the adventure in the voyage home as a new adventure, as he might have done if the master had, as perhaps the facts might have justified him in doing, abandoned the adventure, and sold the ship. The election to repair was made, and the repairs commenced in July 1839, and the facts found by the special verdict are not sufficient to show that the master in making that election acted beyond [721] the scope of his authority; for he certainly had authority to act as a prudent uninsured owner would have done, and it is not found that an owner so situated would have acted differently. Under these circumstances the plaintiff was, we think, bound by that election of the master, and could not in the month of December following, when he heard of the great amount of the expenses, get rid of that election, and put himself in the same situation as if no repairs had been done. The abandonment can have no effect under such circumstances. If the loss, being a loss by damage to the ship, was total in the first instance, no abandonment was necessary; if it was not, abandonment could not, even at the first, make it so; much less, after the plaintiff, by his agent, had elected to repair, and after the repairs had been nearly completed.

In cases of capture or detention, where the loss is apparently total, abandonment

to the underwriters on freight may be very important; but even in such cases, if the ship is retaken or released, and freight earned before action brought, the owner cannot recover on the policy on freight; nor indeed is there any instance to be found in which an action for a total loss of freight has been held to be maintainable where the freight has been actually earned.

We have no doubt that the receipt of the freight by the obligee of the bond was, in law a receipt by the plaintiff, having already expressed our opinion that he was bound by the election of the master to repair, and of course bound by the bottomry bond which became necessary to be given to effect the repairs; and even if it had not been a receipt by the plaintiff, still he would not have been prevented from receiving the freight by the perils insured against, but by his own act in pledging [722] the freight by the bottomry bond, and he might have obtained the freight if he had chosen to pay off that bond. The freight was not actually lost by the perils insured against, for it was in point of fact actually earned; nor can it be said to be lost to the plaintiff by those perils; but if lost to him at all, it has been lost by his own acts and omissions.

We say nothing as to the finding of the jury on the issue as to the total loss of the ship, because your Lordships' question is confined to the effect of the special verdict, which is found only on the third and fourth issues, and cannot be altered or construed by the findings on the other issues.

To the second question put by your Lordships "Whether, upon the pleadings and the facts stated in the special verdict, the plaintiff was entitled to recover for a partial loss?" we answer in the negative. The pleadings indeed present no obstacle, for if a partial loss of freight can be recovered at all, we know no reason why it may not be recovered on a declaration claiming a total loss, as is constantly the case in actions on policies on the ship; but here if any freight was earned, the whole freight was earned; and we have already expressed our opinion that freight was earned. The whole original cargo was re-shipped and brought home.

To the third question put by your Lordships we answer, that the findings of the jury do not entitle the plaintiff to a verdict for £569, or for a partial loss. We have already expressed our opinion that the facts stated in the special verdict do not entitle the plaintiff to recover for a partial loss, and the findings on the other issues do not in any respect touch this question. As to the sum of £569, which is alleged to be the pro-[723]-portion of the expenses at Pernambuco which the freight ought to bear, a question might have arisen if the underwriters on freight had accepted the abandonment, and paid the total loss claimed; for then, the freight having afterwards been received, if the underwriters had claimed it as money had and received to their use, and could have supported that claim, an attempt might have been made to deduct the £569 as salvage of the freight; but no such question arises in this action, in which the sum insured is claimed as lost freight not as money paid by way of average or salvage, or in any other manner than as by loss of freight. The underwriters upon this policy engage only that freight shall be earned, and it has been earned. At all events, if by the terms of the policy any other contract can be considered to be entered into, the declaration in this case is not adapted to such contract, or to *anything but* loss of freight.

Lord Brougham (July 27, 1849): In this case the learned Judges have given a unanimous opinion; and I entertain no doubt upon the question. Indeed, my noble and learned friend and I held the same opinion during the argument: I therefore move your Lordships that judgment should be given for the defendant in error.

Lord Campbell: I think this case does not admit of any reasonable doubt. There is here neither a partial nor a total loss of freight, because the goods, the freight of which was insured, were loaded at the port of outfit, and were [724] delivered at the port of destination, and the freight was paid. To be sure, it was not received by the owner of the ship, but it was received under his authority, and unless you are altogether to discard what the master had done, or to suppose that he had acted fraudulently or without authority, there can be no doubt that the judgment should be for the defendant in error. Therefore I entirely concur in the motion of my noble and learned friend.

Judgment for the defendant in error, with costs.\*

\* In connexion with this case see that of *Duncan v. Benson*, 1 Exch. Rep. 537, 1266

[725] THOMAS HENRY ROWLEY, and his brothers and sisters; and WILLIAM HENRY ORCHARD, and his brothers and sisters,—*Appellants*; SAMUEL ADAMS and EDMUND MARKS and Others (Original Appeal),—*Respondents*. The said S. ADAMS and E. MARKS,—*Appellants*; The said T. H. HOWLEY, and all the other Appellants and Respondents in the original appeal (Cross Appeal),—*Respondents*. WILLIAM WYATT,—*Appellant*; The said S. ADAMS and E. MARKS and Others,—*Respondents* [May 8, 9, 15, 16, 18 and 22, 1848; July 27, 1849].

[Mews' Dig. i. 339; vi. 1351. See *In re Stevens*, (1898), 1 Ch. 162.]

*Duties and liabilities of Trustees and Executors—Wilful default.*

In 1825 Henry Wyatt and his son Henry E., who had previously carried on business as brewers, admitted another son, George, into partnership. By the partnership deed, it was agreed that the plant, etc., which was stated to have been valued at £63,000, exclusive of the stock and debts, should be the capital, to a moiety of which the father was to be entitled. His surplus monies in the business were stated to amount to £48,915, on which he was to receive interest. He died in July 1826, having, by his will, given his surplus capital to his executors, in trust to invest the same in government or other security, and pay the income to his wife, and after her death to set apart two legacies of £12,000 each for his two daughters and their children; He gave his interest in the business and the stipulated ordinary capital to his sons Henry E., George, and William, who was a minor, and he directed his executors to carry on the business, in conjunction with his two sons, until William attained twenty-one, and he empowered them to sell his share in the brewery during his minority. He charged his freehold and other property with the payment of his surplus capital, and directed mortgages of his real estate for securing the legacies. The will was not proved till December 1827, the executors having in the meantime left the surviving partners in the undisturbed possession of the partnership property; and the business, although they did not take any active part in it, was carried on with their concurrence. Disputes having arisen between the surviving partners, the adult legatees filed a bill in 1827 for administration, which, through the interference of the executors, was abandoned.

In 1828 the executors joined in deeds whereby the partnership was dissolved, and Henry E. assigned his interest to George, in consideration of £20,000, and the executors released Henry E. from all claims in respect of any surplus capital. The business, which was afterwards sold with the sanction of the Court, was found to be insolvent, and the partnership property turned out to be wholly unproductive to the testator's estate. The executors then filed a bill for administration of the estate; and in January 1831, a bill was filed by the children of the testator's two daughters, seeking to charge the executors with wilful default in not having obtained payment of the legacies out of the surplus capital.

[726] By several decretal orders, made in both causes, accounts were directed

where an owner of goods, who had been obliged to contribute towards the payment of the bottomry bond, and of the costs of the suit instituted in the Court of Admiralty by the obligee of that bond, was held entitled to maintain an action against the owner of the ship on an implied promise to indemnify. A plea, setting forth the special circumstances, and denying the authority of the master, and alleging that as soon as defendant had notice of the repairs, and of the fact that the cost of them exceeded the value of the ship and freight, he abandoned the ship and freight, was held bad on general demurrer.

to be taken as to the accuracy of the recitals in the partnership deed, the value of the plant, and the surplus money due to the testator at his death; and accounts were directed to be taken of the partnership dealings and transactions; and if the master should find that he was unable to take such accounts, by reason of the non-production of books of account, he was to state the circumstances. The Master, having reported that he could not take the accounts for non-production of books, he was, by another order, directed further to inquire by whom the partnership property was possessed at the death of the testator, and how disposed of, and whether the executors, with due diligence, and without their wilful default, might have possessed themselves, out of the partnership property, of sufficient to pay the two legacies of £12,000. The Master again reported that he was unable to take the accounts, by reason of the non-production of the books; he found, however, on the evidence before him, large sums to have been due to the testator at his death, and large partnership assets, and that the executors might, with due diligence, and without their wilful default, have possessed themselves out of the partnership property, of a sufficient sum to pay the two legacies. The Court, upon exceptions, negatived the finding of wilful default:—

Held, by the House of Lords, that there was no just ground of appeal against the order directing further inquiries as to sufficiency of assets, and wilful default of the executors.

If an order directing inquiries be deemed unnecessary, the party objecting should promptly apply to the Court to discharge it; as a Court of Appeal would not listen to objections taken after the delay and expence of the inquiries were incurred; and if it did, it would reject the information so obtained (*infra*, 767).

Held also by their Lordships—affirming the order of the Court below upon exceptions—That the Master's findings of the sufficiency of assets, and wilful default, were displaced by his former findings—confirmed by the Court—of the impossibility of ascertaining the testator's surplus capital; That there was no reason for thinking that the surplus capital could, if at all, have been realized, without putting an end to the business, which the executors could not do without breach of their duty; That though the executors had not properly performed their duty, still, as it had not been satisfactorily made out that there ever were partnership assets, out of which the legacies could have been recovered or secured, the executors ought not to be charged with wilful default.

Executors are not chargeable with the value of their testator's property, as stated by himself and others in deeds to which the executors are not parties (*infra*, p. 770).

These appeals were brought against orders made in suits, the object of which was to obtain payment of two legacies of £12,000 each, which were bequeathed by Mr. Henry Wyatt, the testator in the causes, in [727] trust for the benefit of his daughters and three children. It was alleged by the appellants in the first appeal, the children of the daughters, that the testator's personal assets were, at his death, amply sufficient for payment of the legacies, but were afterwards wasted and lost; and they charged that the loss was occasioned by the neglect and default of Adams and Marks, the respondents in that appeal, who were the executors of the testator, and that they, therefore, became personally liable to make good the amount of the two legacies, with interest.

In April 1817, Mr. Henry Wyatt, who had for some years previously carried on an extensive business as an ale brewer upon freehold and leasehold premises belonging to himself in Portpool Lane, took his eldest son Henry Earley Wyatt into partnership. Upon that occasion Mr. H. Wyatt's capital embarked in the business—exclusive of the debts due to him in respect thereof, and also exclusive of the value of the stock of malt, hops and ale belonging thereto—was estimated by him at £24,000, which sum had been from time to time expended upon, and was then represented by, the plant, stock in trade, utensils and effects employed in the business, other than the debts and stock excepted from the estimate. By the articles of partner-

ship—founded on the estimate—one-fourth part of the plant, etc., equal to £6000, was given to H. E. Wyatt, and he was to have one-fourth of the profits, subject to the payment thereof of interest, at the rate of £5 per cent. per annum, to his father, upon the said sum of £6000. The articles contained various stipulations in respect to the drawing of bills and checks and the keeping of the accounts, etc. The trade debts and stock of malt, reserved by the articles as the exclusive property of Henry Wyatt, were [728] used in the course of the business as surplus capital belonging to him, upon the amount of which, calculated from time to time, he was entitled under the articles to the like interest, and, for the re-payment of such capital, the joint-stock of the partnership, and the profits thereof, were made liable.

The business was carried on under the firm of "Wyatt and Son" from 1817 to the year 1825, during which time accounts of the stock in trade, of the debts due from and to the firm, and of the profits of the business, were taken at the end of each year, and entered in books signed by both partners. Upon the footing and result of these accounts, at the end of 1824, the plant, utensils and other effects employed in the business—exclusive of the debts due to the partnership, and of the stock of malt and ale in hand—were estimated by Henry Wyatt at the sum of £63,676, and there was then due to him from the concern, as the amount of his surplus capital therein, the sum of £48,915, and to Mr. H. E. Wyatt, the sum of £3129, as his surplus capital.

On the 1st of January, 1825, Mr. George Wyatt, second son of H. Wyatt, was taken into the partnership, and new articles of partnership for seven years from that date were executed; and it was thereby agreed, among other things, that the plant, utensils, horses, carts and other effects employed in the business, estimated at £63,676,—exclusive of the stock of malt etc. then on hand, and the debts due to the late partnership, which were to continue the property of H. Wyatt and H. Earley Wyatt respectively, and exclusive also of the said surplus monies of £48,915 and £3129 due to them respectively from the business—should be the capital of the new partnership, and should be in the proportion of one whole moiety thereof [729] to Henry Wyatt, and one-fourth to each of his said sons; that H. Wyatt and H. Earley Wyatt should be entitled to receive interest of £5 per cent. per annum out of the general profits of the business on their said respective surplus capital; and that out of George Wyatt's share of the profits, H. Wyatt should be entitled to receive interest of £3 per cent. per annum on the sum of £15,919, the estimated value of G. Wyatt's fourth part of the general capital. Upon the footing of these articles, which contained various other stipulations usual in partnerships, the business was carried on under the firm of "Wyatt and Sons," from January 1825 to July 1826, when Mr. H. Wyatt died.

Mr. Henry Wyatt, by his will, dated in June 1826, gave and bequeathed to Hannah Wyatt, his wife, and to the respondents, Samuel Adams and Edmund Marks, their executors and administrators, all such surplus capital and accrued interest thereon, as he should at his decease have in the said business, over and above his stipulated proportion of capital therein, and also all his Government stocks, and other stocks or funds in the will mentioned, upon trust to invest the same surplus capital in their names in Government stocks, or in real securities, and to stand possessed thereof upon trust during his wife's life, to pay her the dividends and annual produce of the same surplus capital, stocks, funds and securities, for her sole and separate use; and after her decease, upon further trust, out of the same surplus capital, stocks, etc., as the primary fund, to set apart the two several legacies of £12,000 thereafter bequeathed for the benefit of his two daughters and their respective children; and as to the then residue of the same surplus capital, stocks, etc., upon trust for his two sons, George and William, in equal shares, as tenants in common, their respective shares [730] to be paid, or transferred to them respectively, at their respective ages of twenty-one years, or so soon thereafter as the decease of his wife would permit.

He devised and bequeathed all his copyhold messuages, lands, etc., situate at Hornsey (exempt from his debts and funeral and testamentary expenses), to his wife, for her life, for her separate use; and from and after her decease, he devised and bequeathed the same to his son George, to hold to him, his heirs and assigns for ever, according to the custom of the manor. And he devised and bequeathed his freehold houses, messuages, tenements, etc., in Tash Street, Gray's Inn Lane (exempt from his debts and funeral and testamentary expenses), to his wife, for her life, for her separate use; and from and after her decease, he devised and bequeathed the same

to his son William, his heirs and assigns for ever. And he gave and bequeathed all his share and interest in the brewhouse, and in the plant, stock in trade, and all other chattels and things used in carrying on his said business, and the goodwill thereof, and in the stipulated ordinary capital for carrying on the said business (charged nevertheless with such of his debts and funeral and testamentary expenses as his residuary personal estate should not extend to pay, and with his legacies and the annual sum thereafter charged thereupon in favour of his wife); as to one moiety of his half-part thereof—being one-fourth part of the entirety of the said business—to and for the use of his son William; and as to the remaining moiety, being the remaining fourth-part of the entirety of the said business, to and for the use of his two sons, George and William, in equal shares, as tenants in common.

And he directed and required his executrix and executors to concur in carrying on and managing his said [731] business, in conjunction with his sons for the time being of full age, on behalf of his son William, until he should attain his age; and he further directed that during his minority £200 a-year should be paid to his guardians out of the annual profits of his share, to be applied to his maintenance; and that the residue of the annual profits of his share should, from time to time, be invested by his said wife, S. Adams and E. Marks, or the survivors or survivor of them, in Government stocks or funds, and should be added to, and be subject to the same limitations as, the said share from which such accumulations should arise.

And he gave all the residue of his goods, chattels and personal estate (subject to his debts and funeral and testamentary expenses, and the deficiency of his legacies) unto his said wife, and Adams and Marks, upon trust to convert the same into money, and invest it in Government stocks or funds in their names; and to stand possessed of the same residuary personal estate, and the stocks, funds and securities in which the same should be invested, upon trust during his wife's life, to pay her the dividends and annual produce thereof for her separate use; and from and after her decease, then as to the same residuary personal estate, stocks, funds and securities, in trust for his said two sons, George and William, and his two daughters, in equal shares, as tenants in common; the share therein of each of his daughters to be held upon the like trusts as her legacy of £12,000.

And he gave and bequeathed the sum of £12,000, from and after the decease of his wife, unto the same Adams and Marks, and the survivor of them, upon trust to invest the same in Government stocks or funds; and to stand possessed thereof upon trust to pay the dividends to his daughter Caroline, the wife of William [732] Orchard, during her life, for her separate use and without anticipation; and from and after her decease upon trust for her children, equally to be divided among them, and to be vested and paid or transferred at such times as in the will mentioned; and he gave and bequeathed unto the said Adams and Marks, their executors, etc., from and after his wife's decease, the further sum of £12,000, upon the like trusts, for his other daughter Jane, the wife of Thomas Rowley, and her children.

And he empowered the guardians of his son William, during his minority, at their discretion, to sell and dispose of his share of his business of a brewer, and the goodwill thereof, to his brother or brothers, or any other person whomsoever. And he devised and bequeathed all his three-fourth parts in his stabling and warehouse in White Hart Yard, Portpool Lane (subject to such of his debts and funeral and testamentary expenses as his residuary personal estate should not extend to pay, and to his legacies), unto and to the use of his son H. E. Wyatt, his heirs and assigns for ever. And he gave, devised and bequeathed all his freehold and leasehold premises in Portpool Lane, being his brewhouse and other premises held and occupied therewith (subject to his debts, and to his legacies) unto the said Adams and Marks, their executors, assigns, etc., upon trust as to the freehold, to the use of his son William, his heirs and assigns, when he should attain twenty-one; and as to the leasehold part thereof, to him, his executors, administrators and assigns, for the remainder of the unexpired term therein. And he declared that all the freehold and other property whatsoever, devised and bequeathed as aforesaid, was so devised and bequeathed subject to the payment of the sur-[733]-plus capital, continued or lent in the said business, and the interest for the same. And he also subjected and charged all his copyhold and freehold estates respectively, and also his residuary personal estate, with payment of the said two sums of £12,000 and £12,000, to his

two daughters, and directed that interest, after the rate of £5 per cent. per annum, should be paid thereon respectively, until the same should be respectively invested as aforesaid, from the day of the decease of his said wife. And he directed that his sons and all necessary parties should, whenever thereunto required, and which he directed might be done, duly execute mortgages to his said trustees of his said copyhold and freehold estates for securing the payment of the said two principal sums, without interest for the same, after the rate aforesaid, and all expenses incurred in and about the same, within two years from the day of his decease, in which mortgages should be contained the usual powers of sale, etc. And he appointed his wife, and in case of her death or second marriage, the said S. Adams and E. Marks, guardians of the said William Wyatt, until he should attain the age of twenty-one years; and he also appointed his wife and them executrix and executors of his will.

On the testator's death, his sons, H. Earley Wyatt and George Wyatt, and his widow, Mrs. Hannah Wyatt, respectively entered into the possession of the freehold, copyhold and leasehold estates, devised to or in trust for them respectively, and his said two sons continued in possession of the partnership property and effects.

The widow died in April 1827, whereupon G. Wyatt was admitted to the copyhold estates at Hornsey, which he afterwards settled on his wife in fee. The [734] testator's will was not proved by Adams and Marks, until December 1827, in consequence of a protracted opposition thereto by H. Earley Wyatt.

From the death of the testator until 1828, his sons H. E. Wyatt and G. Wyatt continued to carry on the business with the concurrence of Adams and Marks, and they (the sons) collected the debts owing to the brewery, and consumed the stock of beer, malt and hops, in the ordinary course of business. Differences having soon arisen between them, and continued up to the end of 1827, an engagement was then entered into for the retirement of H. E. Wyatt from the business, upon the terms of his receiving from George the sum of £20,000 for his one-fourth part of the capital and business, and being released by the executors of the testator from all claims in respect of his estate. This arrangement, after much negotiation, was concluded in January 1828, by two deeds of assignment and dissolution of partnership.

The deed of assignment was made between H. E. Wyatt of the first part, Adams and Marks, as the surviving executors of H. Wyatt, of the second part, and G. Wyatt of the third part; and it recited the articles of copartnership of 1817, a deed of conveyance, dated 7th March, 1820, whereby the White Horse public-house and other freehold hereditaments were conveyed to H. Wyatt and H. E. Wyatt in fee, as part of their copartnership property, and the articles of copartnership of 1825; and then recited that the statements contained in the last mentioned articles with respect to the value of the plant, utensils, stock, etc., employed in the business, and with respect to the amount of the surplus money then due therefrom to H. Wyatt, were untrue, and that since his death the [735] business had been carried on by H. E. Wyatt and G. Wyatt, for the benefit of themselves and the persons interested therein under the will of the testator, and that G. Wyatt had, with the consent of Adams and Marks, as executors and trustees of the testator, contracted with H. E. Wyatt for the absolute purchase of his fourth part or share of the goodwill of the business and of the partnership property, and also of all such surplus capital as H. E. Wyatt had in the business; and it further recited that it had been stipulated by H. E. Wyatt, and agreed to by G. Wyatt, with the consent of Adams and Marks, as such trustees and executors, that G. Wyatt should pay and discharge the fourth part which ought to be paid by H. E. Wyatt (in respect of his one equal fourth-part) of such surplus capital as should be found to have belonged to H. Wyatt at the time of his decease, and of all other debts or engagements of the said copartnerships, and should indemnify H. E. Wyatt from the same; and that it had been also stipulated that Adams and Marks, as such executors as aforesaid, and in their separate capacities respectively, should release H. E. Wyatt from all claims whatsoever in respect of such surplus capital and other sums due to the estate of H. Wyatt, and also from all debts due by H. E. Wyatt and G. Wyatt, as surviving partners, to Adams and Marks respectively, for malt or other goods sold by them for carrying on the said trade since the decease of H. Wyatt, and should execute the declarations thereafter contained as to the sum in the partnership articles of 1825, stated to be the value of the plant, utensils, etc., then belonging to and employed in the said business, and as to the sum stated

to be the amount of surplus money then due from the business to H. Wyatt; and it further [736] recited that it had been ascertained that the fourth part of the said surplus capital of H. Wyatt, and of the other debts and engagements of the copartnership of 1825, or of H. E. Wyatt and G. Wyatt, or either, as surviving partners in respect of the said business, did not amount to £29,500.

The deed witnessed, that in consideration of £5000 then paid by G. Wyatt to H. E. Wyatt, and also of £15,000 and interest secured to be paid by the same to the same, in the manner therein mentioned, H. E. Wyatt (with the consent and approbation of Adams and Marks, as such executors as aforesaid), sold and assigned to G. Wyatt all his one equal fourth part or share of the goodwill of the business of ale brewer, and all the profits thereof; and of the plant, utensils, etc., used in or about the said business; and of all monies, debts, credits, bills and securities then due in respect of the said business, and of the principal money, interest, profit or advantage arisen or to arise on or from the said securities, or any of them; and of all ordinary capital employed in or about the said copartnerships, and also all surplus capital belonging to H. E. Wyatt, and then remaining in the said business, etc.

And it further witnessed, that G. Wyatt covenanted with H. E. Wyatt to pay the fourth part, to any extent not amounting to £29,500, which ought to be paid by H. E. Wyatt, of all such surplus capital as, on taking the partnership accounts, should be found to have belonged to H. Wyatt at the time of his death, and of all other debts and engagements due from the copartnership, or from H. E. Wyatt and G. Wyatt, or either of them, as surviving partners, in respect of the business carried on up to the death of H. Wyatt, and since his decease. And it further witnessed, that [737] Adams and Marks, with the approbation of G. Wyatt (and so far only as they rightfully might), released, and discharged H. E. Wyatt from all claims and demands which they, Adams and Marks, as executors or otherwise, could make against him in respect of any surplus capital or sum of money whatsoever, in anywise due from the said copartnerships, or from H. E. Wyatt and G. Wyatt, as surviving partners, or from H. E. Wyatt, in respect of the said business, but not so as to discharge the capital or joint stock then remaining in the business, or G. Wyatt, from the same or any part thereof. And Adams and Marks, and G. Wyatt severally declared and acknowledged, that the sum of £63,676 mentioned in the articles of copartnership of 1825, as the value of the plant, utensils, etc., was a false and erroneous sum, and far surpassed the actual value of the same, and that no valuation was in fact made thereon, and that the aforesaid sum was erroneously inserted therein; and further, that the sum of £48,915, in the same articles mentioned as the amount of surplus capital then due from the business to H. Wyatt, was also an erroneous sum, and greatly surpassed the amount of his surplus pecuniary capital therein, and that no account was then made or taken thereof, and that the said last-mentioned sum was in like manner erroneously inserted in the said articles by the said H. Wyatt.

By the deed of dissolution of partnership, of the same date, and made by and between the same parties,—after reciting, among other things before stated, the articles of partnership of 1825, and the will of the said testator, and that the same had then lately been proved by Adams and Marks, and also reciting the said contract of sale of H. E. Wyatt's share in the said business;—it [738] was witnessed that in consideration of the premises, they, H. E. and G. Wyatt, and Adams and Marks as trustees and executors, dissolved the copartnership subsisting between them under the recited articles of 1825, or otherwise, so far only as concerned H. E. Wyatt; and thereby declared and agreed that the same, so far only as concerned him, should as from that date cease and determine. And it was thereby further witnessed that H. E. Wyatt released and discharged G. Wyatt, his heirs, and executors, and the said Adams and Marks, their heirs, and executors, and the estate and effects of the said H. Wyatt, from all actions, claims and demands which he, H. E. Wyatt, his executors, etc., might have or make against G. Wyatt, his heirs, or executors, or the estate or effects of H. Wyatt, by means or in consequence of G. Wyatt or H. E. Wyatt, or Adams and Marks as trustees and executors, having been partners in the said copartnerships, or in respect of any act done by them or any of them in or about the said copartnership. Then followed a similar release and discharge of H. E. Wyatt from all claims by G. Wyatt, and by Adams and Marks.



A notice signed by the four, "that the partnership formerly subsisting between H. Wyatt the elder, and his sons, H. E. Wyatt and G. Wyatt, of Portpool Lane, brewers, and the partnership carried on since his death by the undersigned, had been dissolved, by mutual consent, on the 1st of January, 1828, so far as regarded H. E. Wyatt, who retired from the business, and that all persons indebted to either of the firms were to pay their bills to G. Wyatt, by whom all debts due to the said firm were to be paid," was published in the *London Gazette*.

On the retirement of H. E. Wyatt, G. Wyatt, with [739] the concurrence of Adams and Marks, continued to carry on the business until November 1829, when he formed a partnership with Mr. Henry Thompson, who entered into an agreement with Adams and Marks as executors of H. Wyatt to purchase his moiety of the brewery and of the goodwill thereof, and of the plant and stock in trade thereto belonging, and of the debts due thereto, at a price to be ascertained by two valuers.

The new partners, H. Thompson and G. Wyatt, agreed, on the completion of the valuation, to pay the amount thereof to Adams and Marks as executors of H. Wyatt, and to enter into a bond to pay all the debts that would be found due from the former firm, and to indemnify the executors against them; but in case the debts should be found to exceed the value of the whole brewery property, G. Wyatt, and Adams and Marks, and William Wyatt, who was then of full age and a party to this agreement, were to bear such excess in the proportion in which they were respectively entitled to the property.

Upon the investigation then made into the accounts of the partnership, it was found to be in an insolvent state, its liabilities exceeding its effects to the extent of more than £7000. The business was, however, carried on by G. Wyatt and Henry Thompson; the agreement for sale of the testator's moiety to the latter having been confirmed by the Court (*infra*, 742).

Interest had been paid on the two legacies of £12,000 up to April 1829, but, with this exception, no sum was ever paid in respect either of principal or interest.

From the death of the testator till November 1829, Adams, who was a malster, and Marks, who was a hop factor, continued to supply the brewery with malt and hops, as they had done in the lifetime of the testator. Throughout this period they were in the habit of attending at the brewery once or twice a week, but in no [740] way interfered with, or gave any orders or directions with respect to the management of the business, or the collection of the testator's assets.

The legatees of the two £1200, Mr. and Mrs. Orchard, and Mr and Mrs. Rowley, had, in 1837, filed a bill in Chancery against H. E. Wyatt and G. Wyatt, Adams and Marks, and W. Wyatt, then an infant, stating, among other things, that under the articles of partnership there was owing from the concern to the testator, at the time of his death, as well the sum of £48,915 5s. 10d. surplus capital, his exclusive property, as several other sums of money from time to time subsequently brought into the concern by him in increase of its capital, and other large sums applied for that purpose out of the profits of the partnership, which the testator suffered to remain in the concern; and stating that H. E. Wyatt and G. Wyatt had since the testator's death carried on the said business, and employed therein the said surplus capital and other sums of money belonging to the testator; and that great differences and animosity existed between them, and that they had no communication with each other upon the affairs of the said business, and greatly neglected the same, and that no proper written accounts were kept of the dealings, or of the monies received and paid on account of the business, by reason whereof the estate and effects of the testator embarked therein were in great danger of being lost; and that H. E. Wyatt had applied the monies received by him to his private purposes.

The bill charged that the defendants were not entitled to employ the capital belonging to the testator in the said business, for that the late copartnership was determined by his death, and thereupon the affairs thereof should have been wound up, and a balance [741] struck, which the plaintiffs charged had not been done; and they further charged, that if the defendants were so entitled as aforesaid (which the plaintiffs did not admit), yet that the said business should be conducted with the greatest care, and under the superintendence of some trustworthy and skilful person; and that from want of proper attention great loss was likely to accrue to the plaintiffs and all persons interested in the estate of the testator, and that the same ought

therefore to be secured for the benefit of the parties entitled thereto. The bill prayed that the will of the testator might be established, and the trusts thereof carried into execution; that accounts might be taken of the partnership dealings and transactions between the testator and H. E. Wyatt and G. Wyatt, and of the dealings of H. E. Wyatt and G. Wyatt in the said business, etc.; also that a receiver might be appointed and an injunction granted against H. E. and G. Wyatt's disposing of any of the partnership estate.

This bill was dismissed with consent of the plaintiffs, at the suggestion of the executors, and with a view to the arrangement for the retirement of H. E. Wyatt from the business, which all the parties were desirous to facilitate.

No steps having been taken by the executors to secure the testator's property in the business, or to ascertain what was owing from the business to his estate, which, after the retirement of H. E. Wyatt, was left on the personal credit of G. Wyatt, a second bill in Chancery was filed in July 1829, by Mr. and Mrs. Rowley and Mr. and Mrs. Orchard against the same defendants and the children of the plaintiffs, praying that the said will might be established, and the trusts thereof declared and carried into effect, and [742] that an account might be taken of the testator's personal estate and effects, by his will charged with the legacies of £12,000 and £12,000, possessed by or come to the hands of the said defendants, or any of them; and that the same might be applied in a due course of administration, in satisfaction of the said legacies; and that all necessary accounts might be taken, and a receiver and manager of the business appointed; and in the meantime that H. E. Wyatt, G. Wyatt, and W. Wyatt might be ordered to execute mortgages to secure the said legacies, as by the will directed.

The answer of the executors to this bill did not contain any suggestion of the embarrassment or insolvency of the concern, although they were then in possession of the valuation thereof, made in the proposal of taking H. Thompson into partnership. On their petition, presented in the cause, an order was made in November 1829, whereby it was referred to the Master to inquire whether it would be beneficial to the parties interested in the estate of the testator that the agreement with H. Thompson should be carried into execution, and in April 1830 the Master reported that it would. The report was confirmed by an order dated in May 1830; and in pursuance thereof, debts due to the late partnership to the amount of £8810 3s. 4d. were transferred to the new firm of Wyatt and Thompson.

The cause came on to be heard upon bill and answers in July 1830; but before any decree was drawn up, the plaintiffs having become aware of the insolvency of the brewery, did not further prosecute that suit.

In December 1829, Adams and Marks filed their bill in Chancery against H. E. Wyatt, G. Wyatt, W. Wyatt, Thomas Rowley and his wife, William Orchard and his wife, and their respective children; and after [748] stating the will of H. Wyatt, and the opposition made by H. E. Wyatt to the proof thereof in the Ecclesiastical Court, and that he and G. Wyatt, the surviving partners, had possessed themselves of the whole of the partnership property, and they and W. Wyatt, Mr. and Mrs. Rowley, and Mr. and Mrs. Orchard had possessed themselves of other parts of the testator's property; the bill charged that the share and interest of the testator in the partnership concern amounted to a large sum, but that no accounts of the partnership had ever been settled, and that the testator's share and interest therein at the time of his death had not been properly ascertained; that the *caveat* entered by H. E. Wyatt against proof of the will was entered for the purpose of preventing the executors from possessing themselves of the testator's personal estate and effects, and applying the same in a due course of administration, and in order to enable him to obtain the exclusive possession thereof for his own benefit. It further charged, that at the testator's death, there were at the brewery, and at his residence at Hornsey, mortgages, bonds and securities for money, which had been taken and retained by the said defendants, and that in consequence of the disputes in the family there was great danger that the testator's outstanding estate, which the executors had been prevented from receiving, would be lost.

The bill prayed discovery from the defendants, and that the will might be established, and the trusts thereof carried into execution, and that accounts might be taken of the personal estate of the testator, and, in case the same should be insufficient

to pay his debts and legacies, that an account might be taken of his real estates, charged with the payment of his legacies, and of the rents thereof, in the usual manner; and that H. E. [744] Wyatt, G. Wyatt, and W. Wyatt might be directed to execute such mortgages and charges as by the will was directed for the better securing the said two legacies, and that a receiver might be appointed.

In January 1831, the appellants in the original appeal, who are the children of Mr. and Mrs. Rowley, and of Mr. and Mrs. Orchard, filed their bill against the respondents, the executors, Adams and Marks, H. E. Wyatt and G. Wyatt and wife, making Mr. and Mrs. Orchard and Mr. and Mrs. Rowley parties defendants. The bill stated the said partnerships between the testator and his sons, and that the whole of the sum of £48,915, and other sums, were due to the testator from the partnership at the time of his death; and, after stating his will and the entry of the *caveat* against probate thereof, it proceeded to allege neglect against the executors, in causing the suit in the Ecclesiastical Court to be delayed in consequence of pending negotiations between them and H. E. Wyatt and G. Wyatt, and others of the family; and that the executors did not take any proper measures for securing the estate; but that, with their permission, H. E. and G. Wyatt possessed themselves of the partnership effects, and received the outstanding debts, drew out large sums of money, and applied the same to their own use; that on the testator's death, the partnership became dissolved as to him, and the accounts ought then to have been settled, and his surplus pecuniary capital ascertained, and raised out of the property then belonging to the partnership, and paid by H. E. and G. Wyatt, according to the partnership articles; and that at the testator's death the property of the partnership was much more than sufficient to answer the amount of his surplus capital, and the same might, if then called for, have [745] been immediately raised, and the executors ought to have raised or called for payment thereof, and to have invested the same upon the trusts of the will, but that they wholly neglected to do so, and no part of the testator's surplus capital, or of the two legacies, or of the residue of his personal estate, had been raised or invested.

The bill set forth the arrangement for H. E. Wyatt's retirement from the business, and the said deeds whereby that arrangement was carried into effect, and alleged that at the date thereof a large balance would, on a proper settlement of the accounts, have appeared to be due from H. E. Wyatt to the testator's estate; that the executors were not authorised to give him the release contained in the assignment, or to make the admission therein contained as to the testator's surplus capital, and that they were guilty of a breach of trust in so doing, and that the admission was made without any valuation having been made, and without any evidence of its truth, and the release given without any consideration, and without any benefit being thereby obtained to the testator's estate.

The bill, after alleging various acts of neglect and mismanagement against the defendants, whereby the business had been injured, and the value of its property greatly reduced, charged that H. E. and G. Wyatt, by executing the partnership articles of 1825, acknowledged that the sum of £48,915 was due to the testator from the business as surplus capital, and were not at liberty to dispute the same; that they had the means of being and were fully acquainted with the true state of the partnership affairs and accounts, and in particular H. E. Wyatt, who had for several years managed the same; that the executors were not authorised to employ [746] the testator's surplus capital in the business, or concur in carrying on the business, except as trustees for and at the risk of W. Wyatt during his minority.

The bill prayed that the will of the testator might be established, and the trusts thereof carried into execution; that accounts might be taken of the personal estate of the testator possessed or received by Adams and Marks, or which, without their default or neglect, might have been possessed; and of the same estate possessed by H. E. Wyatt, G. Wyatt, W. Wyatt, and Hannah Wyatt, (deceased,) or any of them; that Adams and Marks might be declared to be responsible for such parts of the personal estate as had been possessed by the other defendants with their privity or permission; that the said two legacies of £12,000 each might be raised in the manner provided for by the will, and for that purpose accounts might be taken of the dealings of the partnership from January 1825 to the time of the testator's death, and of his surplus capital therein at his death; and that in taking such accounts credit might be given to the testator's estate for the sum of £48,915 and for

the monies advanced by him to the business after the said date, with interest, and for certain rents of the premises as agreed to in the said articles, and also for his share of the partnership property; and that it might be declared that such surplus capital was a debt due to the testator and a charge on the property and on the debts due to the partnership at the time of his death and that the business might be wound up and the property and debts thereof sold and got in, and the proceeds applied in payment of such surplus capital and in raising the said legacies, and that it might be declared that Adams and Marks, H. E. Wyatt, G. Wyatt and W. Wyatt, were responsible for such [747] diminution of the value of the property and debts of the business as had taken place since the testator's death; and that they, or some of them, might be decreed to make good the same, so far as might be requisite for raising the said legacies; that the assignment of January 1828 might be declared void as against the appellants, so far as it purported to be a release to H. E. Wyatt, or otherwise that Adams and Marks might be decreed to pay what he would, but for such release, have been liable to pay, and that his interest in the premises in Portpool Lane was subject to payment of what should be found due from them to the testator's estate; and that it might also be declared that the freehold, copyhold, and leasehold estates of the testator, and the rents and profits thereof, possessed by the defendants respectively, were liable to the payment of the said legacies; and that the same might be sold for that purpose, or that the defendants respectively might be decreed to execute proper mortgage securities; and the bill also prayed for a receiver and for an injunction.

The defendants Adams and Marks, by their joint and several answer, stated, among other things, by way of defence, that at the time of the formation of the partnership of "Wyatt and Sons," the testator had not any surplus capital in the trade, and that, if he had any, the sum of £48,915 not only far exceeded the actual amount thereof, but was an imaginary sum stated by the testator, without any accounts of the trade being made for ascertaining his actual interest therein; that he had withdrawn from the partnership various sums, and did not advance any thereto; and that the stock of malt, etc., at the formation of the new partnership, and the debts then due, and the plant and utensils, were estimated by the testator [748] without account or valuation, and that such estimate was very erroneous, and was made without taking into account the debts owing by the partnership; that these defendants did not,—except by giving instructions for valuation as preliminary to probate,—act as executors until December 1827, when probate was actually granted; that in the meantime the surviving partners possessed themselves, as they had a right to do, of the partnership stock and effects, and these defendants did not actually take upon themselves the execution of the trusts of the will until January 1828; that the arrangement by which H. E. Wyatt retired was made for enabling the executors to save some portion of the testator's estate, for that without such arrangement an adverse dissolution of the partnership between H. E. and G. Wyatt must have taken place, whereby a great loss would be occasioned to the testator's estate, and their object was that H. E. Wyatt should withdraw the *caveat* and permit the will to be proved; and this arrangement was sanctioned by Mr. and Mrs. Orchard and Mr. and Mrs. Rowley.

The answer of H. E. Wyatt also stated that the sums of £63,676 and £48,915, inserted in the partnership articles of 1825, were imaginary sums named by the testator, without any foundation in fact; and that this defendant executed the said articles containing those alleged sums, under coercion of the testator.

The other defendants having put in their answers, and both causes being at issue, numerous witnesses were examined.

Several supplemental bills were afterwards filed, to bring before the Court the successively born children of Mr. and Mrs. Rowley, and Mr. and Mrs. Orchard. [749] and the assignees of the firm of Wyatt and Thompson, who had been declared bankrupts.

The causes were heard in April 1832 by Sir J. Leach, then Master of the Rolls, who, by his decree of that date, declared that the said will be established, and the trusts thereof carried into execution; and it was referred to the Master to inquire whether, on the 1st of January 1825, the plant, utensils, etc. employed in the brewery business (exclusive of the malt and beer, and of the debts due to the preced-

ing partnership) were of the value of £63,676, or of what other value; and whether £48,915 was then the amount of surplus money due from the said business to the testator or what other sum, and whether £3129 was the amount of surplus due to H. E. Wyatt or what other sum; and the Master was further to inquire what was, at the testator's death, the value of the plant, utensils, etc., employed in the said business; and what was the amount of surplus money then due to him from the said business, with liberty to state special circumstances. And it was ordered that the receiver who had been appointed under orders previously made in this cause and the said cause of *Adams v. Wyatt*, over the freehold, copyhold, and leasehold estates devised to H. E. and George and W. Wyatt, be continued.

The Master made his report in 1835, and certified that certain books which had been used in the partnership business had not been produced before him, namely, the cash-book, bankers' pass-book, check-book, and two other books, in which were entered the annual accounts of the partnership for the year 1824, and which contained an account of the sums due to the partners as part of the annual accounts in each year, and two other books containing an account of [750] what each partner had drawn out: and, as to the inquiry whether on the 1st of January, 1825, the plant, utensils, etc., (exclusive of malt, etc., and of the debts due to the preceding partnership) were of the value of £63,676, the Master found that it appeared by the partnership articles of 1825, that the several parties thereto admitted that at that time the plant, utensils, etc. (exclusive of the stock, and debts due to the preceding partnership), were estimated by H. Wyatt and H. E. Wyatt at the said sum, but in consequence of the non-production of the account books, he was unable to state the real value: and as to the inquiry whether £48,915 was on the 1st of January 1825, the amount of surplus monies due from the business to H. Wyatt (the testator), and whether £3129 was the amount of surplus due to H. E. Wyatt, the Master, after reviewing the several states of facts laid before him by the appellants and the executors and H. E. Wyatt, and after examining the evidence produced by the appellants, found that the partnership articles of 1825 were prepared from instructions given by the testator to his own solicitor, and were executed without the interference of any other solicitor, but there was no evidence to show that they were executed by H. E. Wyatt and G. Wyatt under coercion of their father. And the Master was of opinion that the three sums of £63,676, £48,915 and £3129 were inserted in the said partnership articles as the result of the partnership accounts up to December 1824, made out under the direction of H. E. Wyatt, and entered in books signed by him and the testator, which books were, with others before mentioned, alleged to be lost, and were not produced to him: and he found that the said sums of £48,915 and £3129 were, on the 1st of [751] January 1825, respectively due from the business to H. Wyatt and H. E. Wyatt, and were by them considered as surplus capital; that these sums did not consist of monies or surplus capital over and above what was then employed in the business; that £13,000, part of said two sums, making together £52,044, was composed of improvements and additions made to the plant and stock subsequently to 1817, and £39,044, residue of said two sums, was composed of property of the first partnership, exclusive of plant etc. except the additions; but in the absence of the said account-books he was unable to state how the sums of £48,915 and £3129 were made up (save as aforesaid) or what was the amount of surplus money due to the testator and H. E. Wyatt on the 1st of January, 1825, save that it appeared that on that day there existed partnership property of the following particulars and value (exclusive of the value of the good will of the plant, etc. and of the money due from private customers for table-beer, and of the value of the malt, hops and corn then on hand), viz.

Cash and bills unpaid at the bankers . . . . .	£3283	17	9
Due for beer supplied to publicans . . . . .	17,461	15	0
Loans to publicans . . . . .	18,994	7	6
Value of beer at the brewery . . . . .	8574	0	0
	<hr/>		
	£48,314	0	3

all which he found to be the property of H. Wyatt and H. E. Wyatt, subject to such debts as were then due from them: and he found that the value of the stock of beer

belonging to the partnership at the testator's death amounted to £7831; that the value of the plant, utensils, etc., amounted to £15,338; that the debts due from publicans (excluding loans) amounted [752] to £25,277; the debts due for table beer, to £1595; the amount of loans, due from publicans, to £16,693; the amount of cash at the bankers, to £2268, besides £1103 in bills of exchange not arrived at maturity, but afterwards paid, making together about £70,000, without taking into account the stock of malt and hops, or the value of the good-will: and he stated his opinion (with his reasons) why the good-will of the business (which he found was worth at the testator's death £10,000) ought not to be taken into consideration: and he found that the partnership was then indebted to their bankers in the sum of £8000, which being deducted from the said £70,000 left a clear surplus partnership property of the value of £62,000 at the time of the testator's death. And as to the inquiry directed respecting the amount of the testator's surplus capital in the said business at his death, the master found that the sum of £57,329 was then due to him from the partnership; that it comprised the £48,915 inserted in the partnership articles as surplus capital, with the addition of £9462 afterwards brought into the concern, and interest and certain rents due to the testator; but the said sum of £57,329 did not consist of monies or surplus capital over and above what was employed in the business; and the property liable to pay said sum was subject to the partnership debts; but in consequence of the non-production of the account books, he was unable to state, save as aforesaid, what was the amount of the testator's surplus capital at the time of his death.

The report was confirmed, and the causes came to be heard thereon and for further directions in January 1836, before Sir C. C. Pepys, then Master of the Rolls, by whose order of that date it was ordered that the inquiries directed by the former decree should be further [753] prosecuted; and that if the master should be unable to take the accounts of the partnership dealings by reason of the non-production of books of account or other circumstances, he was to ascertain and state such circumstances, and to make a separate report thereof, the parties to be at liberty to apply for such other order as should be necessary. And it was referred to the Master to take an account of the personal estate of the testator, not specifically bequeathed, come to the hands of Adams and Marks, and of Hannah Wyatt, the executors, and that what, on taking such account, should appear to have come to the hands of Adams should be answered by him personally, and what should appear to have come to the hands of Mrs. Wyatt, should be answered by Marks, or her executor, out of her assets. (Marks himself had been declared bankrupt.)

In pursuance of this order, the Master made a separate report in June 1837, wherein he set forth the sums and items ascertained by his previous report; and,—after noticing that none of the account-books mentioned therein, nor any further accounts relating to the inquiry, were produced to him, and that the appellants had examined the defendants on interrogatories, but their examination did not afford him any information to assist him in taking the accounts of the dealings and transactions of the partnership, further than is before mentioned,—he found, upon consideration of the former and additional evidence laid before him, that he could not take the said accounts, by reason of the non-production of the account-books. The Master made his general report in May 1838.

By an order made by Lord Langdale, M.R., on the 9th May 1839, upon the hearing of the causes on further directions, and on the Master's said report, and on [754] exceptions taken by Adams and Marks to the separate report, the exceptions were over-ruled, with costs; and it was ordered, among other things, that it be referred back to the Master to inquire by whom the property and effects of the partnership, existing at the death of the testator, were possessed and received, and how and by whom the same had been applied and disposed of, and what had become thereof; and that he should inquire whether the executors, with due diligence, and without their wilful default, might have possessed themselves out of the partnership property and for the testator's estate of a sufficient sum to pay and satisfy the legacies found (by the general report) due to the plaintiffs, or any and what part thereof: And in making the said inquiries he was to have regard to the findings in his several former reports, and he was to be at liberty to state any special circumstances as he should

think fit, at the request of either party: And he was also to inquire whether the testator was entitled to any real estates not devised by the will.

From this order, and from part of the order of January 1836, the executors appealed to the Lord Chancellor, and by the order made on the hearing of that appeal in August 1841, the latter order was affirmed, and the former was varied so far only as by directing the consideration of all further directions and of costs to be reserved until after the Master's general report.

The Master made his report in December 1843, and therein-after referring to the states of facts laid before him, and to the evidence produced in support thereof by the appellants and the executors and H. E. Wyatt, and considering the partnership articles of 1825, and having regard to his three former reports, before stated—[755] he found, among other things before-mentioned, that the hops, which were on the premises at the testator's death and which were not included in his former finding, were of the value of £6243, which being added to the sum of £83,200 (including the good-will), found by the former reports (as now corrected) to have been the value of the property therein mentioned, made the gross sum of £89,443; that all the property, consisting of the various items in the reports mentioned, was from the testator's death left to the undisturbed collection and use of H. E. Wyatt and G. Wyatt in the ordinary course of their trade: And he found that the partnership debts at the testator's death were £39,749, all which were since paid: And he found, on consideration of the several states of facts, and the evidence that was laid before him, that there were sufficient assets of the partnership existing at the death of the testator for the payment of the said legacies, and that the executors, with due diligence, and without their wilful default, might have possessed themselves, out of the partnership property and for the testator's estate, of a sufficient sum to pay and satisfy them, or that they might with due diligence, and without their wilful default, have secured out of such property and for the testator's estate, a sum sufficient for the payment of the said legacies: And he further found that the testator was in possession of three-fourths of the house and premises in Portpool Lane, purchased by him and H. E. Wyatt in 1820, out of their partnership property, and that they were not devised by the will, but descended to H. E. Wyatt as his heir-at-law.

The respondents, Adams and Marks, took twenty exceptions to the report, the first of which applied to the finding with regard to the sufficiency of the assets at [756] the testator's death; and the second and third as to the finding of wilful default of the executors; the fourth exception controverted the findings as to the value of the hops; the twentieth exception applied to the last finding respecting the house and premises in Portpool Lane; and the others controverted the findings as to other parts of the partnership property, stated in the report to amount, at the testator's death, to the gross sum of £89,443 *minus* £39,749 of debts.

The cause came on to be heard on the exceptions and for further directions on the Master's last report, in March and in May 1844, before the Master of the Rolls, and by his Lordship's order, made in April 1845, the first, second, and fourth exceptions were allowed, and all the others were overruled, and his Lordship declared that the legatees of £12,000 and £12,000 were entitled to have all the freehold and copyhold estates of the testator sold for payment thereof, but without prejudice to their claim on the primary fund against any parties who might be answerable for the same (see his Lordship's Judgment, 7 Beav. 396).

The original appeal was brought, first, against so much of the order of May 1839 and August 1841, as directed further inquiries relating to the partnership property and the wilful default of the executors, on the ground that the Court ought to have declared them, without any such inquiry, to have committed wilful default, and to be personally liable to make good the said legacies in case of insufficiency of assets of the testator; and, secondly, against the order of May 1845, so far as it allowed the first, second, and fourth of the executors' exceptions.

The second or cross appeal was brought by the ex-[757]-cutors, against so much of the last-mentioned order as overruled the seventeen exceptions.

The third appeal, brought by William Wyatt, did not materially differ from the first appeal, except in submitting that the inquiries, directed by the order of May 1839, ought to be more extensive, and that from the order of May 1845 ought to be omitted the last declaration, that all the testator's freehold and copyhold estates

ought to be sold, to make good the deficiency of the personal estate for payment of the two legacies.

Mr. Bethell and Mr. J. Parker (Mr. Erskine was with them), for the appellants in the first appeal.—It has been established by the evidence and by the findings of the Master thereon, that the testator's property engaged in the brewery business at the time of his death was amply sufficient for the payment of the two legacies, and that the executors might have easily obtained the means of paying them if they had duly performed the trusts of the will. They, on various occasions, and especially in the arrangement effected with H. E. Wyatt in January 1828, represented the testator's property then engaged in the business to be, and throughout dealt with it as being, much more than sufficient to answer the legacies, which therefore ought to be taken without any further proofs, as against the executors, to have been the case; but the fact has been proved and established in the cause, and all the difficulty which has been experienced was the difficulty of ascertaining the amount and particulars of the property, and that was entirely owing to the neglect of the executors themselves, in omitting to take proper accounts in the first instance. That difficulty, therefore, ought not to be a protection to them. It appeared [758] quite clear that the executors, after taking upon themselves the burthen of the trusts of the will, abandoned and wholly neglected their duties, and took no steps whatever for obtaining the means of payment of the legacies and securing the testator's property. They were not only guilty of neglect, but committed a breach of trust by executing the indentures of January 1828, and concurring in the arrangement thereby effected, and especially by releasing Mr. H. E. Wyatt from all claims in respect of the testator's estate.

The executors were guilty of improper and unnecessary delay in obtaining probate of the will, and during that delay they permitted the property available for the payment of the legacies to remain embarked in the brewery business, whereby it was—as they now in effect admitted—wasted and lost. The known misconduct of Henry E. Wyatt and George Wyatt with respect to the business, and the unfortunate dissensions between them, peculiarly called for the active interference of the executors, and rendered it their duty to apply to a Court of Equity for the appointment of a receiver, if, as they now contend, they were prevented by the proceedings of Henry E. Wyatt from obtaining probate at an earlier period. It was, upon the whole, very evident that at the date of the order of May 1839, it had been sufficiently proved that the executors, with due diligence and but for their wilful default, might have possessed themselves, out of the partnership property and from the testator's estate, of a sufficient sum to answer and pay the legacies. The inquiries, therefore, on that subject directed by that order were unnecessary, and ought not to have been directed, although the result of them has been that the case against the executors has been strengthened. The order of May 1845, [759] allowing the three exceptions, was inconsistent with the former orders, and with the evidence and the findings of the Master thereon. Those exceptions ought to be overruled as well as the seventeen others that had been taken to the report.

Mr. Turner and Mr. Rolt (Mr. W. T. S. Daniel was with them) for Mr. Adams, the solvent executor, as a respondent in the first appeal, supported the order of the Master of the Rolls of May 1839, and the Lord Chancellor's order of 1841, affirming the same, and also so much of the order of April 1845 as allowed three of the exceptions taken by the executors. They submitted that there was no ground for charging the executors with wilful default or want of diligence; that it was evident from the evidence, and from the whole proceedings in the causes, that there never were sufficient assets of the testator to pay the legacies; that the testator was mistaken in his estimate of the value of the brewery property; and that the sums inserted in the articles of 1825 as general capital, and as separate surplus capital belonging to the testator, were imaginary estimates, and not founded on any valuation or accounts taken. At all events, the executors did not possess themselves of any of the assets of the testator; it was not indeed charged that they did, but the charge against them was that with due diligence, and without their wilful default, they might have possessed or secured a sufficient share of the testator's property to answer the legacies. They had no right to interfere at all with the brewery as executors until they obtained probate. The two surviving partners were in rightful possession of the partnership



property. Henry Earley Wyatt disputed his father's will, and entered a *caveat* against the proceeding for probate, which was not [760] obtained until nearly eighteen months after the testator's death—until, in fact, he was purchased out of the brewery concern. That concern would have been ruined if the executors had taken adverse possession. The question, therefore, now for consideration was, whether the executors exercised a sound discretion in not interfering sooner? The general principle was, that an executor or trustee is not justified in interfering in the management of trust property, if such interference would lead to the destruction or danger of the property. This principle was laid down in the clearest terms by Lord Lyndhurst in *Ward v. Ward* (MSS., *vide infra*, p. 777), in 1843, and previously by Lord Cottenham, when Master of the Rolls, in the case of *Buxton v. Buxton* (1 Myl. and Cr. 80). The conduct of these executors fell within the principle of those cases. With respect to the release of H. E. Wyatt by the executors, they conceived that if they refused to join in that, the concern would be destroyed, and they could not acquire any title to act, on account of his opposition to the probate. Sir John Leach, in his judgment in 1832, refused to charge them with any default on that account, and in effect negatived all the imputations cast on them by the appellants; and, in 1835-6, when the causes were before Lord Cottenham at the Rolls, he refused to charge them with a breach of trust.

It should be remembered that Mr. Adams is the sole respondent, Marks having been declared a bankrupt. It was imputed to Adams, as a motive for his non-interference, that he was a maltster, and supplied malt to the concern at high prices. But it was because Adams understood the business that the testator ap-[761]-pointed him executor; and it could not be supposed it was intended that he should no longer supply the malt; *Smith v. Langford* (2 Beav. 362). Mr. and Mrs. Rowley, and Mr. and Mrs. Orchard, the appellants' parents, when they abandoned their bill, filed in 1827, must have considered that the executors were blameless. That may not be conclusive, but it was certainly an acquiescence in their conduct; and, as Lord Cottenham observed in the case of *Viscount Lorton v. The Earl of Kingston* (5 Clark and Fin. 335), it would be contrary to all principle not to consider that as an important fact; particularly where the parties litigant had similar interests with the present litigants, and they abandoned their bill.

With respect to the cross-appeal brought by the executors, the learned counsel submitted that the order of April 1845, so far as it overruled the seventeen out of their twenty exceptions, and refused them any portion of their costs, ought to be reversed; because the findings of the Master as to the value of the several items of property, enumerated in his report, were not warranted by the evidence and states of facts laid before him; and inasmuch the appellants, in seeking to charge them beyond their actual receipts, had failed, they ought to be ordered to pay the costs. Whatever, however, may be the decision of the House upon this appeal, it cannot affect the right of the executors, as respondents in the original repeal.

Mr. Bethell, in reply, denied that Sir J. Leach or Lord Cottenham in their decisions in these causes at the Rolls, acquitted the executors from liability in respect the release in the deed of 1828. Lord Langdale, although he allowed three of their exceptions to the [762] findings, in the Master's report, of neglect and wilful default, would not approve the proposition that they were not guilty of default. They unquestionably neglected their duty as trustees and executors in not making a timely valuation of the property. They not only did not themselves file a bill in proper time, but they interfered to stop the bill which was filed by the legatees in 1827. Had the executors filed a bill before probate, the Court of Chancery would order an account and a receiver to get in the estate pending the litigation for probate; *Atkinson v. Henshaw* (2 Ves. and B. 85). The cases of *Buxton v. Buxton* and *Ward v. Ward* were different from this in their material circumstances, and the judgment of Lord Lyndhurst in the latter had no application to this case. (He read passages from that judgment) (*infra*, p. 777).

Mr. Wray, for William Wyatt, the appellant in the third appeal, said he had a distinct interest from the appellants in the original appeal (*supra*, p. 757). He adopted all the arguments urged in their behalf, and asked their Lordships to remember his interests—

The Lord Chancellor.—His case is identical with that of the appellants in the

original appeal. The rule of the House is that only two counsel are to be heard for appellants substantially having the same interest, unless by a previous arrangement, when some distinction is shewn between the cases of the appellants.

Mr. Wray said he presented himself to the House at the proper time, and hoped that the interests of his client might be well considered.

[763] Lord Langdale (July 27).—In the appeals of *Rowley v. Adams* and *Adams v. Rowley*, my noble and learned friend, the Lord Chancellor, who was present during the argument, and attended very carefully to the subject, has formed his opinion upon it; but being unable, in consequence of indisposition, to attend the House, he has requested me to communicate to your Lordships that opinion, and the reasons for it, which are thus expressed in writing.

His Lordship then read as follows:—"The appellants, the legatees, complain of an order made upon further directions by the present Master of the Rolls, dated the 9th of May 1839, and of an order made by me in the Court of Chancery, affirming that order. They also complain of an order of the Master of the Rolls, dated the 7th of April 1845, allowing three exceptions to the Master's report, and upon further directions; and the appeal of the accounting parties (the executors) complains of the same order for having overruled other exceptions to the report taken by them.

"The complaint against the order of the 9th of May, 1839, cannot, I think, be supported.

"The £12,000 legacies claimed by the appellants, being, by the testator's will, first charged upon what he describes his surplus capital in his business of a brewer, Sir John Leach, Master of the Rolls, by his decree of the 28th of April 1832, directed the Master to inquire whether such surplus capital amounted to £48,915, at which it had been stated in a certain deed executed by the testator and his sons; or what it did amount to. The Master reported that, owing to the non-production of books and accounts, he was unable to state what was the amount of the testator's surplus capital. No exceptions were taken to that report; but the cause was [764] brought on before me at the Rolls, and by an order of the 11th of January 1836, I directed the Master to take an account of the partnership dealings; and if he found that he could not take such account by reason of the non-production of account books, he was to make a separate report of such circumstances, and he was to take an account of the testator's real and personal estate, both of which were liable to the payment of the legacies, the surplus capital being first liable. The Master made a separate report, stating that, by reason of the non-production of the books of account, he could not take the account of the partnership dealings and transactions; and that he had no means whatever of taking any account as between the individual partners.

"The object of the directions in the decree of 1836 was that, if the Master should find that he could not, from the non-production of account books, take an account of the partnership dealings, he should make a separate report—in that case the Court might substitute some inquiries to attain, as far as possible, the same end, it being obvious that, without ascertaining by some means what was the amount of the testator's surplus capital, and what was his interest in the stipulated capital, it would be impossible to carry into effect the directions in his will as to the application of those funds in payment of the £12,000 legacies. The plaintiffs, however, did not follow the course so provided for them, for without bringing this separate report under the consideration of the Court, they called upon the Master to make his general report, which he did; the result of which is not material, except that it found that little, if anything, was coming from the testator's general personal estate.

"The defendants, however, the accounting parties, took exceptions to the Master's separate report, con-[765]-tending that he might, without the books of account, to some extent, have taken an account of the partnership dealings, and that he ought to have examined the testator's sons as to the books. These exceptions were overruled by the present Master of the Rolls, and of that order there never was any complaint.

"It stands, therefore, up to this point, established as between the parties, that the Master could not take any account of the partnership dealings, and, consequently, that he could not ascertain what was the amount of the testator's surplus capital, and what was the amount of his interest in the stipulated capital.

"Under these circumstances, the cause again came on before the present Master of the Rolls, and by his order of the 9th of May 1839, he referred it to the Master to in-

quire by whom the property and effects of the partnership, existing at the testator's death, was possessed, and how it had been applied and disposed of, and what had become thereof; and he was to inquire whether the executors might not with due diligence, and but for their wilful default, have possessed themselves, out of the partnership property, for the testator's estate, of a sufficient sum to pay the legacies of £12,000, or any and what part thereof.

"This was a very favourable reference for the plaintiffs, the legatees, as it gave them the opportunity of bringing before the Master any proof of the existence of the property primarily liable to the payment of these legacies—and if they should fail in tracing it, it gave them the opportunity of making any case from which the personal liability of the executors might be shown to arise. The plaintiffs, the legatees, therefore, raised no objection to this reference, but the executors did, and, by an appeal to me in the Court of Chancery, complained that no case had been [766] shown to found such an inquiry. I thought, however, the inquiry proper, saying—'It may yet appear that the executors could not have realised the testator's property left to them invested in the brewery, but I think there is an ample case proved to justify the inquiry.'

"The plaintiffs, the legatees, well satisfied with the inquiry directed by the order of the 9th of May, 1839, and having succeeded in resisting the attempt of the executors to be relieved from it, prosecuted the inquiry in the Master's Office, so as to produce a report dated the 16th of December 1843, favourable to their case, finding that the executors, but for their wilful default, might have possessed themselves of property of the testator sufficient to pay the legacies. But the Master of the Rolls, having upon exceptions to this report, thought that the circumstances did not justify this finding, the plaintiffs now, by the appeal to this House, complain of the reference directing the inquiry, and insist that instead of directing the inquiry, the Master of the Rolls ought, from the facts before him at the time, to have adjudicated and fixed the executors with a personal liability to the legatees for the amount of their legacies.

"If it were right at the present time to consider this question as the facts appeared before the Master of the Rolls in May 1839, I should not hesitate to hold that the case was clearly one for further inquiry, but not for adjudication; but I am of opinion that we ought not to look at the case as it appeared in 1839. The circumstances as they appeared to the Master of the Rolls at the time of his order in that year, did not appear to him to be such as would justify a decree against the executors. But he thought, and upon appeal I also thought, that they required further investigation; and the [767] decree accordingly gave to the plaintiffs ample opportunity of establishing any case they might be able against the executors. To this the plaintiffs did not object, but brought before the Master, and ultimately before the Court, all the information that can now be obtained. But by this part of their appeal they say, 'Reject all this further information, and decide the case as it appeared in 1839, before that information was obtained.' If the decree directing the inquiries was to be reversed, the House could not judicially know what had been the result of such inquiries. It might therefore be adjudicating upon rights upon an apparent state of circumstances, when the real circumstances as disclosed might show that what appeared was directly contrary to the real facts. If inquiries are directed when there is sufficient before the Court to found a decree, the parties are no doubt prejudiced, and will have redress upon appeal. But they should be prompt in applying for it; the prejudice can only be expense and delay; and after those have been incurred, and further information obtained, a Court of Appeal will not readily listen to objections to the decree directing the inquiries. Such an appeal must add to the expense and delay; and if successful, would only lead to the rejection of the further information obtained—a result of no benefit, if the further information be immaterial, and unjust, if it be important. I am therefore clearly of opinion that there is no ground for the appeal against the decree of the 9th of May 1839, and the order affirming it.

"The more important question is whether, under all the circumstances of this case, the appellants, the legatees, are entitled to the payment of their legacies against the representatives personally. The Master, [768] by his report of the 16th of December 1843, finds that they are so entitled; but the Master of the Rolls, upon exceptions to that finding, has held that they are not; and that is the question upon the appeal of the legatees against the order of the Master of the Rolls of the 9th of May 1845.

"The testator by his will gave all the surplus pecuniary capital, which at his decease he should have in his business, over and above his rightful and stipulated proportion therein, with certain other property, to his wife and to Samuel Adams and Edward Marks, upon trust to invest such surplus capital, upon trust for his wife for her life, and after her decease to raise £12,000 for the benefit of each of his two daughters and their children, and the residue for his sons George and William. And he gave all his share and interest in the brewhouse, plant, and all things used in carrying on the business, and in his stipulated capital for carrying on the same, but charged with such of his debts as his residuary estate should not extend to pay, to his legatees as to one-half (that is, one-fourth of the whole) for William Wyatt, and the remaining one-half (or one-fourth of the whole) for George and William equally. And he directed his executrix and executors to concur in carrying on and managing his said business, in conjunction with his sons of full age on behalf of William until he attained the age of twenty-one.

"The testator died in July 1826, but, owing to a contest in the Ecclesiastical Court, probate was not obtained until December 1827, and William Wyatt attained twenty-one in May 1829. But at that time the business must be assumed to have been insolvent, it having been found by the valuation in the first cause of *Rowley v. Adams*, that on the 6th of November, [769] 1829, the property, debts and effects were over £57,000, and the debts and liabilities of the business over £64,000, leaving a deficit of £7000. Now as, in order to charge the executors with these legacies of £12,000, it would be necessary to prove that at the time of the testator's death there were funds of his in the business sufficient to pay the legacies, and that the executors had the means of realizing such funds, but from wilful neglect and default omitted to do so; the inquiry must be confined to the period from the testator's death in 1826 to November 1829, during the whole of which time,—or rather up to May 1829, when William attained his age,—the executors were by the will directed to carry on the business.

"The Master's report of April the 29th 1835, finds, that it was impossible to ascertain what was the amount of the testator's surplus capital; and the report of the 12th of June 1837, finds that it was impossible to take any account of the partnership dealings and transactions, without which it is obvious that no possibility could exist of ascertaining the surplus capital. Now, as the only fund applicable to the payment of these legacies would be the testator's capital, whether surplus or stipulated, in the brewery, these findings, confirmed and acted upon by the Court, go far to displace the first proposition of the plaintiffs, that at the testator's death, there were funds sufficient to pay those legacies.

"There have been several reports, attempting to trace the fund applicable to the payment of these legacies, and each report states results differing widely from the others, as the Master of the Rolls has very correctly observed (7 Beavan, 395; see pp. 418-419), showing how impossible it is, with the existing materials, to ascertain the facts. In attempting to [770] ascertain what funds there were at the testator's death applicable to the payment of these legacies, too much reliance has been placed upon the recitals in the partnership deed of 1825, which states the plant, etc., as valued at £63,676, and the surplus capital of the testator at £48,915. After the testator's death, the plant was valued at £15,000, and the surplus capital, though it may have been correctly stated as between the parties to the deed of 1825, ought not to be considered in establishing a personal charge against the executors who were no parties to it. A statement by a testator, as to the value of his property, cannot form any ground for charging his executors with such value. But assuming the sums to be correct, the only meaning of which the term "surplus capital" is capable, is money, advanced for the purposes of the business beyond what the parties are bound to advance. But such surplus capital can only be realized out of the effects of the partnership, or by the other partners, if such effects are insufficient. It can only represent a debt, and that not payable, until all the partnership debts were paid, and then so much only as should be found due from the other partners upon taking the accounts between them, which it has been ascertained that there was no possibility of taking.

"It appears, therefore, that the recitals in the deed of 1825, cannot be relied upon for the purposes of the present inquiry. The evidence, indeed, shows that those sums were not made up exactly according to facts, and that the mode of making out the accounts could not lead to any safe conclusion as to the value of the property. When any

new purchase was made for the purposes of the business, the money so laid out was added to the amount of capital employed; but the value of the property employed was not thereby in-[771]-creased, the purchase being only in substitution for what had been exhausted or worn out, of which no notice was taken. If profits were to be divided without reference to the ordinary expenditure, it is obvious that it would be a payment of profits out of the capital; and the result would be that, in time, the apparent capital would greatly increase, whilst the real capital or property of the firm remained the same. This is the view I took of the case in my judgment at the Rolls, on the 11th of January 1836, and, upon re-consideration, I think this view was correct.

"Under the decree of the Master of the Rolls of the 9th of May, 1839, the Master had gone into an elaborate investigation of the necessary accounts to answer the inquiries thereby directed, so far as materials were found to exist for that purpose; and partly from such accounts as have been procured, and partly from the evidence of witnesses, has come to the conclusion that there was, at the time of the testator's death, property of his in the business sufficient to have paid the legacies. The Master of the Rolls has in his judgment of the 9th of May 1845, investigated the grounds of this conclusion, and the evidence upon which the statement of figures rests, and has particularly observed upon the variances between this finding of the Master, and the findings in his former reports, and has come to the conclusion that in a question of charging the executors personally, there is not such proof of assets as the Court would require; and in this opinion I fully concur. (See 7 Beavan, pp. 419-20.)

"That, however, is not the only or the most material point upon which the decree in this case must depend; for assuming it to have been proved that at the time of the testator's death he had the required amount of property coming to him from the business, and that there [772] were assets of his in the business sufficient to have realized such amount, it is to be considered what was the duty of the executors under the directions of the testator's will. If it was their duty to take immediate steps to realize and secure the testator's property in the business, it could only be done by stopping the business and selling the property belonging to it; but of what it would have realized under those circumstances no calculation can be made; it is only certain that the produce would fall very short of any calculation made as to the value of the property to parties, who were to use it in the business. This, however, would have been a direct breach of the duty imposed upon the executors by the will, for they were directed to concur with the testator's sons in carrying on the business until William should attain twenty-one, and he was under that age at the testator's death. The legacies were indeed primarily payable out of the surplus capital; but if, as the fact is, such surplus capital was merged in the property employed in the business, and could only be realized by converting such property into money, it was obviously impossible for the executors to raise the £12,000 legacies, assuming that there were assets for that purpose, and to carry on the business.

I cannot, therefore, for the purpose of charging the executors personally, assume that they were wrong in permitting the sons to continue the business, which the testator not only directed them to assist in carrying on, but made his share in it the subject of specific gift, in different proportions, to his sons. If it was not the duty of the executors to endeavour to realize the testator's interest in the business at the time of his death, on account of the directions to carry it on till William [773] attained twenty-one, such duty did not arise until the 21st of May, 1829, when he attained that age; and of the value of the property at that time there is no evidence, except that in November following it was less by above £7000 than the debts and liabilities to which it was subject, and that shortly afterwards the partners became bankrupts.

"But, assuming that it was not the duty of the executors to stop the business, for the purpose of realizing the legacies, till William attained twenty-one, and that there was not at that time property for that purpose, still the executors might have so conducted themselves in the management of the business in the interval, and have so been parties to the loss of the property as to have subjected themselves to personal liability to the legatees. But what is the history of that period? Upon the testator's death in July 1826, Henry Earley Wyatt, the son, disputed his will, and the executors did not obtain probate until December 1827; and it is found that the sons, the surviving partners, receive what was recovered of the debts due to the business,

and conducted and managed it themselves; and of these transactions no evidence appears to exist. But the executors do not appear to have received the share of the testator; and the question is not now what they did receive, but as to charging them with the amount of what they might have received.

"The strongest piece of evidence against the executors upon the subject of value is the deed of the 1st of January 1828, by which Henry Earley Wyatt sold and assigned to George his one-fourth share of the business, in consideration of £20,000. To this deed the executors were parties, but the transaction was entirely between H. E. Wyatt and G. Wyatt. The [774] executors, indeed, by a deed of the same date, released H. E. Wyatt from all responsibility to the testator's estate, which was certainly a very unintelligible transaction, but no question arises upon it in this appeal. The case is not that H. E. Wyatt was responsible to the estate, and that such responsibility has been lost by this release. How G. Wyatt was induced to give, or agreed to give, £20,000 for one-fourth of a property and business, which in November 1829 was upon the sale to Thomson of the testator's half, at a valuation, found to be subject to liabilities beyond its value, cannot be explained. But it seems clear that whatever property the testator had in the business at the time of his death was lost in carrying it on, or by the misconduct of his sons, between that time and May 1829, when William attained twenty-one, during which period the testator had directed his executors to carry on the business; and there is no proof that such loss arose from any misconduct of the executors.

"I am, therefore, of opinion that the charge against them cannot be supported upon that ground. The two propositions found by the Master, and combated by the first and second exceptions, are, I think, not capable of being supported; and I therefore think that those exceptions were properly allowed by the Master of the Rolls.

"If your Lordships shall concur with me in thinking the Master of the Rolls right in allowing the first and second exceptions, the question as to the personal liability of the executors will be disposed of in the negative; and, in that case, the points raised upon the other exceptions become immaterial. But if it were material to enter into the details raised by those exceptions, I think, for the reasons stated by the Master of [775] the Rolls, that he disposed of them in the proper manner. Having come to the conclusion that the legatees must seek their remedy against the other property charged, and not against the executors personally, I think that the Master of the Rolls' decree contains all proper directions for that purpose. It properly leaves open all such remedies as any of the parties may be in a situation to enforce, and gives to the legatees the only relief which, under the unfortunate circumstances of this case, remains open for them.

"I greatly regret to add to the loss and expense these legatees have already sustained in this litigation, but being of opinion that the decree and order of the Master of the Rolls were altogether correct, I must advise your Lordships to affirm them, with costs, to be paid by the appellants; and I think a similar order should be made in the cross appeal."

\* Lord Brougham.—Does your Lordship retain the same opinion as when you gave judgment below in this case?

Lord Langdale.—Yes, I am of the same opinion.

Lord Brougham.—My Lords, my noble and learned friend from whose orders these appeals are brought, and who has just read the Lord Chancellor's opinion and judgment, has stated that he retains the same opinion which he held originally. In this case I did not attend so regularly as I generally do in the cases before your Lordships, but, from particular circumstances I was requested to look into the case; indeed, my noble and learned friend, who is not now present, requested that I should look into it. I consider it to be a case by no means unencumbered with difficulty; on the contrary, it is a case of very considerable complication, and has been so dealt with and so considered [776] throughout the whole of this long litigation. But, my Lords, upon the whole I see no reason to join in any proposition for reversing the judgment of the Court below and the orders of the Master of the Rolls, affirmed in some respects by the order upon the re-hearing before the Lord Chancellor; and I have the less necessity to enter at any length into the case after the very elaborate statement of opinion, with reasons entering into every part of the case, both in point of fact and in point of law, which has been read by my noble and learned friend,

from the Lord Chancellor. I had some doubts originally about the liability of the executors; but I have now come to the opinion that the Court below was right, and, therefore, I shall move your Lordships that the orders appealed from be affirmed with costs.

Lord Campbell.—My Lords, the difficulty in this case is to get at the facts. When they are ascertained I think the case will be found to be without difficulty. The facts have been stated in the most luminous manner in the elaborate judgment of the Lord Chancellor, which my noble and learned friend has read, and after that there is not the smallest difficulty in concurring in the motion which has been made to affirm the decree and order.

Mr. Turner.—Will your Lordships pardon me for mentioning that there was a third appeal, which was considered as standing on the same footing as the appeal of the legatees. I understand the Lord Chancellor's judgment, which the noble and learned Lord has been kind enough to read, to dispose at the same time of that third appeal.

Lord Brougham.—We understand so; Lord Cottenham certainly understood so, and it must be so considered.

[777] Lord Langdale.—There was no separate argument upon it: it was considered at the time to depend upon that which is now specifically disposed of.

Lord Brougham.—There is no doubt about it; we will have that taken care of in the judgment.

The Orders complained of in the first appeal, of May 1839, August 1841, and April 1845, were then affirmed, with costs.

The cross appeal of the executors against the order of 1845, and William Wyatt's appeal, was also dismissed, with costs.

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WARD v. WARD [April 26, 1843].

[Mews' Dig. vi. 1351.]

The following is a note of the judgment in *Ward v. Ward* and *Ward v. Alsager*, referred to ante, pp. 760, 762. It is taken from a copy of a short-hand writer's notes with which Mr. Gregson, solicitor in the causes, has favoured the reporters. The facts are fully stated in the judgment.

The Lord Chancellor (Lord Lyndhurst).—This is a distressing case: I have never adverted to it without feelings of pain and anxiety.

The outline of the case, so far as it is necessary for the purpose of raising and understanding the particular objections and questions that have been argued at the bar, may be stated in a few words:

George Ward, a merchant in London, formed, in the year 1810, a partnership with George Henry Ward and William Ward, his sons, and with a Mr. Thompson, who had been formerly his clerk. The partnership was formed for a period of seven years and a half, commencing in July 1810: it was dissolved at the expiration of seven years, namely, in July 1817; and in the month of November in that year, George Ward executed a deed, by which he conveyed his share of the profits to [778] trustees, in trust, among other things, for the children of William Ward. The profits at that time were not ascertained; nor in fact until five years afterwards—I think in the year 1823. The account was then made up by one of the partners, Mr. Thompson, who was an experienced accountant, and had been long engaged in business; and it stated the profits of the concern at about £90,000, exclusive of bad and doubtful debts, and exclusive also of a sum of about £10,900 London Dock Stock. After this account was made up, it was submitted to the partners, it was acquiesced in, and the sum was divided into four parts, about £23,000 to each. This was exclusive of the London Dock Stock, which amounted to between £2000 and £3000, for each partner: it was carried to their separate accounts, and the money was paid over in shares to the different parties, with the exception, however, of the share of George Ward—which, as I have already said, had been invested in trustees for the benefit, among other persons, of the children of William Ward. Mr. George

Ward lived for several years afterwards; he died in 1829. During the whole of that interval his share of the profits remained in the hands of William Ward and Henry Baines Ward, and afterwards of William Ward, who succeeded to the business of the partnership. Nothing was done with respect to the trust funds, with an exception to which I shall hereafter advert. Upon George Ward's death the funds still continued in the partnership, and they remained there until 1836, with the exception of a sum of between £4000 and £5000, which was drawn out and realized; and in that year William Ward became a bankrupt, and a very considerable loss ensued to the trust fund.

Two bills in Chancery were filed; the first, by George Henry Ward, for the purpose of being freed from the trust, and of obtaining a declaration that he was not liable for the deficiency created in the manner I have stated. A cross-bill was filed on behalf of the children of William Ward, for whose benefit ultimately these profits had been conveyed, imputing neglect and misconduct to the trustee, calling on him to account and make up the deficiency. This is the outline of the case, and what I have stated is sufficient for the purpose [779] of raising the particular questions to which I shall now in succession advert.

The first question regards the profits. I have stated that the profits of the partnership were ascertained in 1823, when the account was made up to the end of the partnership. Those profits were stated at the sum which I have mentioned. After they had been ascertained by Mr. Thompson, the scheme of the profits and the statement of the accounts were submitted to the consideration of all the partners. They acquiesced in the arrangement; the profits were divided according to that scheme; the fourth share was carried over in the partnership books to the account of each partner; and the account, as I have already stated, of George Ward's profits was carried to an account, entitled "the trust account of George Henry Ward and John Ayton." Sometime afterwards some of the outstanding debts were collected, those which had been considered as doubtful debts. They were divided among the several partners. Some liabilities were ascertained, and they were charged on the several partners in equal proportions. Everything was considered as settled with respect to the partnership, and there can be no doubt that, as between the partners themselves that settlement would be a binding and final settlement. But then a question of this kind has been agitated:—It has been stated, and was argued that George Ward had employed the partnership funds for his own particular purposes; that he had laid out those partnership funds in government loans and contracts, and other speculations; and that very large profits had arisen from that employment of the partnership funds and assets; that that therefore was to be considered as a partnership concern, and that the partners were entitled to share in the profits.

First of all, I shall advert to the terms of the partnership deed. It was provided that none of the partners should engage in any business except that which was the subject of the partnership, with the single exception of George Ward; he was expressly excepted from that stipulation; he was allowed to do what he had been accustomed to do, namely, to engage in Government loans and contracts, and any other speculation he might deem profitable. He had a separate account in [780] the partnership books, unconnected with the partnership; that account was managed by Mr. Thompson, the partner who had been formerly his clerk. The profits of this concern were carried to that account, and were not mixed up with the partnership funds or the partnership transactions; it was kept entirely as a separate account. All this was known to all the partners; no complaint was made except in one particular instance. It was never supposed by the partners that this was a partnership account. So it continued during the whole duration of the partnership; five years afterwards elapsed before the account was settled. No claim was made, nor was it considered, during that period, that it formed a part of the partnership concern. It is true that, at one time, William Ward wrote a letter to George Ward, making some general complaints as to the application of the funds of the partnership. To that letter George Ward returned an answer, in which William acquiesced. No other complaint was ever made. On the settlement of the accounts, which took place in 1823, nothing of this private account of George Ward was introduced into that settlement. The scheme of settlement was submitted to the partners—was acquiesced in by them; no claim was made during the lifetime of George Ward, or any complaint made in respect of



this account as between these parties; therefore this settlement must be considered as absolutely final.

But then it is said, and said justly, that, previously to this settlement of the profits, there had been an assignment of the profits to trustees for the benefit of those infants; that they were not parties to that settlement, and they cannot be considered as absolutely bound by it; they have a right (it is said) to an inquiry, and if I thought there was any doubt whatever with respect to this part of the case, I should say they were entitled; but I am satisfied that no doubt whatever exists with respect to it. The settlement was formed on a right principle; the infants were not directly represented in that settlement of the account, but parties who had precisely the same interest, namely, the other partners in the concern, were there. They knew the transaction; they were familiar with every part of it; it was their interest to increase their [781] share of the partnership profits; they never insisted that they were entitled to share in this particular fund; and I am therefore perfectly satisfied that the settlement was made on a right basis, and that there is no ground whatever for opening that account; and therefore, though the infants were not represented at the time, I think there is not the slightest chance, if I was to direct any inquiry, that the account would be varied; and after a lapse of twenty years since the settlement of this account, I think I should not exercise a sound discretion if I were to direct the Master to make any inquiries with respect to it. And it is always to be recollected that George Ward had a control over this fund; he might at any moment have appropriated it in any way he thought proper. He considered the sum that was the subject of the trust was the ascertained amount of the funds of the partnership; he acted on that during his life, as will presently appear, when I come to advert to other parts of the case. Up to the period of his death, he considered this as the subject of the trust, and that would be an additional reason to induce me to say no account ought to be directed, because the person creating the trust, and having during the whole of his life an absolute control over it up to the period of his death, considered that was the subject of the trust. Under these circumstances, I think I should do extremely wrong if I were to direct an inquiry to be made with respect to what were the profits of that concern.

The next question is a question with respect to the interest. The settlement was of this nature: the profits were settled to the use, as far as relates to the interest, of George Ward for his life, after his death to the use of William Ward for his life; and afterwards for the benefit of the children. This fund remained in the hands of William Ward and Henry Baines Ward, and afterwards in the hands of William Ward alone; interest accrued on it, and the question is, to whom that interest belongs; whether it belongs to the personal representative of George Ward, or forms part of the trust fund. *Prima facie*, it would belong to the personal representative of George Ward; but in this case we have to consider what was done with this fund, and what were the proceedings with [782] regard to it. It was entered as a trust fund in the partnership books; every year the interest was added to the principal, and annual rests were made, and interest calculated on the aggregate amount. The interest therefore was entered in the books with the knowledge—and, as it appears, by the direction of George Ward—under the head of the trust fund, and made up in the way I have stated, forming a part of the trust fund. If I were to look at that account alone therefore, I should come to the conclusion that it was the intention of George Ward that the interest should be added to the principal, and that the whole should form a part of the trust fund. This was done during the life of George Ward for a period of twelve years without any exception, he himself giving directions as to the amount of the interest, which at first was 4 per cent. and afterwards was increased to 5 per cent. But the case does not rest here, because there is a distinct recognition on the part of George Ward that the aggregate fund was the trust fund. I allude to the letter of the 8th of March 1828, written by George Ward to William Ward with reference to the complaints to which I have before adverted. He there states that the principal and interest amount to £29,000; and if you look at the accounts you will find they did amount to that sum at that time; but those £29,000, the principal and the interest by name, he says, form part of the trust fund, and are to go to his children. He says, "I have the power of revocation, but I never intend to exercise it." He therefore recognised this sum as a part of the trust fund. Taking

the whole of this case therefore together, the manner in which the account was made up, the title of the account, the successive additions of interest to the principal, and going on for a period of twelve years during the life-time of George Ward, and ultimately the aggregate sum being recognised as a part of the trust fund by the letter to which I have adverted, satisfy me that although, *prima facie*, this interest would go to the personal representative of George Ward, he intended it to form a part of the trust fund, and that in fact it does form a part of that fund. I am of opinion therefore that this is to be considered the sum—whatever it is,—is to be considered as the aggregate fund belonging to this trust.

[783] The next question relates to the London Dock Stock; there was about £3200, which was the share of George Ward's profits of the London Dock Stock. Now, besides the trust deed of 1817, there was another trust deed, which was a continuation or substitution of former trust deeds, by which George Ward disposed of a very large property among his children. In the year 1828 the last of those deeds was executed, and then the fund was made up, and among the other items constituting it was a sum of £40,000 London Dock Stock, and as a part of that £40,000 the £2300 London Dock Stock standing in the name of George Ward, and which formed a part of the partnership profits. The share of the partnership profits that had been allotted to George Ward, that £2300 London Dock Stock, was transferred to the trustees under the deed of 1828. Now, it is certain, with respect to the identity of that sum, and that he intended to convey that London Dock Stock to the new trustees, for other uses and for other purposes. He having the power of revoking any part of the former trust, that would constitute, *pro tanto*, a revocation of the trust, and would transfer to the new trustees, for the benefit of these children, that stock, which formed originally a part of his share of the profits. It is said that this was a mistake; that he was not aware that the London Dock Stock, which he so transferred, formed a part of the partnership profits, or that he had forgotten it: but there is no evidence whatever to show that it was a mistake; there is nothing in any part of the proceedings to lead me to that conclusion. He was a man of business; very well acquainted with his own concerns apparently; very acute; understanding all transactions of this kind; and I cannot assume, therefore, that this was done under a mistake; and in the letter to which I have before adverted, written in March in the same year, he seems to have contemplated the transfer of the London Dock Stock from the original trust to the new trust, because he states at that time what the trust fund consisted of, and he confines the trust fund merely to the principal and the interest of the money. It seems, therefore, that he contemplated at that time the transfer which took place a few months afterwards in the same year. I think, therefore, I [784] am bound to say that the London Dock Stock, under these circumstances, was taken from the profits under the execution of the power of revocation, for it was done by a deed regularly executed, in execution of that power of revocation which he reserved to himself when he originally created that trust. There may be possibly some doubt as to the identity of that fund, whether it was really the same that was formerly assigned as George Ward's share of the profits. As far as I can collect from the proceedings, I am satisfied with respect to the identity; but if the parties consider that it is doubtful, and that it ought to be made a matter of inquiry, so far the inquiry may extend.

I have disposed, therefore, of the question as to the profits, and of the question as to the interest, and of the question as to this appropriation of the London Dock Stock.

\* The remaining question is the question of liability, which, after all, is the main and principal question in this cause. The question, as I apprehend, is this: did George Henry Ward exercise a sound discretion in the management of this trust? Was he able reasonably to do more than he effected? If he was not, he is entitled to be indemnified.

The charges against him are, first, that this trust was created in the year 1817; that he did nothing in the trust during the lifetime of George Ward, a period of nearly twelve years, and that he did not commence acting in the trust for the pur-

\* The judgment, from this paragraph to the end, was read in the argument for the appellants in *Rowley v. Adams*.

pose of endeavouring to get in the trust money and to realize it until after the death of George Ward, and that even then he neglected his duty in the manner in which he attempted to carry that into effect. Now, there is not any evidence, as it appears to me, leading to the conclusion that he knew anything as to the particulars of this trust during the lifetime of George Ward. He swears positively, in his answer that he did not know of it; he knew there was a trust of some kind, but what was the nature of it,—to what it extended—when it was to commence,—when he was to act under that trust,—of all those particulars he was entirely ignorant; and he says it was not until after the death of George Ward, when he [785] found the trust deed tied up with the will, that he was aware of the nature of the trust, and that he had never accepted the trust, and there is no evidence to the contrary.

I am of opinion, therefore, that it is perfectly clear on the case as it stands before me on the evidence, and upon the papers in their present shape, that there is nothing whatever to charge George Henry Ward with any neglect of duty previously to the death of his father.

The question then is, what took place after the death of his father; and the first charge against him is of this nature, that he was very active in realizing that part of the property in which he himself was personally interested; he had a considerable interest in the residue, and was desirous therefore of getting in the assets. Now I think, when you look at the case, there is no just foundation for that charge. I think he did what every reasonable man would have done under such circumstances. There was a balance of about £19,000 due on the cash account, or the account current of William Ward, or the firm of William Ward, to George Ward, at the time of his death. What was the nature of that account? It was an account that was kept by George Ward for the purpose of drawing for his immediate personal necessities; a species of ready money account. He kept no banker; the house of Ward and Company were his only bankers. It was the only available fund therefore for the purpose of supplying immediate wants; and what was done after the death of George Ward? That fund, which consisted of £19,000, was reduced by £3500 in payment of drafts, which had been drawn previously to his death, and which William paid without any consultation with the executors. The fund, therefore, was reduced at once to the sum of £15,500; the only sum that was drawn out at that time was a sum of between £2000 and £3000. It was the only fund that the executors could apply to, in the first instance, for the purpose of paying those charges which it was their duty immediately to defray. There were the funeral expenses, tradesmen's bills, and legacies to the daughters of £200 each, which they were required to pay immediately, and he drew out for those purposes, and applied to those purposes a sum of between £2000 and £3000. The fund was then reduced to £8000, and subsequently, by a [786] claim made against it, it was reduced to £3600, and ultimately these £3600 were drawn out by instalments in two or three distinct payments. I think all this was the natural course of proceeding; the course that every man would pursue; the ordinary course of business. There was no particular impatience or particular anxiety to realize this fund or get possession of it. I think George Henry Ward, in this part of the transaction, acted with perfect accuracy and fairness.

Now, the next question is, was there improper neglect? Was there neglect in realizing the trust fund? It is to be remembered that George Ward, the creator of the fund, the creator of the trust, allowed it to remain in the hands of William Ward and Henry Baines Ward, forming a part of their capital for a period of twelve years, during the whole of his life. It was his intention at that time certainly that it should continue a part of the capital; he considered it necessary for the welfare of that concern, and that is shown by the letter I have before referred to—the letter of March 1828, which he wrote to William Ward, in which he stated that he hoped that the trustees would be forbearing in the exercise of their duty; but at the same time reminded him that it would be a debt on his death, that it must be realized,—placed in a situation and state of security. Under these circumstances George Henry Ward acted. A correspondence began very soon (and a very painful correspondence it was) between him and his brother. I have read the evidence of Mr. Justice Patteson, the evidence of Mr. Burfoot, and the evidence of Mr. Saunders; and they all satisfy me of one thing, that it would have been impossible to have drawn

out and realized the whole of this fund without creating the immediate bankruptcy of William Ward. It clearly, therefore, was not his duty to do that, because by doing that he would have ruined William Ward, who was one of the objects of the trust, and would have ruined and done great injury to William Ward's children, who were also objects of the trust. No man can say he did not exercise a sound discretion in not attempting to draw out the whole of the fund, when drawing it out, or attempting to draw it out, would have been attended with consequences such as I have stated.

[787] The question therefore resolves itself into this: Could more have been obtained than he did obtain? He persuaded William Ward to agree to pay the money by instalments of £3000 every year. He tried to accomplish that; an agreement was entered into; William Ward could not make good the payment. In consequence of this, at the earnest instance, I think, of Mr. Justice Patteson, a new arrangement was come to, and he agreed to pay the interest of the fund, which was to accumulate for the purpose of realizing the whole amount for the benefit of the children. He made one or two payments; he could not continue those payments; it became necessary for George Henry Ward to bring an action on the covenant. He obtained a verdict, and judgment, and shortly after that judgment was obtained, what was the result? Within a few months a fiat in bankruptcy was issued against him. I think, therefore, when I consider all these circumstances, and advert to the correspondence—the correspondence and to all the circumstances of the transaction—I think that George Henry Ward did all that he reasonably could do: that he could not have obtained more.

But still, this being a case in which infants are concerned, it is the duty of the Court to watch with special care over the interest of infants. A bill has been filed and a cross-bill, and therefore the facilities of investigation in this Court by this double mode of proceeding have been greatly increased; but still I must say, after all the attention I have paid to this subject, the mode of investigation is imperfect, it is unsatisfactory; and I think I must, however reluctantly, direct an inquiry as to this part of the case; I think I should not do my duty to the infants, notwithstanding the feeling I have adverted to, if I did not direct an inquiry.

Therefore the substance of what I wish to state is this, that with respect to the London Dock Stock, if the identity of the fund is disputed, and nothing further, that may be made the subject of inquiry. I do not think there is any reasonable doubt about it myself, but I am not thoroughly convinced; and with respect to this last part of the case, there must be an inquiry whether the money has been lost from the wilful neglect and default of the trustee, or an inquiry to that effect; the precise terms at this moment I do not decide.

[788] It is considered that the question with respect to the interest is settled; that the question with respect to the amount of the profits is settled; and that the question with respect to the London Dock Stock is settled, with the simple exception which I have stated.

I do not direct the inquiry unless the parties wish it; it will be attended with great expense. It is for them to say whether they will take it. My impression is strong as to what will be the result of the inquiry, and I have stated it.

Mr. Bethell, of counsel for the infants, said he felt it to be his duty to them to take the inquiry. He had no discretion.

The Solicitor General and Mr. Turner for defendants, said it was in the discretion of his Lordship whether he would direct further inquiry or not.

The Lord Chancellor.—I have looked at the different points, and have said that although my conclusions are so and so, more light may be thrown on the question in a variety of ways. It is almost universally the rule, especially where infants are concerned, to direct further inquiry.

Mr. Turner said, he believed that the assignees, for whom he appeared, ought still to be kept before the Court. The decree of his Lordship ought to contain distinct declarations of the three points which his Lordship had now decided, and the inquiry to be directed should be limited to the question of "wilful default" after the testator's death.

The Lord Chancellor.—Certainly.

[789] WILLIAM SMYTH,—*Plaintiff in Error*; HENRY FARRAN DARLEY,—*Defendant in Error* [July, 16, 17, 19, 27, 1849].

[Mews' Dig. iv. 632. Cited, on point as to notice to corporator, in *Merchants of the Staple v. Bank of England*, 1887, 21 Q.B.D., 165.]

*Corporation "Magistrate"—Election—Summons.*

Where certain acts of a Corporation are to be performed at a special meeting of the members of that Corporation, all the persons entitled to be present thereat must be summoned, if they are within a reasonable summoning distance.

The omission to summon any one so entitled, renders the acts done at such meeting, in his absence, invalid.

A finding in a special verdict that a person entitled to be present at a special meeting of a corporate body was not summoned, and that he was at the time within summoning distance, throws on the party supporting the validity of the acts done at such meeting the *onus* of shewing a sufficient cause for his not being summoned.

The election of treasurer for the county of the city of Dublin was vested by the 49 Geo. III., c. xx. in the "board of magistrates of the county of the said city," and was directed to take place at the Sessions Court of the city, by vote of the magistrates there present.

Held, that the Recorder of Dublin was a member of that board, and ought to have been summoned to a meeting of the magistrates summoned for that election, and that the omission to summon him rendered the election which took place in his absence invalid.

In this case an action of assumpsit had been brought in the Court of Queen's Bench in Dublin, by Smyth against Darley, to recover the money received by the latter while he held the office of treasurer of the county of the city of Dublin. Smyth alleged that Darley never was lawfully elected to the office; but that he, Smyth, was on the 21st of February, 1839, thereunto lawfully elected under the 49 Geo. III., c. xx.,\* and that [790] Darley's possession of the office was a usurpation. Most of the facts out of which the contention between these parties arose were set forth in the report of the case of *Darley v. The Queen* (12 Cl. and Fin. 520). For the purpose of the discussion on the present writ of error it is not necessary to repeat them; but the following facts, found in the special verdict settled in this case, are material. On the 31st of January 1831, Darley obtained a rule for a *mandamus* to the lord mayor to summon a meeting of the magistrates in order to declare him (Darley) to have been duly elected on a previous day to the office of treasurer. That rule was not made absolute till the 12th June, 1839. In the mean time, namely, on the 21st February, 1839, the Lord Mayor, acting, as it was said, on the advice of counsel, treated the previous election as altogether void, and convened a meeting of the city magistrates to proceed to an election of treasurer, under the provisions of the 49 Geo. III., c. xx., as if the office was actually vacant.

Before the year 1838, the Police Justices of the Dublin district had voted at the election of treasurer; but in that year a statute had been passed (1 Vict., [791] c.

\* By the third section of which it is enacted that "whenever the treasurership of the city of Dublin shall be vacant by the death, resignation, removal or dismissal of the present or any future treasurer, the lord mayor of the said city for the time being shall, within twenty-one days after such vacancy, convene the *board of magistrates of the county of the said city of Dublin*, to meet at the Sessions House in the said city, between the hours of twelve in the forenoon and two in the afternoon, and then and there, by the majority of votes of *such magistrates* as shall be present, shall proceed to elect a fit and sufficient person to be treasurer of the said city of Dublin; and at such meeting the said lord mayor, or in his absence, the *senior magistrate* present, shall preside as chairman, and shall take the votes of the *other magistrates*, and shall not himself give his vote except in the case of equality of voices."

25) entitled, "An Act to make more efficient provisions relating to the Police in the district of Dublin metropolis," by which the jurisdiction of the Police Justices, known as Divisional or District Justices there, had been altered and limited, so that their jurisdiction no longer embraced the whole of the county of the city of Dublin, but was confined to a portion thereof. By this alteration it was deemed that their right to vote at the election of the treasurer was lost, and they were consequently not summoned to attend the meeting. No summons to attend the meeting of the 21st February 1839, was issued to either of the Sheriffs, or to the Recorder of the Court, though all were within summoning distance. The Sheriffs, however, attended, and tendered their votes, which were rejected. The Recorder did not attend. Only fifteen aldermen out of the twenty-four were present. Darley caused a protest to be entered against this meeting for illegality in several respects, but took no further part in the proceedings. Smyth was consequently the only person who appeared as a candidate, and out of fifteen aldermen who did not attend, the other nine, though summoned, being absent, he received the votes of fourteen. The mayor thereupon declared Smyth duly elected, and he and his two sureties immediately afterwards entered into recognizances as directed by the act, 49 Geo. 3, c. xx., and he was at once admitted by the mayor to exercise the office.

On the 22d June 1839, Darley, in obedience to the peremptory *mandamus*, issued in pursuance of the judgment delivered on the 12th of that month, was admitted to the possession of the office, Smyth being present, and formally protesting against his admission. On the 16th of November, 1839, one Robert Kinahan obtained leave to file a *quo warranto* against him, on [792] which judgment was given for the Crown (3 Ir. Law Rep. 334). Darley brought that judgment by writ of error to this House, on the question whether such an office was by law the subject of a *quo warranto*, and the judgment of the Court below on that question was affirmed (12 Cl. and Fin. 520); the result of which was that Darley was then completely ousted. As soon as that judgment of affirmance had been pronounced, this action was commenced to recover the amount of the fees and salary received by Darley between the 22nd of June 1839, and the ouster upon the judgment of this House in 1845. Smyth obtained a verdict; the facts were turned, as before stated, into a special verdict, on which Smyth obtained judgment in the Court of Queen's Bench in Ireland. Darley brought a writ of error in the Court of Exchequer Chamber there, and, by a majority of seven to four Judges, a reversal of that judgment was pronounced (10 Ir. Law Rep. 376). Smyth then brought the present writ of error.

There were several points raised for argument on the special verdict, but in the course of the discussion, the Lords intimated a wish that the arguments should be confined to the single point of the right of the Recorder to be present at the election of treasurer.

Mr. Napier and Mr. Fleming, for the plaintiff in error.—The question in this case chiefly depends on the construction to be put on the words to be found in the third section of the 49 Geo. III., c. xx., which, providing for an election upon a vacancy of the office of treasurer of the city, declares that the Lord Mayor shall, within twenty-one days of such vacancy, "convene the board of magistrates of the county of the said [793] city of Dublin;" and "by the majority of the votes of such magistrates shall proceed to elect." What is the meaning of "the board of Magistrates of the city of Dublin?" Is the Recorder of Dublin a member of that board? It has never before been deemed necessary to summon him. In practice, therefore, his right has not been admitted, nor even claimed. The first important act to be referred to is that of the 13 and 14 Geo. III., c. 18 (Ir.), which, referring to, and repealing the 33 Geo. II. c. 13 (Ir.), provides for the regulation of the election of the treasurer of a county, by declaring that he is to be elected by "the Justices." The county of the city of Dublin is expressly included in this act, and the form of the oath to be administered to a voter, at any such election, gives him the description, "a Justice." Now every Magistrate is of necessity a Justice of the Peace, though every Justice is not necessarily a Magistrate. Where the powers of a Justice are exercised as original and independent powers, the person so exercising them is a Magistrate, and if he belonged to the corporation of Dublin, would be entitled to form one of its "Board of Magistrates." The aldermen of Dublin are in this situation. But where the powers of a Justice are not original, but are dependent on,

or subordinate to, some other office, as in the case of the Recorder, he is not a Magistrate within the meaning of the words of the act. It is not the high rank of the officer that would give him the right to vote at the "board of magistrates" of the county of the city of Dublin; for there is no doubt that the Judges of the Court of Queen's Bench in Dublin are, in virtue of their high office, capable of acting as Justices in the city; but their authority in that respect being dependent on, or subordinate to, that of their office of Jus-[794]-tice of the Queen's Bench, they would have no right to sit at the "board of magistrates" of the city. Such a right must be inherent in the office itself, and not dependent on any thing else. *Bagg's Case* (11 Co. Rep., fol. 93 b, p. 174, *Fraser's Ed.*; 1 Roll. Rep. 224, S.C.) shews the existence of this distinction; for there the writ was to restore to office James Bagg, who is described in the writ as "one of the twelve chief burgesses, or magistrates of the borough aforesaid;" that is, he was a magistrate of the borough, in virtue of being one of its twelve chief burgesses. The office itself was magisterial. The act of Parliament here likewise affords its own interpretation; for the second section recites that, persons elected aldermen may be persons in trade, and may not be qualified to act as Justices, but it authorises them so to act, and it expressly calls them "magistrates of the said city." The recorder is not mentioned as one of the number, and the constant intention to exclude all but aldermen is shewn by the *non-intromittant* clause contained in the charter of the city, by which no Justices appointed by the Crown are allowed to interfere in its affairs. The 33 Geo. II., c. 16 (Ir.), known by the name of *Lucas' Act*, and entitled, "An Act to regulate the Corporation of the City of Dublin, and for extending the powers of the Magistrates thereof," was passed for the purpose of re-modelling the corporation, and it divides the corporation into two classes of municipal officers, of which one consists of the Lord Mayor and the twenty-four aldermen, while the sheriffs, peers, and freemen form another class; and it is remarkable that in no one of the acts are the mayor, recorder and aldermen grouped into one class (but see 1 Geo. 3, c. 10, Ir., passed "to prevent the excessive price of coals in Dublin," the 6th section of which provides that "the Lord Mayor, recorder and board of aldermen of the said city, or the majority of them, shall make such rules," as to the usages and conduct of the measures of coals, "as the Lord Mayor, recorder and board of aldermen, or the majority of them, shall think proper"). [795] The liberties of the city are more extensive than the county of the city itself. The aldermen have by that act jurisdiction over the whole; the recorder is only a Justice within the city, and not for the liberties thereof; for his name is omitted from the 18th section, which describes who shall be the Justices of the Peace for the city liberties. From the time of that act to the present, the recorder has never in fact been summoned as a magistrate. The phrase "board of magistrates" must mean a known body of men, having equal and identical powers; the recorder is the adviser of that body; he is therefore not one of the board; he is not in the extent of his jurisdiction their equal. If others besides the aldermen were admitted to vote, then the Judges, and not only the Judges, but the Queen's counsel (for they are, by virtue of their office, Justices in Dublin), and all the constabulary or divisional Justices would, on principle, have the same right.

[Lord Brougham suggested that Queen's Counsel were not magistrates by virtue of being created Queen's Counsel, but that they merely thereby acquired a title to act though they should possess no landed qualification.]

As to the constabulary, or divisional justices, their right has been expressly disaffirmed, and yet they are quite as much justices exercising authority within the city of Dublin as the recorder himself. The aldermen are justices for districts where the recorder cannot act. [796] It is inconsistent therefore to suppose that he could sit as a member of the same board, and as having equal rights with men who possessed jurisdiction where he had none. The statutes already quoted refer to counties, and include Dublin within their provisions; but the 1 Geo. III., c. 10, is an act specifically relating to Dublin alone, and it speaks distinctly of the "Board of Aldermen," and does not include the recorder as a member of that board. The 33 Geo. II., c. 16, distinguishes the recorder from the mayor and aldermen, and for this reason it is expressly referred to by Mr. Baron Richards in his judgment. His Lordship says (10 Ir. Law Rep. 404) "The 19th section speaks of the recorder in his judicial capacity, which shows the way in which the legislature understood his functions;

and we have also the 20th section, speaking of him as an officer of public trust. The act appears to me to have manifestly constituted a board of magistrates, of which the recorder was not a member; nor am I aware of any act which speaks of him in any other character than that of recorder, or which describes him as one of a class. Further, when we find the legislature saying that in the absence of the Lord Mayor (instead of the Recorder, who is next superior officer, and who, if present, is entitled to take a part in the election, ought to have been nominated to take the chair) the senior magistrate present should take the chair, it is clear that it was not intended or contemplated that the recorder should be present." This statement puts the matter in a very clear point of view, and it is confidently submitted that the recorder is not entitled to be present, and to vote at the election; and consequently that the election of [797] 21st February 1839, though he was not summoned to attend it, is perfectly valid.

But even if the recorder had a right to be present, the special verdict does not show that he was in a condition to exercise that right; for it merely finds that he was "within summons" on the day of the election, but it does not find that he could have been summoned, or that he was not, in fact, duly summoned. In this respect, therefore, the finding is defective.

Sir F. Kelly and Mr. Peacock, for the defendant in error.—In order that Smyth may recover in this action, he must establish the proposition that he was duly elected in February 1839. If the Recorder was entitled to vote at that election, Smyth must shew that the Recorder, like the other persons entitled to vote, was duly summoned, or that some lawful and sufficient cause existed for not summoning him. Unless the election was in all respects a valid election, and unless Smyth was by that election completely clothed with the office of treasurer, he cannot be allowed to allege that the money received by Darley, while Darley held possession of the office, was money received to his use. He must show, not only that Darley had no colour of right, but that his own right was perfectly clear. Now, the special verdict, finding that no other persons but aldermen were summoned, excludes such an argument; for where a deliberative body in a corporation exists, all the members of it, having a right to be present, must be summoned; *The King v. The Mayor of Shrewsbury* (Cas. Temp. Hardw. 147; S.C. *nom.*, *Kynaston v. The Mayor of Shrewsbury*, Str. 1051). And in *The King v. Hill* (4 Barn. and Cres. 426) the rule is thus laid down by [798] Mr. Justice Bayley. "Where the election of burgesses is fixed, either by charter or custom, to take place on a specific day, there it is the duty of every person entitled to vote to take notice that there is to be an election on that day. But when no specific day is fixed, and the election may take place at a meeting holden at any time, it is essential that notice of the meeting and of the business to be transacted there should be given to all persons resident within the limits of the borough, who are entitled to vote, and that that should be a reasonable notice, and at a reasonable time before the election actually takes place." It is not necessary here for Darley to show that the recorder might have been summoned: the duty to summon him lies on Smyth, and Smyth is bound to shew the circumstances which excuse the performance of that duty.

Lord Campbell.—Their Lordships are of opinion, that supposing the recorder to be entitled to vote as a magistrate, there is no doubt that he ought to have been summoned, if he was within a reasonable distance. Confine yourself therefore to the point of his right to vote.

Argument for the defendant in error resumed:—Then comes the question—has the recorder a right to be present and vote at this election? Is he a member of the "board of magistrates," within the terms of the act of Parliament, 49 Geo. III., c. xx.? What was the state of the law before that act? It was, that in the county of the city of Dublin, as elsewhere, all the magistrates or justices of the peace had a clear right to vote at the election of treasurer. Mr. Shaw was recorder of Dublin at the time of this election. As such, he was a magistrate of the city. It would be strange to say that the 49 Geo. III., c. xx., must be so construed as to diminish the class of persons who [799] were to be the electors; for that act itself adopts the provisions of the 13th and 14th Geo. III., c. 18. which says that it was passed to remedy the evil occasioned by the small number of magistrates entitled to vote. The construction contended for on the other side would perpetuate the evil instead of remedy-



ing it. The 33 Geo. II., c. 13, which was an act for "regulating the elections of treasurers for counties," gets rid of the supposed difficulty about the Lord Chancellor and the Judges, who are magistrates by virtue of their office, voting at these elections; for it says that the justices of the peace, capable of holding the general sessions of the peace, shall be the persons to elect. And then the 32 Geo. II., c. 16, the act passed to "regulate the corporation of Dublin," says (s. 19) that the Lord Mayor and two justices of the peace, or the Recorder and two justices of the peace, shall form a *quorum*, to hold the sessions of the peace for the city of Dublin. Now, as the city of Dublin is expressly included in the acts relating to the election of treasurers for counties, which acts give the right of election to the justices of counties, it is clear that the justices who are entitled to hold the sessions of the peace for Dublin are the persons entitled to vote for the treasurer there. The 13 and 14 Geo. III., c. 18, is the next act which was passed to regulate the election of treasurers for counties; and that act says that the treasurer is to be elected by the justices of the county, and the county of Dublin is there expressly included within the act. As, before shown, the recorder is one of the justices for the county of the city, and is one of the *quorum*, consequently he is one of the persons authorised by the acts to elect.

This office is not a mere corporate office; and, there-[800]-fore the reasons that might apply to restrict the election to the members of the corporation do not apply here. It is an office of a general kind, and was expressly declared so to be in the judgment of the court below. It is the subject of acts of Parliament which relate to county treasurers, and there is every reason to exclude it from the list of mere corporate offices. But then it is said that as the 49 Geo. III., c. xx., uses the phrase "board of magistrates of the said city of Dublin," it shews that this particular office is, unlike the rest, a mere corporate office; and that the election to it is therefore confined to aldermen. If such was the intention of the legislature, nothing was more easy than to have expressed it in plain unambiguous language. That has not been done; but, on the contrary, the word "magistrate" must be taken to have been used as synonymous with "justices of the peace." But if this matter can be the subject of doubt on the previous statute, all doubt is removed by the 4 Geo. IV., c. 33, entitled "An act for the more effectual regulation of the election of County Treasurers in Ireland," which thoroughly explains the meaning of the words "magistrate" and "alderman;" for there it is said that the election "shall be made at the meeting of the magistrates," and neither the word "alderman" nor the word "justices" is employed in any part of the act, but in the third section, where justices of the peace for a county, or a county of a city and a county of a town, are described, they are called by the common appellation of "magistrates." In the same manner, in the 26 Geo. III., c. 24 (Ir.), passed "for the better Execution of the Laws within the City of Dublin," the words are used as synonymous. If such is the general purport of the statutes, what reason is [801] there for saying that there is any exception in this particular instance. The recorder may be a magistrate, although, on account of certain particular duties which he has to perform, he is distinguished from the other magistrates by the particular designation of Recorder. The election is to take place at "the Sessions Court," but that is precisely the Recorder's Court, and it cannot be assumed that for one particular occasion he is to be excluded from a court which is especially his own. The construction sought to be put on these acts by the other side is forced and unnatural, and the judgment of the majority of the Judges of the Court below adopted the only construction which is in accordance with the plain sense of the legislature: that judgment must be affirmed.

Mr. Fleming, in reply.—The statutes which apply generally to the election of treasurer for counties in Ireland, do not apply to the particular mode of election of a treasurer for the city of Dublin, which is solely regulated by the local acts passed with regard to that city alone. Counties are comparatively recent creations in Ireland. Henry VIII. made the first of them; but cities date from the earliest times, and have preserved distinct and peculiar franchises. Everything relating to Dublin has been treated of by the legislature as distinct from any other town, so that even the act which was passed "for the more equal assessment and collection of public money in counties of cities and counties of towns," excluded Dublin from its operation. The duties of the recorder and of the justices of the peace appointed under the 26 Geo. III., c. 24, are entirely different from each other, so that he cannot be

assimilated to those justices, [802] and the act cannot be treated as applying to him. The words "board of magistrates" in the 49 G. III., c. xx., must be taken to mean board of aldermen, and from that board the recorder is excluded. The 17 and 18 Geo. III., c. 43, is important, as explaining the word "board." That act was passed for improving the police of Dublin, and it directs that the "Lord Mayor and board of aldermen" shall from time to time appoint men to be aldermen of wards and to be guardians of the peace of such wards, and every such alderman is to have power to appoint one of the common council his deputy, to act during pleasure; but such deputy is not to act till approved of by the Lord Mayor and board of aldermen, and the 5th section calls these persons "aldermen and magistrates;" and in the 26 Geo. III., the aldermen are called the magistrates of the city of Dublin. Taking the two acts together, there can be no doubt as to the meaning of the phrase "board of magistrates." There are many important duties of city government, such as the licensing of hackney coaches, and the delivery of coals, in which the recorder can take no part, and wherever he is introduced he is so by name,—a fact which shews that in this particular instance he was not intended to be included among those who were invested with the power of election. Under the act of Parliament called, The act for the settlement of Ireland, the Lord Lieutenant is to make rules relating to the government of the city of Dublin, which rules are to be deemed part of the statute, and to have authority as such. The first of these rules states that the Lord Lieutenant has made and established them for the better regulation and government of the city, and the election of the magistrates and officers thereof. Now, in all these rules the lord mayor and aldermen [803] are spoken of as constituting a board, but the recorder is never mentioned. Then comes Lucas' act, which speaks of the "aldermen," and was passed to extend the jurisdiction of the aldermen, and does extend that of the alderman, but does not affect that of the recorder.

Lord Campbell (July 27).—My Lords, this case having been so recently before your Lordships, and so fully argued, there is no necessity for my stating the nature of the action, or the facts found by the special verdict. The question which we have to consider, I think, is whether, as the law of Ireland stood in the year 1839, the recorder of Dublin was entitled to vote in the election of a treasurer for the county of the city of Dublin. The special verdict finds that he was not present at the election of the plaintiff, and "that he was not convened or summoned to attend at the said election." The election being by a definite body on a day of which, till summons, the electors had no notice, they were all entitled to be specially summoned, and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance—as, for instance, abroad,—there could not be a good electoral assembly; and even a unanimous election by those who did attend would be void.

Objection is made here that the special verdict is defective, in merely finding that "the recorder was within summons on the day of the election." But if he was entitled to vote, I am of opinion that the *onus* was cast upon the plaintiff of shewing that he could not [804] be summoned. The special verdict contains no negative statement upon that subject, and we are bound to suppose that no evidence was given to prove his absence to have been occasioned by anything else except the want of a summons.

The question whether the recorder was entitled to vote in the election of treasurer for the county of the city must be attended with great difficulty, as the very learned Judges were divided upon it. They have treated it with the care and ability which eminently distinguish all their deliberations. But, my Lords, after several times perusing all their opinions, as well as attentively listening to the arguments at our bar, I feel no hesitation in agreeing with the majority, that the recorder was entitled to vote.

Everything turns on the construction to be put upon the expression found in the 3rd section of 49 Geo. III., c. xx., "the board of magistrates of the county of the city of Dublin." Is the recorder therein included or excluded? *Prima facie* he is included; for he is undoubtedly a magistrate of the county of the city of Dublin. "Magistrate" here, certainly means *justice*, and by the charter of Charles II., he is expressly constituted a justice. I do not think there is the slightest weight in the arguments adduced to prove that under subsequent statutes he has, in some respects,

ceased to be a justice of the city. Lucas's Act, 33 Geo. II., chapter 16, is chiefly relied upon. But this only adds to the number of the justices, and in enacting that the lord mayor, aldermen and sheriffs shall be justices, it by no means disfranchises the recorder.

A doubt seems to have arisen whether the statute 13 and 14 Geo. III., c. 18, applied to the election of a treasurer for the county of the city of Dublin. Seve-[805]-ral of its enactments do apply exclusively to the election of a treasurer for a county. But after the 49 Geo. III., c. xx., I think we are bound to understand that the 13 and 14 Geo. III., c. 18, extended to the election of a treasurer for the county of a city; and, therefore, that the recorder of Dublin, as a justice for the county of the city, prior to the 49 Geo. III., c. xx., was entitled to vote. No importance can be attached to one of the findings of the jury, that at one particular election, which is mentioned, aldermen only were convened.

The 49 Geo. III., c. xx., instead of disfranchising the recorder, uses, I think, language well calculated to preserve his rights; it gives the power of election to the magistrates of the county of the city, and he is one of them. The word *board* is used; but this seems to me to be here synonymous with bench; and the lord mayor, on a vacancy of the office of treasurer, may therefore be said to be required "to convene a bench of magistrates," to meet at the sessions court in the said city. The same magistrates are to be convened who would meet if sessions for the county of the city were to be held. It has been gratuitously asserted, that when the aldermen of Dublin meet as magistrates, the recorder attends only as their assessor. On the contrary, it is quite clear that he is present with co-ordinate authority, as a member of the court, board, or bench. He is a dignified officer; but there can be nothing derogatory to his dignity in voting for so important an officer as treasurer for the county of a city.

Several statutes have been cited to us, where the expression occurs "board of aldermen," and it is said that at such a board the recorder would have no right to be pre-[806]-sent, because, although he is a justice, he is not an alderman. But the very existence of this designation of "board of aldermen," strengthens the claim of the recorder to vote for treasurer; for, if the right of voting was to be confined to aldermen, why was not the well-known designation of "board of aldermen" adhered to. But the designation used is the "board of magistrates of the county of the city of Dublin," and of this board the recorder, being a magistrate, is a constituent member.

If this should be your Lordships' opinion, it entirely disposes of the case, and there is no occasion for considering the other objections taken to the plaintiff's right to recover.

Were the election of treasurer for the county of the city of Dublin still to take place under the same statute, for the sake of avoiding future disputes and future litigation, your Lordships might be desirous of determining the right of the other claimants to join in the election; but as the election now takes place under a totally different law, (which I hope may be more free from doubt) no good could arise from doing more than what is necessary to dispose of this writ of error.

I therefore move, my Lords, that there should be judgment for the defendant in error.

Lord Brougham.—My Lords, I entirely agree with my noble and learned friend, and for the reasons which he has given. The point which he made towards the latter part of his observations, is one which occurred to me during the argument at the bar, and which appeared to me to decide the question, without anything further. I shall therefore say no more than that I entirely concur in his proposition.

Judgment for the defendant in error, with costs.

[807] ALEXANDER SMITH,—*Appellant*; The EARL OF STAIR and Others, Officers of State in Scotland,—*Respondents* [July 13 and 31, 1849].

[*Mews' Dig.* v. 79; xii. 657. S.C. 13 Jur. 713; 6 Bell, 487. See *Commissioners of Woods and Forests v. Gammell*, 1851, 13 Dunlop 854; 3 Macq. 419; *Hunter v. Lord Advocate*, 1869, 7 Macph. 913; *Agnew v. Lord Advocate*, 1873, 11 Macph. 317, 323; *Gilbertson v. Mackenzie*, 1878, 5 Rettie, 618; *Buchanan and Geils v. Lord Advocate*, 1882, 9 Rettie, 1221, 1222, 1225.]

*Costs—Officers of the Crown.*

The officers of state in Scotland obtained a judgment on interdict against an individual who had, by erecting a wall, encroached on the sea shore, the suit being instituted by them solely to protect the public right. The judgment of the Court below was appealed against, and affirmed, but was affirmed without costs (the case is reported, on other points, in 6 Bell's Appeal Cases (Scotch) p. 487).

Lord Abercorn had a grant from the Crown of certain lands adjoining the sea-shore, in the barony of Duddingston, with limitations as to the right of granting them out. In the year 1805, he granted to a person, named Stewart, a charter or lease of a certain part of this land, amounting to an eighth of an acre, for the purpose of building a house thereon. In this instrument, one of the limits of this piece of land (the only one material to be considered), was thus described: "bounded by the sea-shore to the north." The sea-shore was described in the allegations of fact as consisting of an extensive stretch of open sands, which the sea covered at spring tides. That part which was covered by the ordinary tides, was firm and solid, that which was only covered when there were spring tides, consisted of a deep loose sand. All these sands the inhabitants of the neighbouring town of Portobello, and of the surrounding country, had been accustomed to use for all purposes of pleasure and recreation, and the [808] troops had frequently been publicly reviewed there. The lease came into the hands of Smith, who, in the year 1842, built a wall, which, it was alleged, was placed for some distance across the loose sand, and reached down to that which was covered at every ordinary tide. The respondents having had complaints made to them on this subject, applied to the Court of Session for an interdict against the appellant, for the purpose of prohibiting him from going on with the erection of this wall. On this proceeding in the Court of Session, the question raised was, as to Smith's right to maintain the wall beyond the high-water mark of ordinary spring tides, either with reference to the terms of his lease, or to the rights of the Crown to grant away the sea shore to a private individual. The judgment of the Court below was given in favour of sustaining the interdict. The appellant appealed against that decision, and the judgment of the Court below was then affirmed, and in moving the affirmative, it was moved that it should be affirmed, with costs.—

Sir F. Kelly and Mr. Anderson for the appellant, requested to be heard on the question of costs. This was a case in which the Crown was a party, and for that reason no costs were given in the Court below. In a case of *The Commissioners of Woods and Forests v. Lord Bute* the Court of Session had acted on the same principle.

Mr. Bethell and Mr. Elliott for the respondents: The rule is not so in the Court of Chancery in this country. There the principle acted on has been this, that where the Crown is suing for a public object, it is allowed to receive costs. This is so in the cases of [809] public charities, though the Crown sues on the information of a relator. [Lord Brougham.—Yes; that is the benefit of having a relator.] The same rule applies where the Attorney-General appears as defendant in such a case. [Lord Brougham.—The Crown would not have to pay costs here; if so, then it cannot get them; the right to costs must be mutual.] That is not necessarily so. Suppose a suit by the Crown against a subject, in the matter of a public right, and a judgment in the Vice-Chancellor's Court, and then in the Lord Chancellor's Court for the Crown, and yet an appeal brought in this House; are the public to pay for all this vexatious litigation? It cannot be said that they are. The recent case of *The Attorney*

*General v. The Corporation of London* (since reported 12 Beavan, p. 171) at the Rolls is in point. In that case there was no relator. The Master of the Rolls there said, that the Corporation would be liable to costs, but it is doubtful whether it will, should it be successful, get them from the Crown. That shews that the two things are not identical. The right of the Crown to receive costs, and its liability to pay them, are not correlative terms. [Lord Campbell.—Suppose the Attorney-General files an information in respect of a public way, and asks for an injunction, how can he get costs there?] The Crown would have a right to costs there. Such a case is like that of *The Attorney General v. The Corporation of London*, which was entirely a proceeding by the Crown in respect of a public right.

The Attorney General (*amicus Curiae*), said, that in the case referred to, the Master of the Rolls had intimated an opinion that the Crown was entitled to costs, but no costs had been formally awarded.

[810] Sir F. Kelly referred to *The Lord Advocate and the Officers of State in Scotland v. Lord Dunglas* (9 Cl. and Fin. 173), to shew that in a case like the present, the Crown would not be liable to pay costs. He insisted that the liability to pay, and the right to receive costs were mutual, and as the House had there decided that an appeal would lie, should costs be improperly awarded against the Crown, that case must be taken as in principle deciding the present. But the case of *The Corporation of London v. The Attorney General*, decided in this House (*ante*, vol. i., 440, see p. 471), is an authority against ordering the present appellant to pay costs; for there the Lord Chancellor said, "I do not mean to say that a case may not occur in which the Attorney-General would be liable to pay costs, but then, where private parties have no chance of getting costs, and they have none here, the Court is cautious how it makes them pay costs," and the judgment of the Court below, in favour of the Crown, was affirmed, without costs.

Lord Brougham.—The cases of charities would not apply to the present. The case of *The Mayor and Commonalty of London v. The Attorney General*, as now referred to, seems in point. But before giving our decision, we will speak to the Master of the Rolls on the subject.

(July 31) Lord Brougham said, that the Lords had considered this case, and no costs would be given.

[811] JOHN DOE, on the several demises of JAMES F. N. DANIEL and others,—*Plaintiff in Error*; GEORGE WOODROFFE,—*Defendant in Error* [July 4, 5, 6, 7 and 10, 1848; July 27 and 30, 1849].

*Et e Contra.*

[Mews' Dig. vi. 234, 328, 346; ix. 172; xiv. 386. S.C. 13 Jur. 1013; in Ex., 10 M. and W. 608; 12 L.J. Ex. 147; in Ex. Ch. 15 M. and W. 769; 7 Jur. 959. Cited on point as to right of entry (10 M. and W. 608, app. 632) in *Cowan v. Milbourn*, 1867, L.R. 2 Ex. 235.]

*Deed-Poll—Base Fee—Merger—Estopped—Entry—Remitter.*

An estate being limited to the use of A. and his wife, and the heirs of their bodies, with remainder to A. in fee, and A. having died, leaving his widow, and G., an only son, and L. and H., only daughters, the widow, in 1735, by deed-poll, in consideration of an annuity granted to her by G., and of natural affection, granted, surrendered, and yielded up the estate to him in fee; and he afterwards, during her life, suffered a recovery. She died in 1767. G. died, without issue, in 1779, having devised the estate to trustees, to secure an annuity to B., only son of his sister L. (then dead), and subject thereto, to W., eldest son of B., for his life, with remainder to B.'s second son. In 1790, W., on his father's death, entered into possession of the whole estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, and in 1816 conveyed the entirety to mortgagees in fee. In 1818, M., the

descendant of H., the other coparcener, suffered a recovery of the other moiety, which, it was declared, should enure (subject to the trusts of a term) to the use of W.'s mortgagees:

Held, by the Lords—affirming a judgment of the Court of Exchequer Chamber,—1st, That the deed-poll of 1735 operated as a covenant to stand seised, and created a base-fee, determinable by the entry of the issue in tail: 2d, That this base-fee did not, on the widow's death, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate: 3d, That, although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued to any one until his death, and therefore the period of twenty years, for the operation of the Statute of Limitations against the issue in tail, was to be calculated from his death, and not from the death of his mother, and consequently W.'s entry (in 1790) was not barred by lapse of time; 4th, That although W. entered under the will, and manifested an intention to take the estate under it for his life only, that was immaterial, and he was remitted as to his moiety to the original estate tail, which was barred by the recovery in 1814; and 5th, That the entry and remitter of W. did not operate to remit his coparcener M., to the other moiety of the estate.

These writs of error arose out of an action of ejectment, brought in the Court of Exchequer, upon eight several demises by the several lessors of the plaintiff, against the defendant, George Woodroffe, to recover possession of certain lands and tenements in the county of Surrey. The cause was tried at the Sum-[812]-mer Assizes for that county, in 1839, and a verdict was found, for the defendant as to part of the premises, and for the plaintiff as to the residue. A rule for a new trial having been obtained, the parties, at the suggestion of the Court, agreed that the facts should be stated in the form of a special case, with leave to turn the case into a special verdict, which was accordingly done.

The special verdict set forth all the facts and documents relied on by both parties; but the following are sufficient to raise the questions for the decision of this House (for a fuller statement, see 10 Mee. and Wels. 608):—

By indentures of lease and release, dated January 1710—recited to be made in pursuance of marriage articles—George Woodroffe, being seised in fee of the lands in question, conveyed them to the use of himself for life, remainder to his first and other sons in tail male, remainder to the use of his brother Robert Woodroffe and Hester his wife, and the heirs of their bodies, with remainder to the use of the said Robert in fee. Robert died intestate in February 1710, leaving the said Hester, his widow, and three children by her, namely, George, his only son, and Lettice and Hester, his only daughters. George Woodroffe, the settlor, died in 1713, without having had any issue, whereupon Hester, widow of Robert, entered into possession of the said lands.

By a deed poll, executed by Hester Woodroffe in 1735,—after reciting the indentures of settlement of 1710, and the death of the settlor without issue, and the death of the said Robert, leaving issue by Hester as aforesaid, and that by no means thereof, and by virtue of the said settlement, the lands in question were well vested in her for her life, with the immediate remain-[813]-der thereof to her son George,—she, in consideration of an annuity granted by him to her, and of natural love and affection, granted, surrendered, and yielded up the premises to him, his heirs and assigns forever. Upon the execution of this deed, George, the son, entered into possession of the lands, and afterwards, in the same year, by deed of bargain and sale enrolled, conveyed them to a tenant to the *precipe* in a common recovery to be suffered by him to the use of himself in fee, which recovery was accordingly suffered in the same year, and therein he was vouched, but Hester, his mother, was not vouched.

This George Woodroffe was twice married, first, in 1735, shortly after the said recovery, and again in 1765, and on both occasions he made settlements of the lands in question by deeds of lease and release, but both his wives having died, and there being no issue of either marriage, the estates created by those settlements terminated in his lifetime.

Hester Woodroffe died in 1767, without having done any act—except executing the deed poll—to alter or affect the title of the said lands, leaving her son George in

possession of them, who thereupon became the heir, in tail under the settlement of 1710. His elder sister, Lettice, wife of William Billinghamurst, had previously died, leaving the Rev. Wm. Billinghamurst her only son and heir. He had issue two sons, William and George, each of whom afterwards took the name of Woodroffe, and the latter is the defendant in the first writ of error. Hester, the other sister of George Woodroffe, was twice married, first to Thomas Caverley, and, surviving him, she married a second husband, and died in 1784, leaving Ann, then wife of Thomas Walker, her only child and heiress at law. Mrs. Walker died in 1797, leaving a daughter Jane, her only child and heiress at law, who, having [814] survived D. Watherstone, her first husband, married, for her second husband, William Mordaunt Maitland, who is one of the lessors of the plaintiff.

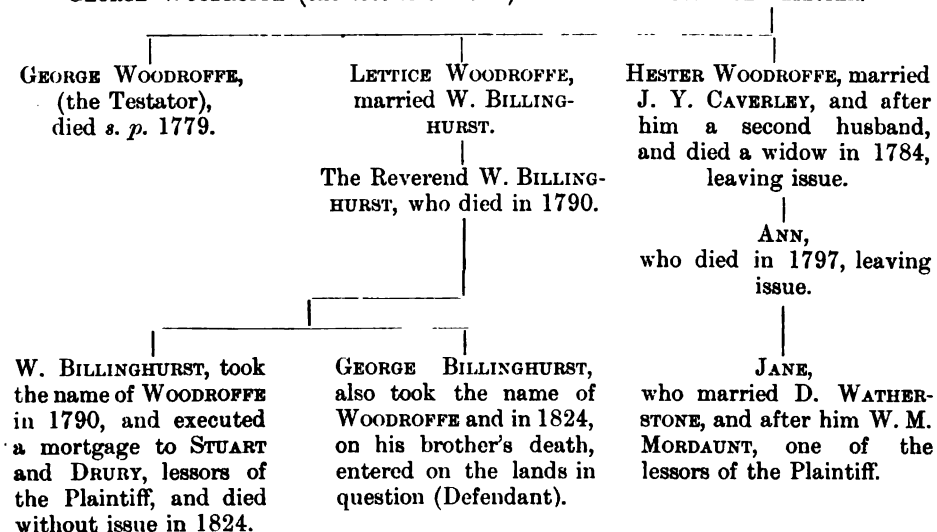
George Woodroffe (son of Robert and Hester Woodroffe) died in 1779, having by his will declared that he devised considerable estates, including the lands now in question, to two trustees, in trust to pay an annuity of £200 to his nephew, the said Rev. W. Billinghamurst, for his life, and, so charged, he devised the estates to the use of William Billinghamurst, eldest son of his said nephew, for his life, with remainder to his first and other sons in tail male, with remainder to George, his said nephew's second son, for his life, with remainder to his first and other sons in tail male, with divers remainders over. The will contained a direction that all persons taking the devised estates should take the name and arms of Woodroffe.

On the testator's death the trustees named in his will entered upon the devised estates. The Rev. Wm. Billinghamurst and Hester Caverley were, at the testator's death, co-heirs of the bodies of Robert Woodroffe and Hester his wife. On the Rev. W. Billinghamurst's death in 1790, his elder son William, having then attained his age of twenty-one, took the name and arms of Woodroffe, and entered into possession of the lands in question. Between that time and the year 1814, he executed various deeds, in which he was stated to be tenant for life under the said will; but in 1814 he suffered a recovery of one moiety of the lands comprised in the settlement of 1710, declaring the use to himself in fee; and by indentures of lease and release, dated February 1816, he conveyed the entirety of the said lands to Robert Stuart and Mark Drury in fee, by way of mortgage, to secure a sum of £10,000, with the usual proviso for redemption reserved to him and his heirs.

[815] In Easter Term 1818, the said W. M. Maitland and Jane his wife (granddaughter and heiress of Hester Caverley) suffered a recovery of her moiety of the lands in question, which was, by other deeds executed in the same year, declared to enure to the use of the said W. M. Maitland for five hundred years, to secure to him £4500,

#### Pedigree.

GEORGE WOODROFFE (the settlor of 1710): ROBERT WOODROFFE—HESTER.



and, subject to that term and the trusts thereof, to the use of the said R. Stuart and M. Drury in fee, subject, however, to the same proviso of redemption in favour of William Woodroffe and his heirs as was contained in the mortgage deed of 1816.

Wm. Woodroffe, or the parties claiming under him, continued in possession of the lands in question until his death, without issue, in August 1824, when his brother George, having taken the name and arms of Woodroffe, entered into possession of them, claiming title as tenant for life under the will of his grand-uncle George Woodroffe.

[816] The ejectment was brought on demises from persons deriving title under Stuart and Drury, the mortgagees, and W. M. Maitland. The Court of Exchequer, after argument on the special case, gave judgment in 1842 as to the entirety of the lands in favour of the plaintiff, and the case having been turned into a special verdict, final judgment was entered for him thereon in 1844 (10 Mee. and Wels. 769).

From that judgment George Woodroffe brought a writ of error to the Court of Exchequer Chamber, which, in 1846, affirmed the judgment of the Court of Exchequer of Pleas as to one moiety of the lands—being the moiety derived from W. Woodroffe—and reversed it as to the other moiety, being that to which Ann Walker, mother of Mrs. Mordaunt, was formerly entitled (15 Mee. and Wels. 769).

Against the latter part of that judgment the plaintiff in the action brought his writ of error in this House; and against the first part of it the defendant in the action brought the second writ of error.

The questions in both cases were argued for several days, in July 1848, in the presence of the Judges of the Courts of Law (they were Mr. Baron Alderson, and Justices Patteson, Coleridge, Coltman, Maule, Cresswell, Erle and Williams), Lord Brougham presiding.

Mr. Turner and Mr. Bethell (Mr. Peacock and Mr. W. Hayes were with them), for the plaintiff in the first writ of error and defendant in the second :

It is found by the special verdict, in substance and effect, that Hester Woodroffe was, in 1735, seised of the property, the moiety of which is now in question, [817] for an estate tail in possession, and by the deed poll of that date, she conveyed the whole to George (her only son and heir) and his heirs; that he thereupon entered into possession, and in November, the same year, conveyed the same property by deed of bargain and sale enrolled, to a tenant to the *precipe* in a common recovery to be suffered by him,—and which was accordingly suffered,—to his own use in fee; that Hester died in 1767, leaving George her heir in tail, who died in 1779, without having done any other act to affect the estate tail. He had made two several settlements on his marriages, the first in 1735, the second in 1765, but there having been no issue of either marriage, the nature of his estate, under the ultimate limitations in those settlements, remained the same as it was in 1735. The necessary construction of law upon these facts is, that George Woodroffe was seized of the property for an estate tail in possession, and consequently had not, at the time of making his will or of his death, any devisable estate or interest in the property, except the reversion expectant on an estate tail, which was afterwards barred.

The estate tail not having been barred or discontinued by any act of Hester, or of her son George, the only ground upon which it could be contended that any estate or interest in the property in question passed by his will is, that his entry under the deed poll of 1735 was the acceptance of a base or determinable fee, which estopped him from asserting, either before or after the death of Hester, any other title; or that if his entry under the deed poll did not produce that effect, yet the recovery suffered by him in 1735, though ineffectual to bar the estate tail (he not being then tenant in tail), was an estoppel by matter of record, whereby he was [818] precluded from setting up any claim to the estate tail, and that, according to either view, the base fee continued after his death. Each of these propositions, if examined, will be found to have insuperable difficulties to contend with.

First, as to the deed poll,—supposing, without however admitting, that such a deed, followed by entry under it, was capable of working an estoppel,—it discloses upon the face of it the actual state of the title by reciting the deeds creating the entail, and the death of Robert, leaving George his only son by Hester, and then it states, erroneously, that “by means thereof, and by virtue of the settlement, the tenements became and then were well vested in Hester for her life, and that the immediate



remainder thereof belonged to George, son of Robert and Hester ;" so that the estoppel and conclusion (if any), would go to exclude any averment contrary to the allegation of the plaintiff in error,—viz., that on and by the death of Hester, without more, the base fee absolutely determined. The deed poll shows, upon the face of it, that Hester was seised of an estate tail in possession, and consequently capable of passing, by way of ordinary conveyance, an estate founded upon ownership, and the argument of the defendant in error admits that it did actually pass a base fee. But it is clear law, that where the instrument itself shews an interest in the conveying party, so as to render it sufficiently operative by way of conveyance, the doctrine of estoppel is excluded.

Secondly, as to the recovery suffered by George in the lifetime of Hester, his ancestor, the recovery deed and recovery must be taken together and construed as a common assurance, operating simply as a conveyance by George to his own use of the estate vested in him [819] under the deed poll ; for unquestionably a tenant in fee, whether absolute or base, was competent to convey by recovery, and it was never apprehended that by adopting that mode of conveyance, he was estopped from alleging at any time afterwards, that he had, subsequently to the recovery, become tenant of an estate in the land, other than the estate which he had at the time of the recovery. The doctrine which attributes so conclusive an effect to the recovery would go even to deny the capacity of George, after the death of Hester, when he became heir in tail in possession, to create a discontinuance by feoffment, or to acquire the absolute fee by suffering another recovery, or by any means whatever to determine the base fee. The principle that, where an assurance is operative by passing an interest it has no operation as an estoppel, applies also to the recovery.

As respects both assurances, the deed poll and recovery, admitting that there might be an estoppel, yet estoppels operate only as between parties and privies, and there must be a person to be estopped as against another person entitled to the benefit of the estoppel ; but, on the death of Hester, there ceased to be any person in whose favor the supposed estoppel could possibly operate. Also, the plaintiff in error derives title under the issue in tail, who cannot be bound by estoppel ; but to affirm that the plaintiff in error is precluded from alleging that George, on the death of Hester, became seised of an estate tail in possession, is in effect to bind the issue in tail by estoppel. When the defendant in error admits (as he is obliged to do) that the recovery was void as against the issue in tail, but at the same time insists, that *by reason of such recovery* the base fee must, in a contest between a claimant under that fee and a claimant under the estate tail, be [820] deemed to have continued after the death of George, so as to prevent the claimant under the estate tail from recovering, that argument involves a manifest contradiction.

Nothing therefore having been done to discontinue the estate tail, or take away the right of entry in respect of it, that right devolved, on the death of Hester, upon George, who, being then in the actual possession, was, by a necessary consequence of law, *in* of the estate tail, independently of the learning of remitter, properly such, which was applicable only where the estate tail had been divested and turned to a right to be asserted by a real action.

If George Woodroffe, the testator, had not in his lifetime any devisable estate, no act done or statement made, subsequently to his death, could, at law, have the effect of bringing the property in question under the operation of his will. Even assuming that the base fee continued after the death of Hester, and passed by the will of George, still, as the right of entry in respect of the estate tail was not taken away, that fee was determined by the entry of William Woodroffe in 1790, such entry being, by construction of law, an entry on behalf of himself and Ann Walker, as coheirs in tail. The 12th section of the act 3 and 4 Will. IV., c. 27, on which alone the defendant in error can found any answer to this argument, did not make any alteration, either prospective or retrospective, in the law, with respect to the effect of *entry* of a co-tenant for any purpose not within the purview of the act, but left the general doctrine as to its constructive operation wholly undisturbed ; and if the entry of William admits of no other construction than that for which the plaintiff in error contends, then the estate tail in the entirety was [821] to all intents restored, and the defendant in error is reduced to confine his argument to the character and effect of the subsequent enjoyment. Although it is true that, with respect to exclusive enjoyment by a co-tenant,

the enactment in the 12th section negatived, both prospectively and retrospectively, the presumption of the former law, yet it must be understood to have so done for the purpose only of limiting, as between co-tenants or those claiming under them, actions or suits concerning matters which, down to the period when the statute came into operation, continued to be litigable. But, in the present case, the contest is between a person claiming through both the co-heirs in tail, and a person claiming adversely to their common title, and moreover every possible question as to the state of the title, from the period of the entry by William, in 1790, down to the arrangement in 1818, under which the then co-heiress in tail suffered a recovery of the moiety in question, was finally disposed of by that arrangement; or if, notwithstanding the relative position of the present litigant parties, and notwithstanding the transaction of 1818, the actual title in regard to that moiety can be considered as depending upon the nature of the enjoyment, as being adverse or non-adverse during the above interval, yet were it adjudged to have been adverse, the result would then be that William thereby acquired wrongfully a fee, to which the plaintiff in error would now be entitled.

To meet this argument the defendant in error will be driven to contend,—first, that either, on general principles of law, or, having regard to the retrospective effect of the new Statute of Limitations (3 and 4 Will. 4, c. 27), the entry of William was insufficient to determine the base fee in the moiety in question, the title to [822] which moiety therefore continued to be referable to that fee; or, failing in this argument, then, secondly, that either on general principles or, having regard to the retrospective effect of the enactment, the continued possession of William was not the possession of his coparcener, and not only that the effect of such possession was to gain wrongfully a fee in the moiety in question, but that the new fee so acquired became, by construction of law, impressed with the uses to which the will of George limited the base fee.

In answer to the first of these propositions, the plaintiff in error submits that, as regards general principles of law, admitting that where an estate tail had been discontinued and turned to a right to be asserted by formedon, the remitter (which operates independently of entry) of the one co-heir in tail coming to the wrongful estate in the entirety, did not extend to the moiety of which he was in by a different and adverse title, and in respect of which the other co-heir might have had his formedon, yet that where, as in the present case, the right of entry in respect of the estate tail remained in full force, and the issue in tail had one and the same title to enter, the same reasoning does not apply. The entry generally of the one coparcener was, as in the common case of descent to coparceners, the entry of the other, who could not, without a subsequent ouster, have maintained an ejectment against her companion. As regards the statute (3 and 4 W. 4, c. 27), it simply operates to abrogate the former doctrine, that where one of several co-tenants had been in the possession or receipt of rents of more than his share to his own use, such possession or receipt, unexplained, was referable to the common title, so as to keep alive for an indefinite period the right of the one party out of possession against the [823] other in actual possession; thus establishing (for its own purposes only) the converse presumption; but it does not affect to determine the character and consequences of an *entry* by one of several co-tenants.

In answer to the second of the above propositions, the plaintiff in error submits, first, that as regards general principles, without some act on the part of William amounting to an ouster or denial of the title of the co-heir (and it is clear that his mere possession or receipt, and retention of the rents of the entirety would not have that effect), the unity of the title of the coparceners was not disturbed; but the special verdict furnishes no evidence of any such act: Secondly, that as regards the statute, the consequences which would obviously result from construing it as an *ex post facto* declaratory law, by which the aspect of titles resting upon transactions concluded at any antecedent period, however remote, by parties competent to bind all the interests, may be wholly changed, and that too in favor of third persons not claiming under the common title, demonstrate that such a construction was not within the contemplation of the legislature, which, while studious to circumscribe the assertion of rights, could not have intended to restore rights which, independently of the effect of possession continuing at the time of passing the act, had, before the passing of the act, been destroyed by the acts and deeds of parties competent by such

acts and deeds to bind all the interests: And, thirdly, assuming William to have gained, by the effect of his continued enjoyment of the moiety in question, a wrongful estate, that estate was not a continuance or an enlargement of the base fee alleged to have been devised by the will of George, but a new and substantive acquisition in fee simple, which could not, with-[824]-out an actual conveyance by William, become subject to the limitations of the will of George, on which limitations the defendant in error founds his claim.

The plaintiff in error further submits, that by virtue of the deeds of lease and release of 1814, and the recovery then suffered, and of the deeds of lease and release of March and May 1818, and the recovery suffered in 1818, and the several other assurances stated in the verdict, the lessors of the plaintiff in the action of ejectment, or some of them, were entitled to recover the undivided moiety in question; and therefore the judgment of the Court of Exchequer of Pleas, deciding in favor of the plaintiff in error for the entirety of this estate, ought to be restored. [For the authorities cited in support of the various points of the argument for the plaintiff in error, see p. 827.]

Mr. Humphry and Mr. Roundell Palmer for the defendant in error in the first writ of error, and plaintiff in the second:

Upon the facts stated in the special verdict, no title is shown in the lessors of the plaintiff, or any of them, to that moiety of the property in question, in respect of which the judgment of the Court of Exchequer of Pleas was reversed by the Court of Exchequer Chamber, even if a title in them, or some of them, be shown to the other moiety. The entirety of the property, or, at all events, one moiety of it, is now vested in the defendant in error as tenant for life in possession under the will of George Woodroffe, from the time of whose death, in 1779, the devisees claiming under his will have been in the uninterrupted possession and enjoyment either of the entirety of the premises, or at all events of this moiety, without any entry by the issue in tail claiming [825] under the settlement of 1710, or any remitter to such issue, who at the death of the testator, were under no disability.

If the effect of the conveyance by Hester Woodroffe in 1735 was not to accelerate and bring into possession the remainder or reversion in fee, then vested in George Woodroffe, her son, as the heir at law of Robert Woodroffe, subject to a right of action only to accrue on the death of Hester to the issue then entitled under the entail created by the settlement of 1710,—which it is submitted was the true effect,—then the effect of such conveyance was to vest the entirety of the premises in question in the testator George Woodroffe for an estate in fee simple, determinable on failure of issue of Robert and Hester Woodroffe, and defeasible by the entry of the issue in tail under the settlement of 1710, within the time prescribed by the old Statute of Limitations. That estate continued vested in George Woodroffe till the time of his death, and passed by his will, and afterwards became and is now indefeasible, either as to the entirety of the premises, or at all events as to that moiety in respect of which the judgment of the Court of Exchequer of Pleas was reversed by the Exchequer Chamber.

The period from which the Statute of Limitations began to run against the estate tail created by the settlement of 1710 ought to be computed, from the death of Hester Woodroffe in 1767, at which time either a right of action or a right of entry accrued to George Woodroffe, as heir in tail, but he, being then in possession of the entirety of the premises under his title, either to the reversion in fee, or to the base fee created by the conveyance of Hester Woodroffe in 1735, was estopped by the several deeds of that date, including [826] the recovery, and by the deeds of 1765, or by some of them, from being remitted to his estate tail under the settlement of 1710. And inasmuch as the operation of this estoppel was only to prevent him from taking advantage of his right of action or entry, and not to prevent the right of action or entry from accruing, it could not and did not suspend the running of the Statute of Limitations during his life.

But if the estate tail was not absolutely barred when William Billingham (afterwards Woodroffe), took possession of the premises in 1790, and even if he was himself remitted to an estate tail as to that moiety of the premises, of which he was heir in tail under the settlement of 1710,—the contrary of which is contended for,—his entry operated in law to vest in him the possession of the other moiety of which

he was not heir in tail under the settlement, according to the title which he actually had thereto as devisee for life under the will of the testator George Woodroffe. The effect of William Woodroffe's acts, between the time when he took possession in 1790 and the date of the recovery of 1818, was to estop him and those claiming under him from setting up any title in him to the premises in question,—or at all events to that moiety of the premises of which he was not heir in tail,—adversely to the title of the devisees under the will of George Woodroffe. The right of the issue in tail, under the settlement of 1710, to the premises in question,—or at all events to that moiety of them,—was absolutely barred before the time when the recovery of 1818 was suffered.

Mr. Turner replied.

The following authorities were referred to and commented on in the course of the arguments:—

On the effect of the deed poll as a covenant to stand [827] seised, creating a base fee:—Co. Litt. 18 (a); *Machell v. Clarke*, 2 Lord Raym. 778, S.C. 2 Salk. 619, and 7 Mod. 18; *Roe v. Tranmer*, 2 Wils. 75; *Doe v. Salkeld*, Willes, 673; 1 Cru. Dig. 90, 4 Cru. Dig. 115, and 5 Cru. Dig. 395 (3d ed.); 1 Barton's Points in Conv. 92; Notes to *Took v. Glascock*, 1 Wm.'s Saund. 260; *Goodright v. Mead*, 3 Burr. 1703; *Stapilton v. Stapilton*, 1 Atk. 2; *Massy v. Batwell*, 4 Dru. and War. 58; *Doe dem. Lewis v. Davies*, 2 Mee. and W. 503. And that the base fee was devisable: *Doe dem. Cooper v. Finch*, 4 B. and Ad. 283.

On estoppel against G. Woodroffe's entry by reason of the recovery suffered by him in 1735; Co. Litt. 352; *Right dem. Jeffereys v. Bucknall*, 2 Barn. and Ad. 278.

On merger; *Amy Townsend's Case*, Plowd. 111; *Stone v. Newman*, Cro. C. 427; 2 Black. Com. 177; Cru. on Fines, 274; *Symonds v. Cudmore*, 4 Mod. 1; 3 Preston's Conv. 257, 341 and 345.

On entry and remitter: Statute of Uses, 27 Henry 8; Statute of Wills, 32 Henry 8; Littleton, ss. 659 (with Butler's note), 690, 693 and 695; Co. Litt. 163 b, 242 and 373 b; the Case of Fines, 3 Co. Rep. 87; *Hawtrey's Case*, Dyer, 191; Anonymous, Dyer, 351 b; *Penyston v. Lyster*, Cro. Eliz. 896; *Smales v. Dale*, and *Duncombe v. Wingfield*, Hob. 120 and 254; *Crompton v. Lord Morley*, Winch's Rep. 5; Bro. Abr., tit. "Entry;" Comyn's Dig., tit. "Remitter," B. 3, C. 6; Preston's Shep. Touch. 73; *Doe v. Prosser*, Cowp. 217; *Doe v. Pearson*, 6 East, 173; *Doe d. Barnett v. Keen*, 7 Ter. Rep. 386; *Curtis v. Price*, 12 Ves. 89 and 97; Sugden on Powers, 172.

On the operation of the Statutes of Limitations (21 Jac. I., c. 16, and 3 and 4 W. IV., c. 27, s. 12): *Otterrell v. Dutton*, 4 Taunt. 826; *Tolson v. Kaye*, [828] 3 Bro. and B. 217; *Doe dem. Thompson v. Thompson*, 6 Ad. and El. 721; *Culley v. Doe dem. Taylerson*, 11 Ad. and El. 1008, and 3 Perry and Dav. 533; *Nepean v. Doe dem. Knight*, 2 Mee. and Wels. 894.

On election under the will of G. Woodroffe, preventing remitter, equal to disclaimer: *Birmingham v. Kirwan*, 2 Sch. and Lef. 420; *Townson v. Tickle*, 3 Barn. and Ald. 31; and *Stacy v. Elph*, 1 Myl. and K. 195.

Lord Brougham, at the close of the argument:—This case has now occupied four days in argument, very usefully and instructively, because the case has been very ably argued. It is a case of very considerable importance to the law, because principles are ventilated and argued, founded upon opinions which are in the nature of first impressions; and it requires therefore a more careful consideration on the part of your Lordships before you finally dispose of it. I congratulate your Lordships on having the assistance of the learned Judges to guide our enquiries into these points, and I propose that you shall put this question to them: "In the state of titles and facts generally found by the special verdict, what estate or estates did the plaintiff in error take, and what estates did the defendant in error take?" This will, I think, embrace the whole case. At the same time I should not be dealing fairly with the case, and with your Lordships, if I did not add that there are certain points upon which I should wish to have the opinion of the learned Judges, though I do not expect them to answer them as if they were questions formally put to them by your Lordships. [His Lordship then proposed several minor questions, and said he expected to find in the [829] answers of the learned Judges great assistance in finally disposing of the main question.]

Mr. Baron Alderson (July 27).—My Lords, your Lordships have proposed the following question of law to her Majesty's Judges:—"In the state of the titles and facts generally found by the special verdict, what estate or estates did the plaintiff in error take, and what estates did the defendant in error take?" And I am now to deliver our answer, and the reasons for it to your Lordships.

It will not be necessary in this case to state the facts of the special verdict at length, because they are already very fully and correctly stated in the judgments of the Courts below (10 and 15 M. and W. 608 and 769). Nor, indeed, after the very elaborate manner in which the question has been discussed, both in the Court of Exchequer and afterwards in the Court of Error, will it be necessary to state at any great length the reasons for the answers which her Majesty's Judges have now to give to the question put to them by your Lordships.

We think, then, that it is clear, first, that by the deed poll of 1735, executed by Hester Woodroffe, a base fee was created. The case of *Macbell v. Clarke* (2 Ld. Raym. 778), seems to have decided this point. There it was held that a deed, which was a covenant to stand seised, being an innocent conveyance, created an estate of inheritance, or a base fee determinable on the failure of the estate tail; and the reasons assigned by Lord Holt for the decision in that case are plainly applicable to the present case. Indeed, this point has never been seriously contested in the arguments at the bar.

[830] It is, however, suggested, that, although this was so, this base fee merged in the reversion in fee, which, at the time of the execution of the deed creating it, was vested in George Woodroffe. But we think it did not, because the intermediate estate tail, which, being preserved by the Statute *De Donis*, was still subsisting, prevented, by its interposition, any such merger from taking effect. This was the state of things at the death of Hester Woodroffe. On her death, however, George Woodroffe entered into the estate. If this entry had been under ordinary circumstances, it would, no doubt, have put an end to the defeasible estate, the base fee previously created. But it is clear that here George Woodroffe took the defeasible title by his own act and consent; he was a party to the recovery suffered in consequence of and contemplated in the deed creating the base fee; and a person so taking the defeasible title cannot be remitted to his better title, being estopped by his own acts from setting it up. George Woodroffe, therefore, we think, remained holding the estate under the defeasible title which came to him, and the base fee continued until his death in 1779.

Then it appears that the trustees under his will entered and held the estate. The two coheirs in tail, the Reverend William Billinghamurst and Mrs. Caverley, made no entry at all, and so did not put an end to the base fee. But in 1790 a new state of things arose: William Woodroffe, the great nephew of George, then entered into possession, no doubt intending to claim under the will of George; but though this was his intention, we think the law is clearly established by the passage cited from Littleton, sect. 695, where he says, "If a man be disseised, and the disseisor let the land to the disseisee by deed poll, or without deed, for a [831] term of years, by which the disseisee entereth, this entry is a remitter to the disseisee. For in such case, where the entry of a man is congeable, and a lease is made to him, although he claims by words in *pais*, that he hath estate by force of the lease, or saith openly that he claimeth nothing in the land but by force of such lease, yet this is a remitter to him, for that such disclaimer is nothing to the purpose." In truth the entry of the party always operates to restore him to his older and better title, whatever he may intend to do when he enters. This point is fully argued, and we think satisfactory reasons are assigned for it, in the judgments of both the Courts of Exchequer and Exchequer Chamber, to which we do not wish to add anything.

It is true, however, that, if by the operation of the Statute of Limitations, William Woodroffe's right of entry, as co-heir in tail, had been taken away, his entry into the estate might not have had this operation. But the facts of the case give an answer to this difficulty. The true construction of the Statute of Limitations is to hold that it bars those only who, having an available right of entry, have omitted during the statutable period of twenty years to exercise it. Now in this case no one had an available right of entry till 1779; for although Hester Woodroffe

died in 1769, yet on her death George Woodroffe, being estopped by his own acts, as we have before mentioned, had no available right of entry as heir in tail. On his death, however, in 1779, the time of limitation began to run. But then in 1790, when William Woodroffe entered, only eleven years had elapsed; it was therefore quite competent for William Woodroffe, had any one else then been in possession under George's will, to have made an entry, and asserted his right as tenant in tail; and [832] his entry in 1790 must therefore, we think, have that effect given to it.

William Woodroffe, therefore, in 1790 was, as we think, remitted to his older and better title, according to the rule of law stated by Littleton. What then was the title which he so had? He was one of the coheirs in tail, and entitled under that to a moiety of the estate; as to the residue, he had only the defeasible title, the base fee. Mrs. Walker was the other coheir, and entitled as such coheir to have entered and defeated the base fee as to her moiety. The reason assigned for the remitter taking place as to the estate of William Woodroffe is hardly applicable to her. For though William Woodroffe could not sue himself by a writ of formedon, and therefore must be in by his remitter, this reason is plainly inapplicable to Mrs. Walker's case.

It is indeed said that the entry of one coparcener is an entry of both, and that so the entry of William Woodroffe, by which he was remitted, was an entry also by Mrs. Walker, and therefore that she also was remitted as to her moiety, and the whole base fee defeated; and for this *Smales v. Dale* (Hobart, 120) was cited. It may be well doubted whether the third manner of entry by a coparcener, mentioned by the court there, viz., an entry where one coparcener claimeth the whole expressly (which is the present case, for William Woodroffe here clearly entered under the then supposed good title created under Hester and George Woodroffe's deed and recovery), could be an entry by the other coparcener at all. For Coke Littleton, 373, seems quite contrary to this extrajudicial opinion of the Judges in *Smales v. Dale*. But we agree with the Court of Exchequer Chamber in thinking, that after the statute [833] 3d and 4th William the 4th, chapter 27, section 12, this cannot be so. There seems no doubt that this statute has a relation back, and makes the possession of one coparcener no longer the possession of the other. If so, the possession of William Woodroffe here was not the possession of Mrs. Walker at all; and therefore, although by that possession he was remitted to his older and better title, in order to avoid the absurd consequence of his being reduced to sue himself if he wished to hold the estate under it, yet Mrs. Walker not being in possession, and not having entered so as to defeat the base fee under which William Woodroffe held the other moiety, the base fee as to this moiety still remained in William Woodroffe till defeated. It is not necessary to go further, for the mere lapse of time, independently of the acts done by Mrs. Walker and those claiming under her, have now made the base fee no longer defeasible as to this moiety of the estate.

The answer, therefore, which we propose to give to your Lordship's question is, that George Woodroffe, the defendant in error, takes an estate for life in a moiety of the estate, inasmuch as William Woodroffe, his brother, had that moiety as tenant for life only under the will of George Woodroffe, the base fee as to that moiety never having been defeated, and that the plaintiffs in error take the other moiety in fee.

Lord Brougham.—I am sure your Lordships feel much indebted to the learned Judges for the great attention they have bestowed on this nice and difficult case,—nice and difficult, I mean, in some parts of it, though I confess that I, while attending to the argument, held the opinion at which the learned Judges have arrived. I had much communication with them in the course of the argument, and I took leave, besides [834] the main question submitted to them,—I took leave, for the purpose of more fully elucidating the subject, to call their attention to certain points which I put in the form of queries, as to whether George Woodroffe took a base fee, or an estate *pour autre vie*, that is, determinable on the death of Hester; secondly, upon the question of merger; thirdly, upon the point of estoppel; and, lastly, upon the question of the application of the old Statute of Limitations, and the statute of 1833 (3 and 4 Will. 4, cap. 27), an act which I brought in at the recommendation of the Real Property Commissioners.

I have now had the advantage of hearing, in common with your Lordships, the

opinion of the learned Judges, delivered by my learned friend Mr. Baron Alderson, and I have been favoured also with the written answers of two of the learned Judges to the additional quaeries, in which answers all the others coincide, and they came to the opinion to which I expected they would come from what passed at the hearing. But it was fit that these points should be all maturely considered; for this is a case which will be hereafter cited as having a great and important influence on this branch of the law of real property.

Although I am prepared now to move your Lordships to give judgment in accordance with the opinion of the learned Judges now delivered, I think it will be as well to look into the printed cases before we apply that opinion to the law, for which reason I propose that it shall stand over till Monday next, and that the opinion now delivered be printed in the mean time.

Lord Campbell.—I have no doubt that your Lordships will be governed by the opinion of the learned Judges, which has been delivered in a manner so highly satisfactory by the learned Baron; but I quite agree with my noble and learned friend that the proper course will be to have this opinion printed, and that the case may be further considered on Monday.

Lord Brougham (July 31).—This case was argued before the learned Judges when I occupied the chair, in the absence of my noble and learned friend the Lord Chancellor; my noble and learned friend Lord Campbell also was present. We had a good deal of argument with the learned counsel at the bar, and a good deal of discussion with the learned Judges, whose invaluable assistance we had the advantage of having. To nine different quaeries which I put to the learned Judges they have given their opinion. It was in order to have a *constat* upon the points which we discussed among ourselves, while the argument was going on at the bar, that I put them those questions. [His Lordship stated the substance of the questions.]

All those points were put to the learned Judges, and having been considered by them, the result of their opinion is, that the plaintiff in the first writ of error is entitled to one moiety of the lands in question, and the defendant to the other moiety. That satisfies the plaintiff in the first writ, but the defendant is not quite satisfied with that. The ejectment was brought against him to disturb his title in both cases. Then the result is that he brings his, the second writ of error, and he is minded to have possession of the moiety which the judgment of the court below and of the learned Judges gives to the plaintiff in the first writ.

The result appears to me, agreeing, as I entirely do, with the learned Judges in their opinion upon all the [836] points, to be, that the parties, as it were, quit the court, so to speak, as they came into it. That the plaintiff in each writ of error fails, and the defendant in each keeps his moiety, that is, both parties retain each his moiety. That results, therefore, in this, that I have to recommend to your Lordships, agreeing with the learned Judges, to pronounce for the defendant in error in both cases.

Lord Campbell.—I entirely agree with the opinion delivered by Mr. Baron Alderson, in his own name, and that of six of his absent brethren. There is no difficulty in applying it to the record. There were eight Judges present when the case was argued. We are unfortunately prevented, by death, from having the opinion of one of them, my learned friend Mr. Justice Coltman. He at one time, as I have understood, entertained doubts upon the subject, and his having entertained such doubts made me hesitate, because he certainly was a very profound lawyer; but I am very glad to hear that his doubts were removed, and that the learned Judges are unanimous in the opinion delivered to us. I entirely concur in it, and I agree with the recommendation of my noble and learned friend.

Lord Brougham.—I furnished my noble and learned friend with the queries which were put to the learned Judges, so that the whole subject has been brought before him.

The judgment of the House will be for the defendant in error in each case. That is, the judgment in the Exchequer Chamber stands, correcting the judgment of the Court of Exchequer. We say nothing of the costs, because those on one side balance those on the other.

[837] The Rev. WILLIAM HAMILTON DRUMMOND and Another,—*Appellants*;  
The ATTORNEY GENERAL for IRELAND, at the relation of GEORGE  
MATTHEWS and Others,—*Respondents* [Feb. 24, 28, and 29, March 2 and  
6, 1848; July 31, 1849].

[Mews' Dig. iii. 260, 330, 382. S.C. 14 Jur. 137; in Ch., 1 Dr. and War. 353; and  
cf. 3 Dr. and War. 165. See *Westwood v. M'Kie*, 1869, 21 L.T. 167; *Shore*  
*v. Wilson*, 9 Cl. and F. 355, and note thereto.]

*Deed of trust—Protestant Dissenters—Unitarians—Evidence.*

In the year 1710 certain members of Protestant Dissenting Congregations in Ireland subscribed sums of money for charitable purposes, and for the management of the fund executed a deed, which recited that the objects of the trusts thereof were; 1st, to support the Protestant Dissenting interests against unreasonable prosecutions; 2dly, to educate youth designed for the ministry among Protestant Dissenters; 3dly, to assist poor Protestant Dissenting congregations; and 4thly; for such other pious and religious ends, and by such means as the subscribers should think proper for promoting these objects:

Held—affirming the judgment of the Court of Chancery in Ireland—that Unitarian Protestant Dissenters were not within the trusts of the deed.

The terms "Protestant Dissenters" not having acquired a known legal meaning in 1710, evidence may be received to shew what was their meaning in a deed of that date,—such as contemporaneous documents and usage, the acts of the party, and the circumstances in which he was when he made the deed, but not his particular opinions or declarations.

Although contemporaneous usage and long enjoyment afford grounds for the interpretation of doubtful words in a trust deed, they give no sanction to a breach of trust.

A decree, which declares Trinitarian Protestant Dissenters only to be entitled to a trust fund, is right in removing from the trust such of them as concurred in the mis-application of the fund.

This appeal was brought against a decree made by Sir Edward Sugden, Lord Chancellor of Ireland, in the year 1842, in a suit instituted there, by information at the relation of the respondents, for the purpose of regulating a charity founded in Dublin in the year 1710, for the benefit of "Protestant Dissenters." By the [838] decree it was declared that Unitarians were not entitled to participate in the charity. (3 Dru. and War. 165.)

The information (filed in April 1840) stated, among other things, that on the passing of the Act of Uniformity (17 and 18 Car. II., cap. 6), several Presbyterian ministers, then in the enjoyment of parochial benefices in Dublin and other parts of Ireland, having declined to conform to the provisions of that statute, withdrew from their parochial cures, and with some of their parishioners, formed five Non-conforming or Protestant Dissenting congregations, agreeably to the Presbyterian form and discipline, and erected five meeting-houses in Dublin, viz., in Wood Street, in Cook Street, in New Row, in Plunket Street, and in Mary's Abbey: That these five congregations, being all agreed upon the doctrine of the Trinity as an essential article of faith, and their ministers having selected Godly persons out of their respective congregations as elders, after the manner of the Presbyterian Church, united in an ecclesiastical association, called a Presbytery, for the government of their internal affairs, known by the name of "The Dublin Association or Presbytery;" and that from their origin to the year 1702, the ministers of these congregations regularly taught and preached the doctrine of the Trinity: That in 1702, the Rev. Thomas Emlyn, minister of the Wood Street congregation, having avowed that he held Unitarian opinions, was removed by the Presbytery from the pastoral charge of the congregation, and was subsequently prosecuted, found guilty, and sentenced to fine and imprisonment for having promulgated Unitarian doctrines in a book entitled "An Humble Inquiry into the Scripture Account of Jesus Christ:" That the



Presbyterians or Protestant Dissenters in Ireland, from the time of [839] their separation from the Established Church in 1665, were all, except Mr. Emlyn, agreed amongst themselves, and with the Established Church, upon articles of faith and the objects of Christian religious worship, dissenting from the then Established Church only upon questions of Church government.

The information further stated, that in the year 1710, Sir Arthur Langford, with others, members of the said five congregations, and believers in the doctrine of the Trinity, subscribed large sums of money for the charitable purposes thereafter set forth, and that in order to secure the due management of the fund so formed, the founders thereof executed a deed of trust, dated the 1st of May, 1710, which recited that, "from a pious disposition and concern for the interest of our Lord Jesus Christ, and the welfare of precious souls, Sir A. Langford and Joseph Damer, Esq., with divers other well-disposed Christians, had designed and intended to set on foot a stock or fund for the support of religion in and about Dublin and the south of Ireland, by, first, assisting and supporting the Protestant Dissenting interest against unreasonable prosecutions, some of which they had lately been exposed to; secondly, for the education of youth designed for the ministry among Protestant Dissenters; thirdly, for assisting Protestant Dissenting congregations that were poor, and unable to provide for their ministers; and fourthly, for such pious and religious ends, and by such means, as should by the subscribers thereunto be thought proper and reasonable, for promoting the design and intention therein expressed: And that the several subscribers had mutually engaged to employ the utmost of their integrity and faithfulness, with all necessary care and diligence, in the pur-[840]-suit of the rules and methods thereafter unanimously agreed to by them, and which should or might be thereafter added, for the accomplishing and carrying on so good a work."

The deed then stated twelve rules or provisions (all which were set forth in the information) for the management of the fund then subscribed, and such additional funds as should from time to time accrue. The third rule proceeded thus: "and since a corporation by charter is not on this occasion to be expected or attempted, and seeing deeds of trust and conveyances are still liable to many contingent hazards and inconveniences, it seems best to place the great security of the present undertaking (next to the blessing and protection of God) upon the faithfulness and integrity of the persons herein named to be trustees, being the ministers of the several Dissenting Protestant congregations associated in Dublin, and two out of each of their congregations, and the other persons hereinafter named, viz., the Rev. Mr. Joseph Boyce" (then followed the names of nine other ministers of the five congregations, and ten members thereof called elders, and seven other persons, also called elders, who subscribed large sums), "whom we do hereby constitute, etc. trustees and managers of the said fund, together with all and every the additions that shall be made thereunto; and that they, or the major part of them, being eleven at least of the whole number, duly summoned, who shall be in and about the city of Dublin, shall order, manage, and set out at interest, or otherwise to the best advantage, as to them shall seem most fit, the present fund, together with the additions and revenue thereof from time to time, to the uses, intents and purposes aforesaid." The eighth rule provided for a succession in the [841] trusteeship, by covenanting that, "as often as any of the said members" (the ten ministers and ten elders) "die or be displaced, that in the room of a minister, such other minister as shall regularly succeed to such congregation, shall succeed to the said trust; and in room of any of the said members of a congregation, one of the said congregation shall be chosen by ballot,—all which shall be done by the unanimous agreement of the said trustees, or three-fourths of them present," etc. The ninth rule was to the effect that as often as any deed, gift, etc. should be made for the use of this fund, it would be advisable "that it be made to two of the trustees, not ministers, and that it be expressed to be made to them, to such pious and charitable uses as they should think fit, without any mention of this fund; and that thereupon the same, as well as any already made, shall be taken to be to the uses of this fund, and under the regulations therein mentioned." The tenth rule was, that when any such deed or grant as aforesaid, be made, or any security by bonds, mortgages, etc., be taken, the same should be made to two of the said trustees, not ministers, and not many to the same persons. The eleventh rule required newly-elected trustees to endorse on the deed their

acceptance of the trust, and to act with the other trustees with all diligence and faithfulness in the execution of the trust, according to the covenants and rules in the deed mentioned; and the twelfth provided for the investment of the fund, then amounting to £1500—"which sum, with the interest and increase thereof, with what additions should be made thereto by any person whatever, the trustees" (after declaring their acceptance of the trust), "promised and declared should be and remain to the uses, intents and purposes aforesaid; and that they would from time to [842] time, follow the articles and rules as prescribed, and which should afterwards be added for the better government of the fund and the registry of the donors and their subscriptions, and for executing the trust, and every particular with the utmost fidelity."

The information further stated, that all the original trustees believed in the doctrine of the Trinity, and that up to a recent period the entire income of the fund was applied, according to the trusts of the deed, for the benefit of Trinitarian Protestant Dissenters; that the Wood Street congregation had united with that of Cook Street, and removed to a meeting-house in Strand Street; that the congregation of New Row had removed to Eustace Street, and the congregation of Plunkett Street had joined a congregation of Trinitarian Presbyterians on Usher's Quay; that the said congregations of Strand Street and Eustace Street, lately abandoning their ancient faith, had adopted what are called Unitarian opinions, and the Reverend Joseph Hutton and Dr. Ledlie, ministers of Eustace Street, and Dr. Drummond, minister of Strand Street, congregations, taught and preached Unitarian doctrines, and the lay elders and members of these congregations were of the sect called Unitarians; but that the ministers, elders, and members of Mary's Abbey and Usher's Quay congregations, still maintained their ancient faith, being Trinitarian Presbyterians.

The information then submitted, that according to the true construction of the said deed, it was inconsistent with the trusts thereof to apply any part of the funds in aid of teachers of doctrines at variance with belief in the Trinity, or with belief in the divinity of Jesus Christ, yet that the greater part of the income of the trust fund was applied by the present trustees,—[843] the majority of whom were Unitarians,—to the propagation of Unitarian doctrines, at variance with the Trinity as held by the Established Church, and by the said five Protestant Dissenting congregations, at the date of the trust deed. And the information, after stating the alleged misapplications of the trust fund, prayed that the charity might be established according to the true construction of the said deed; that it might be declared that ministers and preachers of what is commonly called Unitarian belief and doctrine, or persons entertaining such religious opinions, were not fit objects of the charity; that all allowances thereout to Unitarian preachers should be discontinued; that it might be declared that such Protestant Dissenters only as are commonly called Trinitarians, could be considered as coming within the intent of the founders; and that such of the trustees as should be found to hold doctrines at variance with those of the founders, might be removed from the trust, etc.

All the trustees of the charity (reduced to twenty), were made defendants. Fifteen of them joined in one answer, and,—admitting that eleven of these, including the appellants, were Unitarians,—(the other four being Trinitarians)—they said they could not set forth whether the original ministers of the said five congregations all agreed upon the doctrine of the Trinity as an essential article of faith, but believed some of them did; and they denied that all Protestant Dissenters in Dublin, from the year 1665 to 1735, (except the Rev. Mr. Emlyn), were agreed among themselves and with the Established Church upon articles of faith (as stated in the information), and they insisted that the only principle recognized by them as fundamental was the rejection, in matters of religion, of human authority, and of all creeds and tests, [844] and the recognition of the Bible alone as the rule of faith. They further answered that, according to the true construction of the deed of May 1710, the trustees were not restricted in the application of the funds to any particular sect of Protestant Dissenters, and that it was not inconsistent with the trusts thereof to apply portions of the funds in aid of Protestant Dissenters who taught or preached Unitarian doctrines; and that it did not appear from the deed to have been the design of the founders of the charity to exclude Unitarians from its benefit.

The other five defendants, all Trinitarians, put in separate answers, but took no further step in the cause.

A large body of evidence, consisting, in a great part, of historical documents, and extracts from sermons and theological and controversial works published by the original trustees, ministers of the five Dublin congregations, prior and subsequent to the foundation of the charity, was received (see 1 Dru. and War. 363, 381). The other evidence, given by the relators, was directed to prove that the founders and original trustees, and their successors for a long time, were not merely Trinitarian Protestant Dissenters, but that they had in various ways manifested the utmost abhorrence of Unitarians and their doctrines.

By the decree, dated Nov. 1842, it was declared (3 Dru. and War. 165) that ministers or preachers of what is commonly called Unitarian belief and doctrines, and the students and congregations and others holding, or professing to hold, Unitarian belief and doctrines, are not fit objects of, and are not entitled to participate in, the trusts or the funds created by the deed of 1710, and that the said defendants (eleven Unitarians, and the four Trinitarians who concurred with them in the application of the funds) be removed from being trustees or managers of the cha-[845]-rity; and it was referred to the Master to appoint proper persons to be trustees in their place, in conjunction with the five remaining trustees (Trinitarians who did not concur with the former); and the Master was to take the usual accounts, and all the parties were to be paid their costs out of the charity funds.

The income of the charity, consisting of lands near Dublin, purchased with the trust funds, and of money in the public stocks, was about £700 a-year at the date of the decree.

The appeal was brought by two of the Unitarian ministers and trustees.

Mr. Rolt and Mr. Roundell Palmer for the appellants.—This charity, from its foundation in 1710 to the date of the decree, continued to be managed by the successive ministers of the five Dublin congregations, the principal founders of it, and by the lay members of these congregations, elected from time to time for the purpose, according to the provisions of the deed of trust. The information was not filed by members of these congregations, but at the relation of George Mathews and other Presbyterians, wholly unconnected with them, claiming the charity for their own sect exclusively. There was no clause or provision in the deed of foundation indicating an intention to confine the charity to that, or any other sect of Protestant Dissenters. The deed recites that the charity was designed by Sir A. Langford, J. Damer, and other well-disposed Christians, for the support of religion in Dublin and in the south of Ireland; *first*, by assisting the "Protestant dissenting interest" against unreasonable prosecutions; *secondly*, by the education of youth for the ministry among "Protestant Dissenters;" *thirdly*, [846] by assisting "Protestant Dissenting Congregations," poor and unable to provide for their Ministers; and *fourthly*, for such other "pious and religious ends" as the subscribers should think proper. Unitarians as well as Presbyterians were, or might be, comprised in each of these descriptions of the several objects of the charity: they were, like all other "Protestant Dissenters," liable to prosecutions as being contrary to law, there being no toleration-act in Ireland until the year 1719; they were "poor Protestant Dissenting Congregations," and any aid to them fell within "the pious and religious ends" of the subscribers.

The first objection to the decree is, that the charity was illegal at the period of its constitution. Protestant Dissenters in Ireland, whether Unitarians or Trinitarians, had then no legal *status*; they were in the same position as Roman Catholics were before the passing of the Emancipation Act (1829,) and all trusts for the protection or promotion of their religious principles were void. The language of the deed of trust in this case shews plainly that the subscribers and founders were aware of the illegality of the charity (see the 3d and 9th Rules, *supra*, pp. 840-1). There were in force in Ireland several Acts, in effect preventing the recognition and the existence of *any* Dissenters from the Established Church (2 Eliz. cap. 2; 17 and 18 Car. II., cap. 6, and 2 Anne, cap. 6). That was the state of the law until the passing of the Toleration Act, (6 Geo. I. cap. 5, Irish) in 1719, which recognised, and, to some extent, relieved Protestant Dissenters without distinction of sect, upon taking the several oaths and the declaration therein prescribed. The benefit of that act, it is true, by the 13th section of it, was not to extend to any person who, by *preaching or writing*, [847] denied the doctrine of the Trinity as it is declared in the thirty-nine articles. But as

the act did not require subscriptions to any doctrinal article of the Established Protestant Church, Unitarians had from that time a legal existence, upon taking the prescribed oaths, if they did not *write* or *preach* against the Trinity.

That being the effect of the act of 1719, the question arises, was it retrospective, so as to make valid this charitable trust of 1710, which was unquestionably invalid at the time of its creation? Two cases were cited in the Court below on that point: *Bradshaw v. Tasker* (2 Myl. and K. 222), and *The Attorney General v. Todd* (1 Keen, 803). In the former Lord Brougham (Chancellor) held that legacies given in 1823 in trust for Roman Catholic Schools, a trust then invalid, were made valid by the subsequent Act, 2 and 3 Wm. IV., c. 115, for securing charitable bequests of Roman Catholics, which, in connection with the Emancipation Act in 1829, his Lordship declared to be retrospective. Doubts have been entertained on the correctness of that decision; but, supposing it correct, it is quite consistent with it that the Irish Toleration Act (1719) was not retrospective, and that was the opinion of the Lord Chancellor of Ireland (1 Dru. and War. 380), and he is supported therein by the case of *The Attorney General v. Todd*. In that case an information was filed in 1831, before the passing of the Act 2 and 3 Wm. IV., c. 115, to establish an old gift in trust for a Catholic charity; the Master of the Rolls held the trust to be invalid; but, seeing that the purpose of the gift was charitable, he recommended that an application be made to the King, for his sign manual, to appoint the uses of the gift. The appellants submit that that is the proper [848] course to be adopted in respect of the trust funds in this case. There is no question that the purposes were charitable.

The Lord Chancellor of Ireland, instead of following the precedent of *The Attorney General v. Todd*, was of opinion that, in consideration of the very long enjoyment by the trustees—though the trust was illegal when created,—and that their disability was now by law removed, the Court was warranted in executing the trust (1 Dru. and War. 380). But this trust, being for a charity, and admitted to be illegal in its creation, the right of the Crown, under sign manual, to apply the charity attached, and the Court had no jurisdiction. The Crown would, no doubt, be influenced in the application of the charity in favor of Unitarians, by considerations of their long enjoyment, and that they and their preaching, their chapels and congregations, are now legalized. So also if the Court, in taking the Charity under its own jurisdiction, is to give effect to the lapse of time and long enjoyment, its decree should have directed the regulation of the trust on the same footing on which it had been so long administered. It is admitted that the trustees of the fund, for 120 years at least, consisted of persons, more than one half of whom held anti-Trinitarian opinions. All these are excluded by the decree, although it is on their long possession and enjoyment that the title of the persons to whom the whole benefit of the trust is by the decree transferred, is founded. If possession and enjoyment of the fund for so long a time ought to govern the future possession and enjoyment of it in any way, it ought to be for the purpose of securing it to those who so long held it. There is an inconsistency in refusing to enforce the [849] law strictly from an unwillingness to disturb long enjoyment, and then proceeding to disturb that long enjoyment in order to give effect to the supposed original intention, which at best was illegal.

The trust funds have been admirably managed; there was no complaint on that ground, nor imputation cast on the trustees, who have been, since 1740, if not from the foundation of the charity, persons who have held the same religious opinions in respect of Unitarian doctrine and belief as those who are excluded by the decree. Though the majority of them lately were Unitarians, more than two-thirds of the income of the charity was distributed among Trinitarians. It was the opinion of all parties from 1710 to the time of filing the information, that the trust was of a general nature, including Unitarians and Trinitarians and other Protestant Dissenters. The descriptions of the beneficiaries of the charity in the deed of trust were of the most general nature; the terms "Protestant Dissenters" and "Protestant Dissenting Congregations," include all classes of Protestants,—Protestants as against the Church of Rome and Dissenters from the Established Church; members of both these churches, by the terms of the deed, were excluded.

If the House should be of opinion that the charity was not illegal, then there is no ground for excluding Unitarians from participating in it. They are included in the comprehensive descriptions in the deed. It cannot be said that they are not "Chris-

tians," although it is to be observed that in the deed, "well disposed Christians" were appealed to rather as the contributors or donors, and "Protestant Dissenters" and "Dissenting Congregations" were to be the donees or beneficiaries of the charity. Unitarians were comprehended among "Protestant Dissenters" as effectually as [850] Presbyterians or Trinitarians. No evidence can make the terms "Protestant Dissenters" more intelligible; they have acquired a legal meaning from various Acts of Parliament, and are as incapable of definition as the term "heir-at-law." There was no expression in the deed of trust to control or restrain their ordinary legal meaning. When terms of an uncertain meaning occur in the construction of a deed or will, evidence may be received of conventional and contemporaneous usage of them, of acts of the party, and the circumstances in which he was placed when he executed the instrument. But when terms, as in this case, "Protestant Dissenters," have acquired a fixed legal meaning from Acts of Parliament, no evidence, not even of surrounding circumstances, is admissible to explain them. That doctrine is laid down by the Judges of the Court of King's Bench, in *Smith v. Wilson* (3 Barn. and Ad. 728), and more recently in the case of *Lady Hewley's Charities* (9 Cl. and F. 355), by the Lord Chancellor in moving the judgment of this House, and also by several of the Judges who delivered their opinions on that occasion. The words "Godly preachers of Christ's holy Gospel," contained in the deed in that case, had no known meaning, never having occurred before in any instrument, and consequently required explanation; but "Protestant Dissenters" are found in numerous Acts of the Legislature, and have a known legal meaning (see Irish Acts, cited *supra*, p. 846, and 11 G. 2, c. 10; 19 and 20 G. 3, c. 6; and 21 and 22 G. 3, c. 25).

The Lord Chancellor of Ireland, however, thought there was some ambiguity in the description, and accordingly he received evidence to aid him in the construction of the deed. The inconvenience of that [851] course is quite manifest when applied to the construction of an instrument which is of itself capable of a sensible construction.

The evidence upon which the Court below founded its construction, consisted chiefly of the published works of Mr. Emlyn, "An Humble Inquiry," etc., and "The narrative" of the legal proceedings taken against him, of which he stated that the Protestant Dissenters of Dublin were the most zealous promoters: and the inference drawn from that circumstance was, that Unitarians, being regarded with horror by those Protestant Dissenters, could not have been among the intended objects of the charity. That Mr. Emlyn was tried and convicted of blasphemy for *holding* Unitarian doctrine there is no question; but it is equally certain that the conviction was erroneous. Whatever might have been the state of the law at that time as affecting Unitarians, it is admitted that they have been for a long time capable of partaking of a charity founded for Protestant Dissenters; that was settled in respect to Unitarians in England, by the answers of all the judges to the sixth question put to them in the case of *Lady Hewley's Charities* (9 Cl. and F. 509, 524, 539, 544, 556, 565, and 578). Protestant Dissenters, including Unitarians, are put on the same footing in Ireland by the several acts passed for their relief, from that of 6 Geo. I., c. 5, the Irish Toleration Act, to the Dissenters' Chapels Act, 7 and 8 Vict., c. 45.

The authors of this trust, consisting of the ministers and members of the five Dublin congregations, must have been well aware of the existence, at that time, of anti-Trinitarian opinions to a great extent, in Dublin and elsewhere in Ireland. The trial and conviction of Mr. Emlyn had then recently (1703) taken place. [852] Numerous publications and controversial tracts, from the year 1690, had attracted the public attention, and excited men's minds in a violent degree. It is impossible to believe that, if the founders of this charity intended to exclude persons holding anti-Trinitarian opinions from its benefits, they would leave such intention unexpressed in the deed. The true interpretation of their silence on the point is, that they had no particular sectarian views in establishing the trust, their motive being to have a fund available for the protection of the civil rights of all Protestant Dissenters, without reference to doctrine, against the prosecutions of the Episcopalians. That was the first and the principal object of the trust, to which the other objects were subordinate. The five congregations of Dublin were called "Protestant Dissenters," not "Presbyterians," as the Trinitarian Protestants of the north of Ireland were called. These insisted on the adoption of a creed or articles, but the Protestant Dissenters in Dublin, and of the

South of Ireland, repudiated all creeds and doctrinal subscriptions. The debates between the two bodies, for many years, on the subject of obtaining a legislative toleration, developed the differences which existed between them in regard to subscription to creeds and tests, and the Toleration Act was obtained at last, in 1719, without subscription to any test.

Of the five congregations, whose ministers and members founded this charity by way of a defence fund for themselves and their posterity, three have become Unitarians. It is impossible to ascertain the period when the change of opinion began, or when or by whom the first breach of trust, as declared by the decree, was committed. The present trustees are the ministers and members of the congregations, the successors and representatives of those who established the trust fund; they are the persons contemplated by the founders as the parties who should succeed to the trust; they can all trace an unbroken succession to the original founders and trustees, from whom several of them are lineally descended. If the decree removing these trustees be upheld, how can their places be supplied conformably with the deed of trust, which requires that the ministers of the congregations, *ex officio*, and lay members or elders, by election, should be the trustees perpetually? The effect of the decree is to deprive these three congregations of all connection with, and benefit from, the trust fund. The trustees representing the other congregations, that of St. Mary's Abbey, and another, are continued in the trust on the ground that they are Trinitarians, and did not join the Unitarian trustees in their answer, justifying their application of the trust funds. These, however, cannot be the only trustees of the charity; so that if the decree be upheld, some foreign bodies, strangers to the trust, must be introduced into the administration of it. It is also to be observed, that among the removed trustees are four Trinitarians, who joined in the answer with the eleven Unitarians. A decree which declares that Trinitarians only are entitled to the administration and benefit of the trust, and yet removes trustees of that class of Protestant Dissenters, is inconsistent, and cannot be sustained. It is submitted that the decree is altogether wrong, and ought to be reversed.

Mr. Kindersley and Mr. Malins for the respondents, after noticing that the appeal was brought by only two of the removed trustees, both Unitarian ministers, pro-[854]-ceeded to maintain the following propositions; First, that the founders of the charity were all Trinitarians and Presbyterians, and the evidence received in the court below, to show the founders' intention and in explanation of the terms "Protestant Dissenters," was rightly admitted (*The Attorney-General v. Pearson*, 3 Meriv. pp. 400, 401, 418, 420, and *Shore v. Wilson*, 9 Cl. and F. p. 355): Secondly, that at the date of the deed of trust, there were no Unitarian congregations in Dublin or in the south of Ireland, and persons who professed Unitarian opinions were regarded by the Protestant Dissenters of Dublin with the utmost abhorrence (Emlyn's *Narrative*, *passim*). Thirdly, that the application of any part of the trust funds for the benefit of Unitarians was inconsistent with the scope and language of the trust deed, which should be construed according to the intention of the founders (*Craigdallie v. Aikman*, 1 Dow, p. 6, and *Attorney-General v. Pearson*, 3 Meriv. p. 400): Fourthly, that it was not competent to the appellants, after their long enjoyment of the charity, to argue that it was illegal in its origin; that such illegality was not adverted to in their answers or arguments in the Court of Chancery, but was the suggestion of the Lord Chancellor of Ireland, who nevertheless maintained the charity (1 Dru. and War. p. 753); and fifthly, that the purposes of the trust fund, as expressed in the deed, were perfectly legal, that these purposes were not for universal benevolence, as suggested by the appellants, but for the protection and maintenance of Trinitarian Protestant Dissenters, whose ministers were recognised and remunerated by stipends from the Crown, and annual grants from the Irish Parliament. The arguments and authorities cited by the learned counsel in support of [855] these propositions, were nearly the same as those used for the respondents in the case of Lady Hewley's charities (9 Cl. and F. p. 480 to p. 497)—which, they submitted, was, in most of its points, similar to this, and the judgment of the House in it ought to govern their Lordships' judgment in this case.

Mr. Rolt, in reply, again contended that the trusts were illegal originally, and that no Court would execute trusts illegal in their nature; *Attorney-General v. Pearson* (3 Meriv. p. 399); that the only way to give effect to such a charity was, by recom-

mentation of the Attorney-General to the Crown to appoint by sign manual the objects of the charity, as was done in the case of the *Attorney-General v. Todd* (1 Keen, 803); that if the charity was to be maintained, that class of persons, who and whose ancestors had so long administered and participated in the charity, ought, on the grounds of contemporaneous usage, long enjoyment, and prescription, to be favored; that if choice was to be made between two classes of claimants to the benefit of a trust fund, in its nature illegal, the class that could shew long and undisturbed possession should be preferred, but the appellants did not, as the respondents did, claim exclusive title; that the terms "Protestant Dissenters" having acquired a fixed legal meaning from numerous Acts of Parliament (*vide supra*, p. 850), as comprising Unitarians, evidence even of surrounding circumstances to explain their meaning in the trust deed was inadmissible, and that the House could not, in deciding this case, be governed by previous decisions, the only previous cases in *pari materia* being the *Attorney-General v. Pearson*—and *Shore v. Wilson*, which were cases of valid trusts, and were [856] decided on the grounds of mis-application of the funds, and the evidence in them both was properly admissible in explanation of words of uncertain meaning, as "for the worship and service of God" in the former, and "Godly preachers of Christ's holy Gospel" in the latter; but if for either of these phrases, the words "Protestant Dissenters" were substituted, there could be no dispute as to their meaning, and evidence could not be received.

In support of these arguments he read passages from Milton, Locke, Drs. Arnold and Hampden; and, as to the inadmissibility of the evidence, he referred to the opinions of the Judges, in answer to the first of the six questions put to them in the case of *Wilson v. Shore* (9 Cl. and F., pp. 499, 511-14, 555-60, and 565).

Lord Brougham (July 31, 1849).—I attended at the hearing of this case with my noble and learned friend near me (Lord Campbell) and my noble and learned friend Lord Cottenham, whose absence, on account of indisposition, we have to lament. He has, however, considered this case, and after communicating with us on the subject, he has sent me a corrected copy of his judgment, which I will read to your Lordships, and in which I entirely coincide. The case is of great importance; and whatever opinion we might have had before the case of Lady Hewley's Charities, I do not consider that we can do otherwise than the Court of Chancery in Ireland did, that is, to follow the principles laid down in that case.

His Lordship then read Lord Cottenham's judgment, as follows:

"It appears to me that the rules and principles [857] acted upon in the case of Lady Hewley's Charities, govern the present. The cases indeed are very similar. In Lady Hewley's Charities, the principal question was, the meaning of the founder's words, 'Godly Preachers of Christ's Holy Gospel;' and whether Unitarians were included in that description. In the present case the question is the meaning of the founders' words, 'Protestant Dissenters;' and whether Unitarians are included in that description. In Lady Hewley's Charities, the evidence used below embraced a wide range, much of which was probably not properly receivable; but there was sufficient evidence free from all objection to enable the Judges and this House to come to a satisfactory conclusion upon the meaning of the words, and the disqualification of Unitarians.

"In commenting upon the opinions delivered by the learned Judges upon the question of the admissibility of evidence in the case of Lady Hewley's Charities, I observed that the evidence which went to show the existence of a religious party, by which the phraseology found in the deed was used, and that Lady Hewley was a member of that party was clearly admissible, being in effect no more than evidence of the circumstances by which the author of the instrument was surrounded at the time (9 Cl. and F., p. 580). The appellants, in this case, indeed, attempted to distinguish the two cases, upon the ground that, although no distinct meaning could be attributed to the mere words, 'Godly Preachers of Christ's Holy Gospel,' the words 'Protestant Dissenters' had a known legal meaning, and therefore in the absence of ambiguity, evidence of the meaning of those words could not be [858] received. It is clear that the words of themselves have not any such known legal meaning as the appellants would attach to them. The expression, 'Protestant Dissenters,' do indeed of themselves imply that the parties are Protestants against the Church of Rome, and Dissenters from the Church of England, but that

is all. They cannot include all those who are neither of the Church of Rome nor of that of England, for that would include all those who reject Christianity altogether; nor all those who, to some extent, admit the divine mission of Christ, for do not the Mahomedans do that? What classes, and what descriptions of persons are included, is uncertain from the terms used, and therefore matter of proof. The appellants indeed refer to acts of Parliament and other documents, for the purpose of showing that Unitarians have been included in the general terms of Protestant Dissenters. If this be admissible for the appellants, it is clearly open to the respondents to adduce evidence to prove that such was not the sense in which the words were used by the founders of these trusts, which is in truth the whole question.

"It appears to me clear, that upon the principle of the case of Lady Hewley's Charities, and within the limits acted upon in that case in this House, evidence of the meaning of these words 'Protestant Dissenters,' as understood and used by the authors of these trusts, is admissible.

"Some important points are certain from the deed itself, such as that the trust originated with the members of certain congregations of Dissenting Protestants in Dublin; that they professed that the Charity was founded upon a pious disposition and concern for the interest of our Lord Jesus Christ; and that its [859] object was the support of religion in and about Dublin and the south of Ireland, by assisting and supporting the Protestant Dissenting interest against unreasonable prosecutions, and for the education of youth designed for the ministry amongst Protestant dissenting congregations that were poor and unable to provide for their ministers. It is established beyond all doubt that these congregations professed Trinitarian doctrines; that there were not at that time any Unitarian congregations or ministers in Dublin or the south of Ireland, although there were individuals who professed those doctrines.

"Looking then to the declared objects of the trust, those who had no congregations or ministers, and who had not in the opinion of the founders been subject to any unjust prosecutions, could not have been in the immediate contemplation of its authors; but still they may have had intentions so liberal and enlarged as to embrace objects not immediately contemplated, but such objects must have been within their general intentions and within the mischief they proposed to guard against. They must have been Protestant Dissenters within the sense in which the authors of the trust understood and used this description. The inquiry therefore, is, were Unitarians or Unitarian Christians included in this description, as so understood and used? The evidence I think proves that they were not.

"The quotations in evidence from members of those congregations, at or about the period of the trust, prove the abhorrence in which they held the Unitarian doctrines. This cannot be more strongly expressed than in the extract from the sermon of Samuel Mather, who says: 'If any man deny one God and three Persons, deny the Scriptures, the Deity of Christ, the immortality [860] of the soul, the resurrection of the body, or such like fundamental points, it is the duty of the church to cast him out; he is unclean.' So his brother Nathaniel Mather says, 'this belongs to Christ; he is God, co-equal with the father and the Holy Ghost, being one of the blessed perfections of the Divine essence.' And after speaking of the opinions of Papists, Socinians and their followers, he says, 'Grotius indeed does the same, and I learn that Armenians and Socinians do so too; but I do not reckon Grotius, or them, among Protestants.'

"Many other extracts to the same effect were produced; but that, which is most conclusive, is what appears in Emlyn's history and narrative, and the reply to it by Mr. Boyce, one of the authors of this trust. Emlyn complains of these congregations and their members as having taken part against him, and the Irish convocation in their address to the Crown claim credit for having so done, and declare that there are no people in the world, whose principles and practices are more opposite to Deists, Socinians, and all the enemies of revealed religion, and to Papists, than they were, and ever had been.

"It is useless after this, to refer to more evidence upon this point. The authors of this trust at the time it was created, were professed Trinitarians, and not only disclaimed all connexion with, or sympathy for those who professed Unitarian Doctrines, but held them in abhorrence, and publicly declared such to be their opinions, denying that such Unitarians were Protestants or Christians. Can it then be sup-



posed that these authors of the trust in question intended to associate with themselves as *cestuis que trust*, those whose doctrines they so abhorred and condemned? Is [861] not the sense in which the words 'Protestant Dissenters' were used by the authors of this trust, made clear beyond all question? They denied the right of Unitarians to the appellations of Protestants or Christians, and could not therefore intend to include them in the description of Protestant Dissenters.

"It appears to me, therefore, that the decree of the Lord Chancellor of Ireland was correct, in declaring that Unitarians are not entitled to be considered as objects of the trust.

"Other objections were raised to the decree, which may be disposed of in very few words. It was said that there being at the time no Toleration Act for Ireland, the whole trust was illegal; now if the illegality were proved, the question would arise, how can these appellants raise that objection, they claiming under the trust, and showing no other title to be heard?

"Secondly, it was urged that long enjoyment gave title to the Unitarians. Contemporaneous usage is, indeed, a strong ground for the interpretation of doubtful words or expressions, but time affords no sanction to established breaches of trust.

"It was also objected that the decree removed some Trinitarians, as well as the Unitarian trustees; but this was sanctioned by the decree in Lady Hewley's Charities, and is right upon principle. The decree proceeding to correct a breach of trust, removes those trustees who were the authors of it, for that is of itself a sufficient ground of removal, common to both classes. I therefore advise your Lordships to affirm the decree, with costs."

Lord Brougham then stated his own opinion thus:—The only point upon which I entertain the least doubt is, whether his Lordship (Lord Cottenham) does [862] not express too doubtfully the inadmissibility of some of the evidence which was received in the Court below in the case of Lady Hewley's Charities; but I think he is quite right in his argument upon the admissibility of the evidence which was received in this case, and that the evidence was admissible in this case for the purpose of shewing the circumstances in which the party was when making the instrument. You admit it as you admit evidence in construing a will, not to modify the expressions of the will, not to affix a sense upon the will which it does not bear, not to tell you what the meaning of the will is, but to tell you what were the circumstances in which the testator was when he used those expressions, for the purpose of enabling you to ascertain what meaning he affixed to the expressions that he used, and for no other purpose. There was nothing further done in this case, and it is clear that the evidence was admissible.

I therefore entirely agree with the view taken by my noble and learned friend, and move your Lordships that this appeal be dismissed, and that the judgment of the Court below be affirmed, with costs.

Lord Campbell.—As my noble and learned friend has alluded to the case of Lady Hewley's Charities, I have no difficulty in saying that I am clearly of opinion now, speaking judicially, that there was a great deal of evidence admitted in that case, which ought to have been rejected. There was abundant evidence to support the decree, of course; we are now bound by that decree, because it has received the sanction of this House, and I think that the evidence which was admissible there, was abundant for the purpose of supporting the decree. But there were, in that case, admitted and reasoned upon by the [863] Vice-Chancellor of England, and partly by Lord Lyndhurst, declarations made by Lady Hewley as to the particular sense in which she used particular words,—or rather evidence tending to shew the sense in which the words were used by her. Now that, I apprehend, was clearly inadmissible. On general principles I adhere to what I contended at your Lordships' bar, as counsel in the case of Lady Hewley's Charities, and which I find the Lord Chancellor of Ireland has done me the honour to adopt, and to say that it is the canon by which he himself has been guided, viz., that in construing such an instrument, you may look to the usage to see in what sense the words were used at that time; you may look to contemporaneous documents, as well as to acts of Parliament, to see in what sense the words were used in the age in which the deeds were executed (*Shore v. Wilson*, 9 Cl. and F., p. 413, *et seq.*); but to admit evidence to shew the sense in which words were used by particular individuals, is contrary to sound principle, and I think my

noble and learned friend the present Lord Chancellor (Lord Cottenham) could not have any doubt at all in rejecting such evidence.

My Lords, adopting that canon, I really do not think that there is any reasonable doubt in this case, because what we have to determine is, the meaning of the words "Protestant Dissenters" in the deed constituting this charity, at the time that deed was made,—not what may be the meaning of the words "Protestant Dissenters" in the reign of Queen Victoria, because I have no doubt now that, upon most occasions, Unitarians would be considered as Protestant Dissenters. Since the repeal of the act of William III., against impugning the doctrine of the Trinity, they have not been liable to any penalties, and it would be [864] very unchristian to say they are not Christians. They are Dissenters, and, therefore, I apprehend, they may be properly denominated Christian Dissenters, and that they are "Protestant Dissenters."

But at the same time we have to look at what they were when this charity was founded. At that time I think the evidence is abundant to shew that the authors of the charity would not at all have considered Unitarians as "Christian brethren;" that they would have looked upon them with great horror, and never would have called them "Protestant Dissenters;" and therefore they cannot be considered as included in the description of those for whom this charity was founded.

That being the case, the decree pronounced by Lord Chancellor Sugden seems to me to be perfectly correct.

Enjoyment might be evidence, if it was doubtful how far Unitarians were included; but assuming that Unitarians are excluded, the enjoyment must go for nothing.

Then as to the other point, that the purposes of this charity cannot by law be carried into execution, and that the funds must be disposed of by the sign manual of her Majesty; I entirely concur in the opinion that that argument cannot be entertained by your Lordships.

I do not think it necessary to enter more at large into this subject, which has been already so ably discussed, but, upon the whole, I entirely concur in the opinion that the judgment of the Court below should be affirmed, with costs.

It was ordered accordingly, That the decree be affirmed, and the appeal dismissed, with costs to be paid by the appellants to the relators, Mathews and Black, who alone answered the appeal.

[865]

## IN COMMITTEE FOR PRIVILEGES.

THE EARLDOM OF PERTH [July 23, 30, 1846; April 20, June 10, 11, and 17, 1847; August 11, 1848].

[Mews' Dig. vi. 625; x. 306, 312, 316.]

*Scotch Peerage—Creation—Limitations—Attainder—Evidence.*

On a claim to a Scotch Peerage, there being no patent or charter of creation or enrolment thereof discovered, a copy of an enrolment of a commission under the great seal and King's sign manual, dated in February, 1605, directing the commissioners to create James Lord Drummond Earl of Perth, was received and held, in conjunction with subsequent entries in the Parliament records, to be sufficient proof of the creation of the Earldom.

In the absence of the instrument of creation of a Scotch Peerage, the limitations are taken from usage to be to the grantee and his heirs male general.

On the death of a peer, leaving his eldest son and heir, who had been attainted, the peerage does not vest in him, nor, on his death, in the nearest heir male, but is forfeited, as much as if he had been a peer at the time of the attainder.

A peerage limited to a man, and his heirs male, is one entire estate, and no substitution of heirs takes place.

A peerage limited to a man and his heirs male whomsoever, is forfeitable under the act of 26 Hen. 8, c. 13.

Attested copies of French registers of marriages, births and deaths, Held to be

admissible evidence, upon the testimony of a French advocate, that such registers were kept according to French law, and would be received in evidence in the French courts.

The petition of George Drummond, Duke de Melfort and Count de Lussan in France, to the Queen, claiming to be Earl of Perth, in the peerage of Scotland, and praying her Majesty to adjudge and declare him to be [866] entitled to the said Dignity, was, with her Majesty's reference thereof to the House, brought before the [867] Lords Committees (there were present (besides the Chairman the Earl of Shaftesbury, and other Peers), the Lord Chancellor (Lord Cottenham), Lord Lyndhurst, Lord Brougham, and Lord Campbell) for Privileges, first, on the 23d of July, 1846. Her Majesty's Attorney-General, and the Lord-Advocate for Scotland, attended their Lordships on behalf of the Crown.

Mr. Fleming, for the Duke de Melfort, opened the allegations of his petition, to the effect following:—

That Patrick Drummond, third Lord Drummond, sat in the Parliaments of Scotland in the reigns of Queen Mary and James the Sixth, and died in 1601, leaving two sons, James and John Drummond surviving: that James, the eldest, succeeding his father, as fourth Lord Drummond, and in 1605 was created Earl of Perth, the Earldom being limited to him and *his heirs male*; and that on his death, in 1611, having had issue, a daughter, an only child—who became the wife of the Earl of Sutherland—he was succeeded by John, his brother and heir male: that the said John, second Earl of Perth, sat in Parliament under that title, in the reigns of James VI. and Charles I., and died in 1662, when he was succeeded by his eldest son James, third Earl of Perth, who had issue two sons, James and John, and died in 1675, when he was succeeded by James, his eldest son, the fourth Earl of Perth.

That this James, fourth Earl, who filled the office of Lord Chancellor of Scotland to Charles II. and James II., having attached himself to the latter, and being obliged to quit Scotland, joined him in his exile at St. Germain, in France, in 1693, and was by him created Duke of Perth (neither this title, nor that of Lord Drummond, is now claimed): that he had four sons, James, John, William (who died an infant), and Edward, and died at [868] St. Germain, in May 1716, when the Dignity of Earl of Perth became dormant, in consequence of the attainder, in his life-time, of his eldest son James,—by Act of Parliament, 1 Geo. I., c. 32, attainting him of high treason from the 19th of January, 1715, by the style and title of "James Drummond, Esq., commonly called Lord Drummond, eldest son and heir-apparent of the Earl of Perth:" That he, on his father's death, assumed the title of the Duke of Perth, and died in France in April 1720, having had issue two sons, James and John: that James also took the title of Duke of Perth, attended Prince Charles Edward in his invasion of Scotland in 1745, and died at sea in 1746, never having been married: \* That his brother John, also styled Duke of Perth, was an officer in the French army, and was attainted by Act of Parliament (19 G. II., c. 26) in 1746, and died in 1747, unmarried: That the male issue of James, who was attainted in 1715, having thus become extinct, the petitioner submitted that the Earldom of Perth vested in his (James's) next brother, John Drummond, as the heir male general of the grantee; and that on the death of that John without issue, in 1757, the Earldom passed to his then next surviving brother, Edward Drummond: That he also died without having any issue, and thereupon the male issue of James, the fourth Earl of Perth, being extinct, that dignity, the petitioner [869] submitted, descended to the heir male of his brother, John Drummond, as heir male general of James, first Earl of Perth, under the limitations of the original grant.

That this John Drummond, next brother of James, fourth Earl of Perth, was

\* This was denied in a petition presented to the House by Mr. Thomas Drummond, of New Penshaw, in the county of Durham, stating that he, the petitioner, was the grandson and heir male of the body of the said James, who, being in the rebellion of 1745, and not surrendering himself, was attainted of high treason; that he concealed himself in the county of Durham, was married there, and had children. The petitioner, as his heir, claimed to be entitled to the said Earldom; but he was not represented before the Committee, nor was any notice taken of his claim.

**Pedigree of the Earls of Perth.**

PATRICK DRUMMOND, 3d Lord Drummond.

JAMES, 4th Lord Drummond, created Earl of Perth.  
Died in 1611, having had issue,

JANE, an only child, who married the Earl of Sutherland.

JOHN, 2d Earl of Perth. Died in 1662.

JAMES, 3d Earl. Died in 1675.

JAMES, 4th Earl of Perth. Died in 1716.

JOHN DRUMMOND, created Earl and Duke of Melfort in France.  
Died in 1714.

By 1st wife,

By 2d wife,

JAMES,  
Attainted of  
high treason  
in 1715.  
Died in 1720.

JOHN,  
styled Duke  
of Perth,  
died *s.p.* 1757.

WILLIAM,  
died an infant.

EDWARD,  
styled Duke  
of Perth,  
died *s.p.* 1760.

JAMES,  
Died *s.p.*

ROBERT,  
Died in 1716.

JOHN,  
2d Duke of  
Melfort.

JOHN DRUMMOND,  
of Lundin. Died *s.p.* 1735.

JAMES DRUMMOND.  
Died 1781.

JAMES,  
3d Duke of Melfort.  
Died in 1766.

JAMES,  
styled Duke  
of Perth.  
Died *s.p.* in 1746.

JOHN,  
styled Duke  
of Perth,  
attainted of  
high treason.  
Died *s.p.* in 1747.

JAMES DRUMMOND, created Lord Perth in 1798. Died 1800.

CLAMENTINA, an only child, married Lord Willoughby d'Eresby.

JAMES,  
4th Duke de Melfort.  
Died *s.p.* 1800.

CHARLES EDWARD,  
5th Duke.  
Died *s.p.* 1840.

HENRY  
BENEDICT.  
Died *s.p.* 1778.

LEON MAURICE.  
Died 1825.

GEO. DRUMMOND, Duke de Melfort  
(the Claimant).

twice married, and was created Viscount and Earl of Melfort and Lord Forth, by letters patent, or charters, dated respectively in 1685 and 1686, limiting these Dignities to him and the heirs male of his body by his second wife, whom failing, to the heirs male of his body, and that King James II. granted letters patent, dated in 1692, at St. Germain's, purporting to create him Duke of Melfort, limiting that Dignity, as the Viscounty and Earldom of Melfort had been limited, and that he and his successors, according to such limitations, were accepted and recognised by the Kings of France as Dukes of that kingdom by that title: That in 1695 a decree of forfeiture was passed against him in the Scotch Parliament, in consequence of his adhering to the Stuart family, but it was in the decree provided that his issue by his first wife should not be thereby prejudiced: That the said John, first Viscount, Earl, and Duke of Melfort, had by his first wife two sons, viz. James, who died without issue in his father's lifetime, and Robert, who took the name of Lundin and the estate of that name, in right of his mother: That the said John by his second wife had issue John, second Duke de Melfort, in France, and three younger sons, and died at St. Germain's in 1714: That Robert, his eldest surviving son by his first wife, had issue two sons, John, who died without issue in 1735, and James, who on the death of Edward—styled Duke of Perth—in 1760 became and was served heir male general of James, first Earl of Perth, and claimed that Dignity, and died in 1781, leaving an only son, James Drummond, who also claimed to [870] be Earl of Perth, that he was not recognised as such, but was, in 1793, created Baron Perth in the Peerage of Great Britain, and the Perth estates, forfeited by the attainder of John Drummond in 1746, were restored to him, and he died in 1800, leaving a daughter, an only child, now the wife of Lord Willoughby d'Eresby: That the male issue of John Earl etc. of Melfort, by his first wife, being then extinct, John Drummond, his eldest son by his second wife, and who was born in Scotland in 1682, was heir to all the rights and titles of the family in Scotland, and became Duke of Melfort, in France. - He married a French lady, Countess de Lussan in her own right, and died in 1754, leaving James, the only surviving issue of that marriage, third Duke de Melfort, and Count de Lussan in right of his mother. He died in 1766, leaving four sons, three of whom died without issue—two having been successively Dukes de Melfort—and the fourth, Leon Maurice Drummond, who survived them, married in 1794, and had issue a daughter, now the wife of F. H. Davis, Esq., and George Drummond, the claimant, who was born in London in 1807, and in 1840, on the death of his uncle, Charles Edward, became Duke de Melfort in France, and, as his learned counsel submitted, Earl of Perth in Scotland, as being the heir male general of James, the first Earl of Perth.

Two questions of great importance arose in this case; the first related to the proofs of the creation and limitations of the Earldom; the second, to the effect of the several attainders of James, eldest son of the fourth Earl in 1715, and of John, second son of James, in 1746, and of the decree of forfeiture in 1695.

As to the first question, Mr. Nairne, writer to the signet, proved that he diligently searched the record [871] offices in Edinburgh, viz.—the Great Seal, Privy Seal, and Signet Offices, and the Paper Record Office, for an enrolment or entry of the patent or other instrument creating the Earldom, but did not find any. This search extended to five years prior and five years subsequent to 1605. He found, and produced from the repositories of Lord and Lady Willoughby d'Eresby (this lady being the only child of Lord Perth, who died in 1800 (*see* pedigree), and heir general of the family, and as such heir, in possession of the Perth estates, the document was admitted as coming out of the proper custody), a copy of an enrolment of a Commission or King's Letter, dated at Whitehall, the 11th of February, 1605, authorising the creation of Alexander Lord Jedburgh as Earl of Home, of James Lord Drummond as Earl of Perth, and of Alexander Lord Fyvie as Earl of Dumfermline. This instrument, after reciting that great services were rendered to the king's progenitors by the predecessors of these lords, and that for their own greater alacrity in the king's service, his majesty was resolved to create them Earls, proceeded, "*Igitur dedimus, etc., tenoreque praesentium, damus concedimus, etc., nostram plenam potestatem et mandatum speciale nostro praedilecto, etc., Johanni Comiti de Montrose Domino Grahame, nostro commissario pro parlamenti nostri infra regnum nostrum Scotiae tentione, vel casu seu absentiae ejus aut inhabilitatis, praedilecto nostro etc., Francisco, Erreliac*

*comiti domino Hay, regni nostri Scotiae constabulario, talem numerum nostrae nobilitatis vel concilii Scotiae, prout videbitur expediens, convenire ac omnibus ceremoniis honoribus et solemnitatibus\* eisdem incumbentibus dictos predilectos nostros, consanguineos et conciliarios, Alexandrum Comitem de Home dominum Jedburgh et Douglas, Jacobum Comitem de Perth do-[872]-minum Drummond, Alexandrum Comitem de Dumfermline Dominum Fyvie creandi, et generaliter omnia alia et singula pro creatione ante dictorum honorum et dignitatum faciendi et exercendi in tanto solenni et amplo more, quanto ibidem personaliter interessimus, etc. In cujus rei testimonium hisce presentibus magnum sigillum nostrum apponi praecepimus, etc.*

*Per signaturam manu S. D. N. Regis superscriptam, etc.*

*Haec est vera copia principalis litterae supra scriptae.*

(Signed)

GEORGIUS HAY, clericus registri.

The witness said that this letter must have passed under the Privy Seal. In his search of the Privy Seal records of the same date, he found in them a deficiency of some years. (A similar unsuccessful search was proved by other witnesses to have been made in the Privy Seal Office, and other record offices in London).

The same witness produced from the Great Seal Register in Edinburgh, a copy of the patent, "*Carta creationis comitatus de Dumfermline*;" creating the said Alexander, and *his heirs male*, Earls of Dumfermline. He also produced copies of extracts from the records of the Parliament of Scotland, shewing the sitting of the Earl of Perth in the secret councils of Parliament in 1610. It appeared, by an inquisition set forth in a precept of sasine, and also by a royal charter and grant, that he had only one child, a daughter; and to shew that he was succeeded in the Earldom by his brother John, the same witness produced from the Privy Seal Records a copy of a charter of confirmation, in January 1613, of a grant made by that John, as Earl of Perth. His (Earl John's) sittings in Parliament in 1612 and subsequently, were proved by the records of Parliament. Several copies of extracts from the same records of an-[873]-terior date to the creation of the Earldom, were produced, the first stating that John Drummond of Cargill was made ("*effectus fuit*") a Lord of Parliament, "*nominandus Dominus Drummond*," in 1487, and the others, shewing the sittings of him and his successors, Lords Drummond, down to and including James, third Lord, and father of James the first Earl. Numerous documents, comprising retours, charters, and enrolments of sasines, were produced from the repositories of Lady Willoughby d'Eresby, shewing the pedigree of the family and devolution of the Earldom, as before stated, down to the departure of James, fourth Earl, to join the royal exiles at St. Germain. No question arose on the reception of any of this evidence.

To prove the pedigree and state of the family after their departure from Scotland to France, the claimant's counsel offered to put in evidence attested copies of extracts from the registers of marriages, births, and deaths—"registers de mariages, de naissances, et de décès"—kept in the Hotel de Ville at St. Germain, and other places in France. The witness who produced them, and compared them with the originals, proved that they were kept in official places, and under the care of official persons.

The Lord-Advocate and the Attorney-General objected to the reception of these documents, insisting that they were matter of foreign law, to be proved by competent witnesses; that it should be proved that the registers were kept according to the laws of France, and that they would be received in evidence in that country.

The Lords of the Committee were of that opinion, but received the extracts *de bene esse*, on the understanding that the required legal proof would be given on a future day. Their Lordships added, that a French [874] law book, referred to by Mr. Fleming, and entitled "*Recueil General des anciennes lois Francaises*," by M. Isambert, was not evidence of the French law, and that a French lawyer's evidence would be required.

Accordingly, a French advocate (M. Colin) of forty years' standing, was examined on a subsequent day; and he, after explaining several terms, as "*qualite*," "*les actes de l'etat civil*," etc., said that the registers above-mentioned fell within the latter terms, and would be all, not only received in evidence in the French law

courts, but would of themselves be the proper proofs of the state described in them, requiring only proof of the hand-writing of the officer whose signature they bore.

The signatures to these documents were attested by the proper official persons in Paris, whose signatures were attested by the British Consul there, and some of them also by this witness.

The extracts were declared admissible, as were also, without any objection, copies of inscriptions on the tombstones of James, the fourth Earl, who died in 1716; and of James, his eldest son (attainted in 1715), who died in 1720, deposited in the chapel of the Scotch College in Paris.

The Act of Attainder, passed in 1715 (1 G. I., c. 32), and the Act of conditional attainder, passed in 1746 (19 G. II., c. 26),\* were also put in evidence.

[875] Mr. Fleming proposed to put in a copy of a letter, dated June 7, 1746, written by the Officer of Marine at Nantes, to the Minister of Marine in Paris, stating the arrival at Nantes of a French ship of war, and that the Duke of Perth—James, eldest son of James who was attainted in 1715—had died on the passage.

The Lord Advocate objected, but on its being shewn that the letter was of an official character, and was in the proper repository, the office of the Minister of Marine in Paris, and also that the Duke of Perth, of whose death mention was made, was an officer in the French army, the objection was overruled.

Extracts from the Parliament records in Scotland were produced and received in evidence, showing that John Earl of Perth sat therein in 1612 and 1617; and his successors, Earls of Perth, sat therein in 1662, 1672, and 1686. The same extracts shewed the like sittings of the Earl of Home, mentioned in the royal commission of 1605, although no other instrument for creating that Dignity could be discovered after a similar search, as before stated to have been made in respect to the Earldom of Perth.

Among the various documents produced from the claimant's custody, was a royal charter, dated Whitehall, in 1685, creating John Drummond, brother of the fourth Earl of Perth, Viscount Melfort, limiting the Dignity to him and the heirs male of his body, by his second wife, whom failing to the heirs male of his body; and another charter dated Windsor, in 1686, creating him Earl of Melfort, Viscount Forth, and Lord Drummond, with like limitations; and letters patent by King James, dated St. Germain's, the 17th of April 1692, creating him Duke of Melfort.

[876] A pedigree, and also a copy of an inscription, purporting to have been engraved on a monument, which was said to have been erected in a chapel formerly belonging to the English nuns at Antwerp, and to have disappeared or been destroyed, were produced, and it was stated by the witness who produced them, that they had been hung up on the wall of the apartment of a relative of the family, who gave the witness copies. It was objected to the reception of them, that the apartment in which they had been kept was the private room of the individual, and that they were not—like an epitaph in a church or churchyard,—exposed to the observation and correction of the public, or even of the other relatives of the family. But the witness having stated that the apartment was the relative's general reception room, to which all his visitors had access, the documents were received.

Proof was given of an unsuccessful search in 1844 for monuments of James and John Dukes of Perth, in the buildings which once formed the English nunnery and convent at Antwerp, but were long ago sold and converted into store cellars. Fragments of tombstones with names were found among the rubbish in the vaults.

The chaplain to the Carmelite nuns at Llanherne, in Cornwall, produced a book headed, "An account of ye seculars buried in our church," and containing an entry (among others) of the burial of "Lord John Drummond, Duke of Perth, 1747." He produced another paper, containing similar entries, including "Duke de Perth, 28 September, 1747, "All those that have been buried in our church till the year 1778." The nuns came over from Antwerp in 1794, and brought those

\* The preamble of the act named numerous persons, including "James Drummond taking on himself the title of the Duke of Perth," and "John Drummond, taking on himself the title of Lord John Drummond, brother to James, etc., Duke of Perth," and recited that they had taken up arms against his Majesty, etc., and had fled; it was then enacted that if they should not surrender on or before the 12th of July, 1746, they should, from the 14th of April, 1746, be attainted of high treason.

documents [877] with them. One of these nuns was still living, but was not capable of being examined. He further stated this paper was found with other documents by the prioress, in a chest which the nuns had brought from Antwerp. There is a rule of the convent obliging the prioress to keep all documents or muniments in a chest with three keys, of which she keeps one, and two other nuns, called "Discreets," keep the other keys. The book was kept in the convent sacristy, because it contained the names of benefactors, for the repose of whose souls the community prayed on certain days, and then the names were mentioned. The book is not seen by any one but the sacristan, the prioress, and the discreets. It is a register of deaths of persons connected with the convent, and is brought down to the present time, and is a book of authority in the convent.

These copies of the entries were received.

A family pedigree, dated 1730, was produced from the muniments of the claimant, and the witness who produced it said the claimant shewed it to him in 1825, and it was before that time in the custody of the claimant's father.

Several monumental inscriptions and pedigrees were received without objection. (So much only of the evidence has been here noticed as was the subject of discussion at the bar, or shewed the creation and limitations of the Dignity.)

Mr. Fleming (June 10, 1847), in summing up the evidence, said the only points in the pedigree on which, as he believed, any question could be raised, were the proofs of the deaths without issue of James and John, styled Dukes [878] of Perth. Of the death of the former at sea, in 1746, the letter of the Officer of Marine at Nantes to the Minister of Marine in Paris, a copy of which was received in evidence, removed all doubt. It stated that one of the ships which had been sent to Scotland to bring away the fugitives, after the failure of the insurrection of 1745, had arrived at Nantes without the Prince (Charles Edward), but bringing Lord Drummond (that is, John, the younger brother), and that the Duke of Perth (James, the elder brother) died on the passage. That statement would be found quite incontrovertible upon consideration of other unquestionable evidence. If he, James, had lived to the 12th of July 1746, the period for surrender prescribed by the act 19 G. II. c. 26, in which he was named among many others, he would have come under its operation, and the Perth estates vested in him would have been forfeited; but it appeared by decrees of the Court of Session, which were put in evidence, and by a decision of this House, that the estates became forfeited by the non-surrender and consequential attainder, not of James, but of the younger brother, John. It was only by the decease of James without issue, before the act came into operation, that John was capable of taking the estates by descent. In one of the said decrees, dated December 1, 1750, dismissing a claim of Thomas Drummond of Logie-Almond on the estate of Perth, against the Crown, the Court of Session held that James Drummond, described in the act 19 G. II., c. 26, as "James Drummond, taking on himself the title of Duke of Perth," having died on the 13th of May 1746, before the 12th of July 1746, on or before which day he was allowed by the said act to surrender himself and submit to justice, he, the said James Drummond, was not [879] attainted by the said act. This House, on appeal against that decree, decided that the estate was forfeited by the attainder of John Drummond, brother of James, taking on himself the title of Duke of Perth.

Another decree of the Court of Session, dated July 15, 1752, contained passages which left no doubt on this point. Its title was a decree "sustaining the title of Mary Drummond upon the forfeited estate of Perth;" and it shewed that she was the only sister of the said James and John, and her claim (by bond from their father) made against the Crown, was therein stated to be "upon the estate real and personal which belonged to the deceased James Drummond of Perth, commonly called Duke of Perth, and is now seised and surveyed by order of the barons of the Exchequer in Scotland, as being the estate of John Drummond, taking on himself the style of Lord John Drummond, brother to the said James, etc., and as being vested in his Majesty *by and through the attainder of the said John*, etc., pursuant to an act of Parliament made in the twentieth year of his Majesty's reign, for vesting in his Majesty the estate of certain traitors." In another passage it was stated that James, the eldest son, "took the family estate during the life of his father, by virtue of a



disposition and infeoffment thereon, burdened with all his father's debts, and on his (James') death on the 13th of May, 1746, the estate descended to his brother John Drummond." There were also several letters in evidence, written in 1748, by John Drummond, uncle of the said James and John, speaking of his "late nephew, James, Duke of Perth, deceased," and signing himself as "Perth;" and in one of the pedigrees, and in monumental inscriptions, received in evidence, James Duke of Perth is stated [880] to have died without issue, the 13th of May 1746, and John (his brother), Duke of Perth, in the year 1747.

In the Act 24 G. III., c. 57, for enabling his Majesty to restore forfeited estates in Scotland, it was recited, that "the estate of Perth became forfeited by the attainder of John Drummond, taking upon himself the style of Lord John Drummond, brother to James Drummond, taking upon himself the style of Duke of Perth," etc.; and that "the said John Drummond died without leaving lawful issue of his body, and it was not yet ascertained who was his nearest collateral heir male," etc. It was afterwards, in March 1785, declared by the Court of Session that James Drummond, great grandson of John, first Earl and Viscount Melfort, and father of the present Lady Willoughby d'Eresby, was then the heir male of the said John, Lord Drummond (attainted in 1746), and the Perth estates were, by virtue of the said act, restored to him: as such heir he had claimed the Earldom of Perth, which was not allowed; but he was created Baron Perth in the Peerage of Great Britain.

The learned counsel, after directing the attention of the Committee to the material parts of the evidence, sustaining the pedigree and carrying down the dignity, link by link, to the claimant, said, he considered no difficulty could occur, on the ground that he came within the Alien laws, because it was proved that, though his father and grandfather were born in France, he himself was born in London, and his great grandfather John, second Duke of Melfort, was, as his father, the first Duke had been, born in Scotland. The claimant's pedigree was established by as clear proof as any pedigree that was ever put in evidence at their Lordships' bar.

[881] The next question, relating to the creation and destination of the Earldom of Perth, was a mixed question of evidence, and of law arising thereupon and upon contemporaneous usage. It has been clearly proved that James, Lord Drummond, sat in the Parliament of Scotland in 1604, and that he sat therein, as Earl of Perth, in 1610. Between these two periods the Earldom must have been created. It has been shewn that the most diligent searches have been made, as well in private repositories as in the Privy Seal and other public record offices in England, as well as in Scotland, for a patent or charter of creation, but none having been found, a copy of a Privy Seal letter, authorising the creation of three lords, James Lord Drummond being one of them, has been received in evidence. That letter does not indicate the destination of the dignities; the same words are used in relation to all the three. Only one of the patents, passed in conformity to that letter, has been found recorded; it is that of the Earldom of Dumfermline, and it expresses the limitations to be to the grantee's *heirs male*. It has been also proved by evidence, that the Earl of Home, another of the three so created, and whose patent has not been found, sat in Parliament in and previous to the year 1612. Now, it is submitted that it is a clear induction of law from the evidence, that the patent of the Earldom of Perth was in the same terms as the patents of the Earls of Home and Dumfermline, all proceeding on the authority of the said letter. But the case does not rest upon induction or presumption of law, clear and cogent as that would be, because it is proved by inquisitions and other records, that after the death of the first Earl in 1611, leaving only a daughter, his next brother, John, sat in Parliament as Earl of Perth in 1612. His succession, therefore, to the [882] Dignity, in exclusion of the daughter, clearly and incontrovertibly establishes that the limitations were to the heirs male general of the grantee. The usual limitations of titles at that period were, either to the heirs male of the body, or "heirs male" simply, as in the Dumfermline patent,—sometimes followed by the word "whomsoever." All the peerages created in the reigns of King James the First (the Sixth of Scotland) and Charles the First, are stated in an Appendix to the printed case of one of the claimants to the Roxburgh titles. Of thirty-six dignities created by King James, four were limited to the heirs male of the bodies of the grantees; four, to the heirs male of the bodies of the grantees, whom failing, to the heirs male whomsoever of the grantees;

two, to the heirs whomsoever of the grantees; and twenty-six, to the heirs male of the grantees. Of sixty-seven dignities created by King Charles, thirteen were limited to the heirs male of the bodies of the grantees; four, to the heirs male of the bodies of the grantees, whom failing, to their heirs male whomsoever; two, to the heirs whomsoever of the grantees; two, with peculiar limitations; and the remaining forty-six, to the heirs male of the grantees. It must therefore be presumed from the general usage, and from the evidence before detailed, in the absence of any evidence to the contrary, that the Earldom of Perth was limited to the heirs male whomsoever, or general, of the grantee. The evidence proves that the title has devolved, and has been enjoyed, in accordance with that limitation; and enjoyment is, in the absence of the patent, the best evidence of the limitations. He trusted, therefore, that the proof of the creation and destination of the dignity were as satisfactory to the Committee as the proofs of the claimant's pedigree must have been.

[883] The next and principal question relates to the effect of the attainders and forfeiture. There were two attainders; first, of James Lord Drummond in 1715, in his father's life-time; the second, of his second son, John Duke of Perth, in 1746. The second may be easily disposed of, because if the first attainer operated a total forfeiture of the title, the second was ineffectual in any sense, there being no dignity left for John to inherit; and, secondly, if the attainer of James operated a forfeiture of the title only for his life, the attainer of John could not have a greater effect, and must have been inoperative beyond his death in 1747; so that in no way can the latter attainer stand in the way of the present claimant.

The forfeiture, which was pronounced in 1695 against John Earl of Melfort, the direct ancestor of the claimant, was not a statutory attainer, but a decree of the Parliament of Scotland at the suit or prosecution of the Lord Advocate; and there was contained in it a proviso that it should not affect or taint the blood of his children by Sophia of Lundin, his first wife. Admitting that it was a valid decree against the Earl of Melfort, it could not work a forfeiture of the Earldom of Perth, inasmuch as John Earl of Melfort had then no estate in it; he had only a possibility; it might or might not devolve on him; in fact, it never did devolve on him, for he died in 1714, and the Earldom of Perth was at the time enjoyed by his elder brother, who survived him above two years. A mere possibility of succession, a right which may or may not vest, is not forfeitable. That was distinctly decided by this House upon the recommendation of the learned Judges in the Camoys Peerage (6 Clark and Fin. 789; and see pp. 827, 846, 860). Earlier decisions by [884] the House supply ample authorities that this forfeiture against the Earl of Melfort would not work a forfeiture of his succession to the Earldom of Perth. Such was the case of the Earl of Cambridge, who, in the reign of Henry V. (1402), was declared by Act of Parliament to have forfeited that dignity, and was attainted of high treason and executed. He left a son, then an infant, who afterwards on the death of his father's elder brother, the Duke of York (at Agincourt in 1415), was found to be his heir, and succeeded to that title, notwithstanding the attainer of his father, and was summoned to and sat in this House as Duke of York in the eleventh year of the reign of Henry VI. (see the Parliamentary Rolls of 8, 9, and 11 Hen. VI.). The House came to a similar decision in the case of the Duke of Athol in 1764. He was the son and heir of Lord George Murray, the Commander-in-Chief of Prince Charles Edward's army in the insurrection of 1745, and was attainted in 1746, and died in France in 1760. His elder brother, James Duke of Athol, survived him, and died without issue in 1764. George, the son of the attainted Lord George, claimed the Dukedom, and the House resolved that he was entitled to it, and he was accordingly admitted (3 Cruise, 183); and the Dukedom has been ever since held by his successor under that decision, which proceeded on the ground that the claimant could make his pedigree through his attainted father, and that his attainer did not affect a dignity which had not vested and might never have vested in him. The same question arose in 1813, in the case of Viscount Strathallan, and the House came to the same conclusion (*Lords' Jour.* for 1813). There are, [885] therefore, three judicial recognitions by this House, at different periods, upon the same state of facts, to establish this conclusion, that the effect of the forfeiture of John Earl of Melfort did not forfeit the right of his descendant to the Earldom of Perth.

There remained yet another question,—the only one which appeared to present

any difficulty,—and that was the effect of the attainder of James Lord Drummond in 1715. The same question arose in the first Airlie and in the Lovat Peerages, and was argued at this bar by some of the ablest advocates that ever addressed the House; but no decision was given in either of those cases, the legislature having, upon the petition of the claimant and recommendation from the Crown, passed an act reversing the attainder in the Airlie case, and the claimant in the Lovat case having been created a Peer of the United Kingdom.

Titles of peerage in Scotland, as in England, were in ancient times unquestionably territorial; and after they ceased to be territorial, the rights of succession to them were still regulated by the rules of real property. A dignity, when it became separated from the property, was considered in Scotland as well as in England to be a strict entail, or in Scotland “tailzie.” In Scotland, before the Union, a Peer might, with consent of the Crown, surrender his peerage, and the Crown might re-grant it to him and to a different series of heirs (*vide* the Crawford and Lindsay Peerages, *ante*, p. 534); but without the Crown’s consent, the Peer had no power to surrender or otherwise dispose of his dignity, or alter the succession. The King was always, as the fountain of honour, the sole maker of Peers. But Peers of Scotland, since the union with England, cannot surrender their dignities, nor can the Crown accept them, [886] or make new grants of them; but every dignity must descend according to the destination prescribed to it at its creation, being as strictly tailzied and as incapable of being diverted by the possessor as an estate in lands, guarded by all the necessary clauses, and duly recorded under the act of 1685.

The question here partly depends on the construction of the Act, 7 Anne, c. 21, in connection with the laws of Scotland. The Act declares certain crimes to be high treason in Scotland, and that the person guilty of such treason shall forfeit as in England; but it does not alter or touch the Scotch estate of the party. There is not much resemblance between an estate tail in England and a Scotch tailzie. In England several estates, including an estate tail, may be carved out of the fee simple; in Scotland, every person in possession under a tailzie has the whole fee vested in him; it is a succession of fees to be taken by different substitutes, as they are called, one by one, to the succession. The fee exists whole and entire, and absolute in each taker of the estate, in intendment of law; although his power over it may be restricted by proper clauses, there is no estate in any of the series except the person in possession; there is a mere possibility that each person in the series may come to the succession, but that is all; there is no remainder, no reversion. If the destination of a Scotch estate, besides mentioning the series of substitutes, directs that, upon the failure of the substitutes, the estate shall return to the grantor and his heirs, these do not take anything of the nature of an English reversion—they are like the others, mere substitutes, and nothing more.

The state of the law of Scotland in respect to forfeitures, prior to the Statute of 7 Anne, c. 21, was this: [887] By the Act of 1685, tailzies, fenced with the necessary clauses and duly recorded, were declared to be perpetual. Supposing that act to remain unrepealed, destinations made in pursuance of it must remain unbroken. By the Act of 1690 it was provided that no heir of entail should be affected by the forfeiture of his predecessors, except in so far as the attainted persons had power, under the entail, to contract debts and encumber the estate, if the entail were recorded under the Act of 1685. In that state of the law of Scotland, the act of Anne was passed, assimilating the treason laws of England and Scotland, by applying to Scotland the law of treason as it existed in England. The act became immediately applicable to Scotch simple destinations, or entails that were not protected with all the necessary clauses, and recorded in conformity with the provisions of the act of 1690; but where the act was complied with, and clauses irritant and resolute were annexed to the entails to prevent alienation, the party forfeiting, forfeited only for his life; and so the Court of Session decided in numerous cases which came before it after the rebellion of 1715. Although these decisions were considered extra-judicial, by reason of the power over the then forfeited estates being, by the act of 1 Geo. I., c. 50, placed in certain commissioners, still they shewed the opinion of the Court, of what the law was regarding those tailzied estates. The question was again brought before the Court of Session after the attainders for the rebellion of 1745-6, and that Court adhered to the decisions of its predecessors, holding that such estates

were forfeited only for the lives of the parties in possession. The principle of the decisions would appear to be that [888] the interest of each substitute named in the deed flowed from the maker, and, therefore, could not be impaired or affected by the acts of the predecessors of any substitute, his interest being distinct and independent. One of the cases so decided by the Court of Session, that of Gordon, of Park, was brought under review of this House (Foster's Cr. Law, 95). The tailzie,—which is not correctly stated in the report,—was in effect this; to Sir James Gordon, whom failing, to Sir William and the heirs male of his body, whom failing, to the heirs male of the body of Sir James. Sir William was one of those who were attainted in 1746 (by the Act 19 G. II., c. 32). The Court of Session found, upon the claim of his brother—who was not named in the tailzie,—“that Sir William Gordon, is by the entail disabled from alienating or incumbering the estate, or altering the course of succession in prejudice of the claimant and other heirs of tailzie, or from impairing their title to the estate after his death, and that therefore the said estate is, by Sir William's attainder, forfeited to the Crown only during his life, and that after his decease John Gordon, the claimant, hath right to the same” (*id.* 100). On the appeal against that judgment this House called in, and put questions to, the Judges, whose answer was, in substance, “that the estate and interest in the said Barony and lands, forfeited by the said attainder, was not only during the life of Sir W. Gordon, but so long as there should be any heir male of his body; and also the reversionary interest in the fee thereof, limited by the said settlement to the heirs and assigns whatsoever of the said Sir J. Gordon, on failure of the heirs male of his body, and the determination of the several estates by the said other substitutions,—supposing that, [889] by the law of Scotland, such reversionary interest was in Sir William Gordon at the time of his attainder.” The House, adopting that opinion of the Judges, reversed the first part of the interlocutor of the Court of Session, and, after affirming another part of it, further declared (Foster's Cr. Law, 103), that Sir William Gordon (the person attainted) being, under the settlement made by his father Sir J. Gordon, dated 19th of October 1713, seised of an estate tailzie in the Barony and estate of Park, notwithstanding that such tailzie was affected with prohibitive, irritant and resolute clauses, the said Barony and estate did, by virtue of the Statute of 7 Anne, c. 21, become forfeited to the Crown by the said Sir W. G.'s attainder, during his life and the continuance of such issue male of his body as would have been inheritable to the said estate, in case he had not been attainted; and also for such estate and interest as was vested in, or might have been claimed by the said Sir W. G. by virtue of the last limitation in the said settlement to the heirs and assigns whomsoever of the said Sir James Gordon, after all the substitutions therein contained shall be expired or determined; and that by virtue of the substitution to the heirs male of the said Sir James Gordon's body of his then marriage, the respondent John Gordon hath right to succeed to the said Barony and estate after the death of the said Sir W. Gordon, and failure of such issue male of his body as aforesaid, according to the limitations of the said settlement.”

That solemn decision of the House, in substance and effect, was, that as far as the interest of the substitutes in the settlement was concerned, no interest was forfeited by the attainder beyond that of the attainted party and his issue, the collateral heirs of entail being [890] left untouched. Lord Hardwicke, then Lord Chancellor, in a letter which has been preserved (Lord Kames' Elucidations, p. 381), refers to the difficulties he had in framing the questions for the judges, so as to confine them to the main point “arising upon the construction of the Act 7 Anne;” and says, “All the Lords concurred that, by the law of Scotland, an estate-tailzie with prohibitive, irritant and resolute clauses, is an estate of inheritance, and that, by the same law, no estate or interest in the lands was vested in Sir William Gordon by virtue of the limitation in the settlement to the heirs male of the body of Sir James Gordon, though that would have been clearly otherwise by the rules of the law of England.”

(After reading and commenting on several passages in the letter, and applying them in support of his contention in the present case, Mr. Fleming referred for the same purpose, to the opinions of Lord Bankton (2 Bank. 268), and of Erskine in his Institutes (Bk. 4, tit. 4, s. 27), and then to Mercer's Case (Foster's Cr. cases, and Elchies Rep. No. 47; *voce* “Tailzie”),—first correcting what he alleged to be

evidently errors in Justice Forster's note of it—and submitted that the present case, though not relating to lands, but to a title of honour, fell within the principle of the decision of the case of Gordon, of Park, and ought to be governed by it. But, should their Lordships be disposed to differ from him in respect to that case, he still trusted that, having regard to the limitation of the Perth Peerage to the heirs male general, their Lordships would come to the conclusion that, according to the law of England, that Dignity was not forfeited by the attainder of Lord Drummond.)

[891] It becomes necessary to direct their Lordships' attention to the distinction between estates in land and an estate in a Peerage. All estates in land, however numerous and distinct, are carved out of, and constitute only one fee-simple. If any of these separate estates depend on a contingency which does not occur before or at the termination of the prior estate, the contingent estate fails, as there must be always a tenant of the freehold, which is assumed to have always existed. A dignity is quite the reverse; it is called into existence by the Crown, and exists only by and according to the terms of the instrument by which the Crown has created it. The possessor has no control over it; he cannot divest himself of it, or alter its destination in prejudice of the rights of the proper successor; and where the line called to take it fails, there is an end of it; for it cannot revert to the Crown, because the Crown is incapable of holding a peerage, as the House decided in Lord Oranmore's claim (*vide infra*, 911); so that there can be no reversion in a dignity, neither can there be a remainder,—it is impartible and indivisible. If one of several co-heirs to a peerage that has been in abeyance be summoned to this House, the whole dignity is in that co-heir as fully as any of his predecessors held it before the abeyance; and that forms another distinction between lands and dignities, that there cannot be an abeyance of the freehold in lands, whereas a dignity may be in abeyance or dormant for centuries (*vide Camoys' Peerage*, 6 C. and F. 789). All the co-heirs would succeed to lands as joint tenants or coparceners, or they might, upon partition, take them in severalty. To these numerous distinctions between estates in lands and in a [892] Dignity may be added this, that a grant of lands to a man and his heirs male, whether made by the Crown or by a subject, is void; but a Dignity may be so granted, as in the Devon Peerage (2 Dow and Clark, 200, and 5 Bligh. N.S. 220). From these distinctions it may be seen that the principles of the law of estates in land are not applicable always to Dignities. Anterior to the Statute *De Donis*, a person having a conditional fee in lands could not forfeit or alienate them before the condition was performed. Since the passing of that statute to the time of the passing of the 26th Henry VIII., c. 13, it was a rule of law that a tenant in tail could not forfeit his estate to the prejudice of the next person entitled under the entail. A tenant in tail, in respect to the Act of Hen. VIII., held the entire estate *quoad* the Crown and strangers. He represented every heir of the entail, and any acts done lawfully against him, in reference to the estate, bound the heir, who had no estate or interest distinct or separate from that of the tenant in tail in possession. It was on that principle that a forfeiture by the tenant in tail, under the Act of Hen. VIII., was held to work an absolute forfeiture. It may be assumed that, prior to the 26th Hen. VIII., Dignities were not by the common law forfeitable on attainder, because the forfeiture of titles of honor appears to have been effected generally by Acts of Parliament, which recited the treason and conviction of the party, and by express words forfeited the dignities. The Act of Henry VIII. had not for its object to forfeit or affect Dignities; the scope and intent of it was to make estates tail in land forfeitable upon conviction of high treason. It enacted that an attainder for high treason should forfeit [893] the estate and inheritance vested in the traitor; but unless the whole estate tail be vested in him, the attainder could not extend beyond his own interest. If a Barony, created by writ of summons and sitting, fell into abeyance, and there were several coheirs, the whole Dignity was in all of them, and they all made but one heir, until one of them was called up by the Crown; but if, before that, one of them were attainted, the Dignity was said by Lord Chief Justice Eyre in the Beaumont case (3 Cruise on Dig. 236, to 243, 3d edit.) to be forfeited as to all; but this House has recently, in the Camoys and Braye Peerages, and in the Beaumont also, decided in accordance with the opinions of the Judges then taken (6 Cl. and Fin. 846), that the attainder of one coheir did not prejudice the others, and did in no way affect the

Barony, and under that decision two peers (Lords Camoys and Beaumont) have taken their places in this House. But analogous decisions, still more in point as to the present case, were pronounced by the House in the cases of the Earl of Northumberland (3 Cruise 171), the Duke of Somerset (Collins' Peerage), and Lord Bolingbroke (3 Cru. 180), whose interests severally were held to have been preserved under the words of the saving clause of the 26th of Henry VIII., cap. 13.

The title of Lord Bolingbroke was granted in 1712, by patent, to Henry St. John and the heirs male of his body, whom failing, to the heirs male of the body of his father, Sir John St. John. Lord Bolingbroke was attainted in 1715, and died without issue in 1751. If the forfeiture of Dignities were identical with forfeitures of estates and inheritance in lands, there is no doubt that the attainder of Lord Bolingbroke would have forfeited and an-[894]-nihilated the whole of that Dignity. Had he the same estate tail in lands, as he had in the Viscounty, vested in him, the whole estate would be forfeited, the whole estate being in him, because he might, by recovery, give himself the fee simple. It was different in respect to the Dignity; that had not gone from the collateral heir, because he might, independently of the attainted party, make his title as heir of the body of Sir John St. John. Accordingly, on the death of the attainted lord in 1754, his grand-nephew the great-grandson of his father, Sir John St. John, claimed and took his seat in this House, his interest under the patent of creation having been protected by the saving clause in the 26th of Henry VIII. The House, in that case, therefore, decided that that which, as an estate tail in lands, would be forfeited upon the attainder for high treason of the person in possession, was saved in a Dignity to the collateral heir. That case could not be distinguished in substance from the case before their Lordships; and as they were bound in adjudicating on the effect of high treason, to proceed according to precedent, their decision should be governed by the cases, especially the last, to which he had referred. There was another case, The Earldom of Oxford (Collins' Baronies by Writ, p. 173), which was much commented on in the Devon Case. It was clearly held by C. J. Crewe and Justice Dodderige, whose opinions were communicated to the House, that if a Dignity had been validly granted to a man and his heirs male, the attainder of a person in possession under that limitation would not work an absolute forfeiture of the Dignity. In the present case, in which the Dignity was limited to James, the first Earl of Perth, and his heirs male,—which is [895] not an estate tail,—what prevents the claimant, the collateral heir, from making himself the male heir of that Earl, as he is proved to be, without deriving through the attainted Lord James? Had not the then collateral heir a right to say to the fourth Earl, "You and your issue male are entitled under the patent to be Earls of Perth, for your respective lives, but on failure of your male issue, we are entitled independently of you, deriving our title from the terms of the patent?" If that existed, it has been protected by the saving clause in the act of 26 Henry VIII., c. 13.

The Lord Advocate asked if the learned counsel had any observation to make on the Airlie and Lovat cases?

Mr. Fleming replied that he had nothing to say on those cases.

Lord Lyndhurst.—You have cited numerous cases. Some new cases may be cited in the Lord Advocate's argument, and then, by the indulgence of the Committee you may possibly be allowed to observe on the cases which may be cited for the first time. But if the other side now suggest that there are other cases, which they mean to cite, it would be convenient that you should now make such observations as occur to you on them.

The Lord Advocate.—My learned friend is aware of the cases of Airlie and Lovat, and that I shall observe upon them, not in an adverse spirit to the present claim, but in my duty as assistant to the Committee.

Mr. Fleming.—The questions involved in both those cases were the questions upon the distinction between Scotch and English law, in relation to estates tail and tailzie, upon which I have addressed my observations to your Lordships. The case of Airlie was not argued before the House in reference to that distinction-[896]-tion, but on another point, viz., that the attainder took place before the party succeeded to the Dignity. The House afterwards allowed printed cases to be laid on the table, in which that question was very elaborately argued by Mr. Cranstoun (Lord Corehouse), but it became unnecessary to bring the case again before the Committee, in

consequence of the recommendation of the King (George IV.), to have an act of Parliament introduced to reverse the attainders of Lord Airlie, and other Scotch noblemen. That act blotted out the only question that arose on the attainder, so that no decision was pronounced on it by the House.

The case of the Lovat Peerage was argued with great ability at the Bar, but before any decision was come to, the claimant was raised to a British Peerage by the same title. There is not to be found in the proceedings on that, or the Airlie claim, any intimation by the House, or the Lords of the Committee, against the claims. The Lord Chancellor at that time did state the grounds, as well against as in favour of the claim in the Lovat Case, and recommended to the committee to adjourn the further consideration of it to the then next session, and there the matter has ever since rested. Neither of those cases can be properly urged as an authority against the present claim; and I do trust that it will be the opinion of your Lordships that the noble claimant is entitled to a recommendation to her Majesty to restore him to the place of his ancestors.

The Lord Advocate said he was happy to have it in his power to dispense with observations on the claimant's pedigree, because, from the attention which he paid to the evidence on that head, he was satisfied that the pedigree was established. The only point in the evidence which appears to require any comment was, [897] the question which arose on the admissibility and effect of the letter from the officer of marine at Nantes, mentioning the death of James Drummond, the Duke of Perth. That was a point of some importance, both because there was a want of direct evidence of his death, and because there was before the House a petition of another party, claiming to be descended from him. It was, however, shewn in answer to the objection to the reception of the letter, that it had an official character; that the Duke of Perth, whose death it mentioned, was in the French service; and the statement, thus shown to be official, has been held admissible in evidence. If the fact of the death of James depended alone on that letter, he would feel it to be his duty to submit to their Lordships that the evidence was not satisfactory;—but connecting the letter with other documents, with the restoration of the Perth estate under an act of parliament, and with various claims made under that act against the estate, and seeing that all persons agreed in the statement that James Duke of Perth died at sea in May 1746, he felt satisfied that their Lordships might safely rely on the facts as stated.

Holding the pedigree to be established, the first question to be considered was, how was this peerage created, and what was its destination. And upon that point also it may be admitted that it was satisfactorily proved that the destination of the Earldom of Perth was to James the first Earl, and to his heirs male general. Proofs were given of searches for the patent, not only in the family muniments, but also in all the record offices of Scotland, in which such patent, or the registration of it, might be found. The records of parliament shewed the sittings therein of that James [898] as Earl of Perth, and of his brother John after James's death, to the exclusion of his daughter and only child. That succession must be taken to imply that the patent of the honour had been granted to the first holder thereof, and to his heirs male; because there was a taking by the collateral heir male, to the exclusion of the lineal descendant, a female. The evidence on this head was made complete and conclusive by the King's letter, authorising the creation of the three lords named to be Earls, and by the production of the patent of the Earl of Dumfermline, one of the three, shewing the grant to be to him and his heirs male general, and not the heirs male of his body.

The next, and the principal question in this case and which was involved in the attainders, he approached with much anxiety. James Lord Drummond, eldest son of the fourth Earl of Perth, was attainted of high treason in 1715; his father, then living, died in 1716, and he himself died in 1720; the honours of Perth, therefore, descended upon a person attainted when his turn came to succeed to them. An argument has been raised to shew, that there is a difference in the operation of an attainder where an honour descends on a person already attainted, and where a person is attainted when he is in possession of the honour. The point is of very little moment, because the attainder operates equally in one case as the other. It

may be seen in the opinion given to the House by the Judges in the first Airlie case, upon which the House acted.

Prior to the act of 7 Anne, c. 21, Scotland had its own treason laws, but by that act, passed "for Improving the Union of the two Kingdoms," it is declared that high treason, or misprision of treason within England shall be construed and adjudged and taken [899] to be high treason or misprision of treason within Scotland; and no crimes or offences shall be high treason or misprision of treason in Scotland but those that are high treason, etc. in England. There was only one estate created by the patent of peerage in this case: it was a grant to one person, and his heirs male general; there was no remainder over to a third person, as in the case of Lord Bolingbroke, and other cases which have been referred to; in all of which it was admitted that the whole estate, which existed in the tenant in tail in possession of the honour, and who was attainted, was forfeited; and, accordingly, the persons who succeeded to those dignities claimed them as remainders. The entry in the Journals of the House in Lord Bolingbroke's case was this: "Frederick Viscount Bolingbroke, claiming by virtue of a *special limitation* contained in a patent granted to his uncle Henry, late Viscount Bolingbroke, dated 7th July, 11 Anne, was introduced in his robes." That was the case of a particular estate or remainder over in the grant of his peerage. Henry, Lord Bolingbroke, had by his attainder forfeited all the estate that was in him, and the heirs male of his body, if he had any, could not take the peerage. Suppose he had sons, and the eldest of them, and not the father himself, was attainted in the father's life-time, the next brother could not, on the father's death, take his peerage, for that, by descending on the attainted son was forfeited, but the special remainder in the peerage, limited over to another party, still existed.

In the Duke of Atholl's case, the son, who would succeed, was attainted, and died in his father's life time; the peerage, therefore, did not descend on him, because he died before the honour passed to him. That case, therefore, was not applicable to the present; but in the [900] case of Airlie the question put by the House to the Judges was precisely in point, being simply, whether, if a person being attainted survives the ancestor, upon whose death the honour would have passed to him, that honour, to come after his attainder, is forfeited; and the judges declared that it was, and forfeited to the same intents and purposes as if he had held the honour at the time of his attainder. There being in that case as in this, but one estate limited to the grantee and his heirs male, without special limitation or remainder over to any other party, the whole estate was forfeited, and no interest left in any person to be protected either by the statute *de donis*, or by the words of exception in the statute of Henry VIII. He would not say that there was an adjudication in that case of Airlie, but the argument in it certainly was not successful, and it was unnecessary to resume it afterwards, because the attainder was removed by Act of Parliament.

As to the Lovat case, it was of the greatest importance to the claimant to establish his title to one of the oldest and most distinguished Baronies of Scotland, and he lamented his inability to do so, although he was by the kindness of his sovereign called up to this House by the same title. The general impression certainly was at the time that his Lordship had little chance, in the opinion of the Committee, of making good his claim.

Lord Brougham.—Nothing to that effect was stated by the Committee. I afterwards, speaking to the Lord Chief Justice on the point, stated to him that I thought it was a question incumbered with considerable difficulty. It was, however, considered an open question.

Mr. Fleming said he had subsequently been counsel for Lord Lovat, and neither Lord Lovat, nor certainly [901] himself ever entertained the slightest suspicion of any adverse opinion being entertained; it was merely a matter of prudence with Lord Lovat, whether his claim should be pressed or not.

Lord Lyndhurst.—It was a case of considerable doubt, as a second argument was ordered, and Lord Eldon was present, and he, as I understood from my noble and learned friend, considered it a most difficult question. Did he express any opinion?

Mr. Fleming.—It was argued a second time before Lord Eldon, Lord Wynford,



and the noble and learned Lord (Lord Brougham) in July 1831, without any expression of an adverse opinion. The first argument was in June 1831. No opinion was expressed by Lord Eldon, or by any other Lord of the Committee, save the noble Lord (Lord Brougham).

The Lord Advocate.—The cases of Airlie, and of Gordon of Park, were referred to in both the arguments, and in one of them, one of their Lordships (Lord Brougham) observed emphatically, that if a case occurred in a state of circumstances similar to those of Gordon of Park, he would repeat the decision of Lord Hardwicke; but he did not consider that under the circumstances of an attempt to create a substitution, for the purpose of equalizing the law of treason in Scotland and England, that decision would as a precedent be extended. That was the substance of the noble and learned Lord's observation. Those, who argued the Airlie and Lovat cases, certainly did not succeed in convincing the Committee that a single grant to a man and his heirs could be cut into so many possible limitations as might have been to secure it in the same line of descent. He was therefore entitled to say, that the matter was pressed in the argument as of [902] great importance to the claimants, and that, although no adverse opinion was expressed, there was no favourable adjudication, though judgment was asked for with as much zeal as a party arguing a case could ask for a judgment in his favour.

The case of Gordon of Park—on which the present claimant founds his case—was this. Sir J. Gordon had tailzied the estate and barony of Park to himself, and after his death to his eldest son, William Gordon, and the heirs male of his body, whom failing to the heirs male of his (the entailor's) own body. Here then were two special limitations, as in the Bolingbroke case. Sir William Gordon succeeded on his father's death, and was afterwards attainted for his accession to the rebellion of 1745, in consequence of which the estate was claimed by his brother Captain John Gordon, as the next heir of entail, under the second special limitation. The argument used by the counsel for the Crown against the claim was, to the effect that, as by the law of Scotland each heir of entail in possession is the fiar, or owner of the whole conditional fee, he by his attainder forfeits the whole, as well the interest of all heirs substitute of entail, as his own. It was assumed to be settled law in Scotland, that when a person is attainted of high treason, he forfeits the whole estate which is in him, and thereby disappoints the other heirs, although he cannot interfere with their rights by voluntary alienation. It was, on the other side, considered very hard that by the law of Scotland this consequence, so affecting the rights of the other heirs, should be ascribed to the forfeiture of the guilty person, putting them in a worse position than heirs of entail are by the law of England, by which the heir in tail takes only a temporary estate, on the termination [903] of which the remainder-man, not affected by the attainder of the previous tenant, would succeed. Lord Hardwicke, anxious to assimilate the law of attainder of both countries, and considering the substitution found in the entail of the Barony of Park to be analogous to a remainder in an English entail, he therefore held, that the attainder of Sir. W. Gordon did not forfeit more than the estate given in the first substitution,—to him and the heirs of his body,—and that on the termination of that estate, the substitution in favour of his brother, the next heir male of their father's body, took effect, precisely the same as would be the case in England in favour of a remainder over. The grounds of his Lordship's judgment are stated in his letter already referred to (Lord Kames' *Elucidations*, p. 381). But it is to be observed that he proceeded upon an actual substitution, which was of the same nature as the special remainder in the case of Lord Bolingbroke,—he did not do what has been asked in the Airlie and Lovat cases, and in the present claim,—he did not attempt to sever a single estate in fee into several independent estates, but finding an actual substitution in the Gordon entail, he considered it equivalent to a special remainder in an English entail. The case of Mercer (*Elochie's Decisions*, *voce* "Tailzie") is still stronger against, if not fatal to, the present claim.

The Lord Advocate, after stating Mercer's case, submitted to the Committee that they could not report in favour of the claim then before them, without interfering with the broad recognized principle in the administration of the law of treason as to attainder and forfeiture in this country as well as in Scotland.

[904] The Lord Chancellor.—In this case I will in the first place—following the

course which has been taken by my noble and learned friend in the last case (the Crawford and Lindsay Peerages, *ante*, 534, in which Lord Lyndhurst, on the same day, delivering the opinion of the Committee, expressed his approbation of the manner in which that case had been got up by Mr. Riddell)—express my opinion of the great ability with which the case of the claimant has been brought forward and advocated at your lordships' bar. This case has received every consideration on my part. I attended to it during the arguments, and I have since read the notes of the arguments on both sides, and the result is that I am under the necessity of stating to your lordships that in my opinion the claim is not made out.

The document creating this Peerage not being forthcoming, the limitation must be taken from usage to have been to the grantee and to his heirs male. It appears that James, the fourth Earl, held under that limitation, and that he died in 1716. James, his eldest son, was alive at that time, not having died until the year 1720; but in 1715, living his father, he had been attainted. By his father's death the title would have descended upon him, had he not been attainted; but it did, in fact—if it can be said to have descended at all—descend upon an attainted person, and it became as much forfeited as if he had been a Peer at the time of his attainder. The first case of the Airlie Peerage is decisive as to this.

The claimant says that he is heir male of the grantee, and entitled, upon failure of the line of the attainted party; but if that party had the whole estate in him, the whole was forfeited.

[905] It is said, however, that by the law of Scotland each party may be considered as coming in by way of substitution, and that the party attainted forfeits only what was in him; and the case of Gordon of Park (Foster's Cr. Cas. 95), and Lord Bolingbroke's case (3 Cru. 180), are relied upon for that purpose. But in those cases there were substantive substitutions, which there are not in this case; and Lord Hardwicke adopted that course to assimilate the law of Scotland as nearly as possible to that of England, in pursuance of the provisions of the statute of Anne (7 Anne, c. 21). Those cases do not affect the present, in which there is no substitution; but the whole is held under one estate. The attempt to apply the rule to such a case was made in the second Airlie case (*vide supra*, 890), and in the Lovat case (*Ibidem*); but it was not admitted by the House, though there was no express decision upon the point. In the Mercer case (Elchies' Decisions, 481) I cannot but think that the question actually arose, and was decided against the claimant.

If such a substitution of an estate were allowable between a party having an estate granted to him and the heirs of his body, and others who might come in under the same limitation,—as the limitation in this case to a man and his heirs male,—I cannot see any reason whatever why that, which is merely an arbitrary rule, should not be extended a great deal further; and why it should not be introduced as between the party, the grantee himself, and his own son; because, being purely arbitrary, it might just as well be allowed in the one case as in the other. There is no decision, and no authority, and no reason for altering the terms of the [906] grant which constitute it one estate, and, being all one estate at the time the party is attainted, the whole is forfeited; and, therefore, I advise your lordships to report to the House that the petitioner has not made out his claim.

Lord Lyndhurst.—I am of opinion that the claim in this case is barred by attainder. There are three attainders, or rather two attainders, and a decree of forfeiture; but it is only necessary to consider one of those, namely, the attainder of James, Lord Drummond, in the year 1715. He was the eldest son of the fourth Earl: He was attainted in the life time of his father: His father died in 1716: He survived, and died in 1720. Now, if this had been the case of an English Peerage, there is no doubt whatever that the Peerage would have become extinct by the attainder of James Lord Drummond. I will consider it first in that view.

If an estate be limited by a subject to a man and his heirs male, that estate is not an estate tail, but an estate in fee; if it be granted by the Crown, it is altogether void; but if it be a limitation of a peerage, it has been decided, as in the case of the Earldom of Devon (Dow and Cl. 200; 5 Bligh, 220), that such a limitation is valid. The estate is not an estate tail within the statute *de donis*, but a fee with a qualified descent. If this, therefore, were an English peerage, it is quite clear that upon the

death of the fourth Earl of Perth, there would have been an end of the Earldom, because there would have been nobody to succeed. The next heir was attained; his blood was corrupted; he, therefore, could not succeed; and there being an eldest son, nobody else could [907] succeed. The Earldom would, therefore, escheat and entirely cease.

With respect to the law of Scotland, a peerage by that law may also be limited to a man and his heirs male general, as in this instance. Under such a limitation the peerage would descend precisely in the same way as in England, first to the lineal heirs, and afterwards to the collateral heirs in succession. As each person succeeded to the title, he would take the fee. But by the statute of Anne the corruption of blood, and forfeiture and other penalties arising from attainder, are applied to Scotland precisely as they are applied to England. It follows therefore that, if the Peerage would in the case before us be extinguished if it were an English Peerage, it would be equally extinguished in the case of a Scotch Peerage, and not for the life only of the party attained, or during the continuance of his issue, but it would terminate entirely.

The case of Gordon of Park is distinguished from the present for the reasons stated by my noble and learned friend. In that case Lord Hardwicke, in order to apply the statute of Anne to the Scotch law, was obliged, in some degree, to do violence to that law; but in the present case no such violence is necessary; the application of the statute is immediate and direct. I think, therefore, that the title is barred by attainder, and I am of opinion that the petitioner has failed in establishing his claim.

The Committee accordingly resolved, "That George Drummond, Duke de Melfort, and Count de Lussan, in the kingdom of France, has not made out his claim to the titles, honours, and Dignities of Earl of Perth and Lord Drummond."

Lord Lyndhurst, after the next case was disposed of, said:—"With respect to the last case, that of the [908] Duke de Melfort, the Crown alone can relieve; but I think I may, without impropriety say, it is a case deserving the serious consideration of my noble and learned friend as to the adoption of some proceedings on the part of the Crown to do away with the effect of the attainder. This has been done in several cases; and I think there is as strong a claim for this relief, in the present case, as in any that have preceded it."

## THE BARONY OF CARNEGIE AND EARLDOM OF SOUTHESK

[Aug. 3 and 11, 1848].

[Mews' Dig. x. 316.]

### *Scotch Peerages—Attainder.*

Scotch Peerages, created by patents in 1616 and 1633 respectively, and limited to the grantee and his heirs male, descended through the line of his eldest son, and became, in 1699, vested in the fifth Baron and Earl, who was attainted of high treason in 1715, and died in 1729, without leaving issue. His collateral heir, descended from a younger son of the first Peer, claimed the Dignities in 1848:

Held, that the attainder was a bar.

The allegations of the petition of Sir James Carnegie to her Majesty, claiming the titles of Earl of Southesk and Baron Carnegie of Kinniard, referred by her Majesty to the House, and by the House to the Committee for Privileges, were opened by Sir Fitzroy Kelly on the 3d of August 1848. Some evidence in support of the claim was taken on the same day. By an original patent, dated in 1716, it appeared that King James created Sir David Carnegie of Kinniard, Knight, a Baron and Lord of Parliament, by the title of Lord Carnegie of [909] Kinniard, with a limitation to him and his heirs male, bearing the surname and arms of Carnegie. He was afterwards, in 1633, by a patent of Charles I., raised to the Dignity of an Earl, by the

title of Earl of Southesk, with a limitation to his heirs male for ever. He had four sons, and the eldest having died without issue in his lifetime, he was succeeded by James his second son. From that James the said Dignities descended lineally, and in 1699 vested in James the fifth Earl and Lord, who was, by act of Parliament, attainted of high treason in 1715, for his accession to the rebellion of that period, and died in 1729. He had an only son, who died in 1722, without issue. The issue of John, third son of David, the first peer, became extinct in 1663. Alexander, the fourth son of the first peer, left a son David, whose lineal male heir was the petitioner. The petitioner had not completed his proofs of these allegations.

On the 11th of Aug., after the Lords of the Committee had disposed of the claim of the petitioner to the Earldom of Perth, Sir Fitzroy Kelly said he was prepared, with the permission of the Committee, to complete the evidence in support of his client's claim, but after their Lordships' decision in the former case, he felt it to be his duty to state that there was some resemblance between the two cases in respect to the attainder. He was not then prepared to argue the question as to the effect of the attainder on his client's claim, with reference to the opinions which were expressed by their Lordships in the Perth case. If it was the pleasure of their Lordships then to hear the remainder of the evidence, he would, before taking any further steps, confer with his learned friends (Mr. Wortley and Mr. Innes) who were with him, and consider how far the one case was [910] governed by the other. Unless they should find that there was a clear distinction between the cases, they would not feel themselves justified in occupying any further time of the Committee.

The Committee informed the learned counsel that they did not consider it advisable, under the circumstances, to proceed further with the evidence. If the learned counsel, upon consultation, should be of opinion that the present claim could be supported, further proceedings might be taken in the next session: the present session was nearly at an end.

No proceeding has been since had on the claim.

The following is the case referred to, *ante*, p. 895

#### LORD ORANMORE'S CLAIM.

[Mews' Dig. x. 307.]

The Sovereign cannot hold a peerage: accordingly, where a member of the Royal Family, who was a Peer of Ireland, succeeded to the Crown, the Peerage became extinct.

Dominick Browne was by letters patent, dated the 4th of May, 6 W. IV. (1836), created a Peer of Ireland, by the style and title of Baron Oranmore and Browne. In July the same year, Lord Oranmore presented his petition to the House of Lords, praying that his right to vote at the election of Representative Peers [911] for Ireland to sit in the Parliament of the United Kingdom, may be admitted. That petition came before the Committee of Privileges on the 4th of August, 1836. It was shewn by evidence that, prior to the date of the letters patent, three Irish Peerages were then recently extinct, as required by the Act of Union (39 and 40 Geo. III.), before a new Peer of Ireland could be created (see the Bloomfield Peerage, 2 Dow and Clark, 344). These peerages were, the Barony of Kingsland, extinct by the death of Viscount Kingsland in 1831; the Earldom of Connaught, extinct by the death of the Duke of Gloucester and Earl of Connaught, in 1834; and the Earldom of Munster, extinct by the accession of William, Duke of Clarence and Earl of Munster, to the Throne, in 1830.

The Committee, including the Lord Chancellor (Lord Cottenham), after considering whether the last-mentioned peerage was extinct, held that it was; and, accordingly, on a subsequent day, resolved that the petitioner had made out his claim (see the Lords' Journals for 1836).

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